

ICLE urges NTIA to avoid heavy-handed privacy regulation that would stifle innovation and limit consumer choice

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[Geoffrey A. Manne](#), [Kristian Stout](#) and [Dirk Auer](#)

Last week, ICLE submitted [comments](#) to the National Telecommunications and Information Administration (NTIA) on Developing the Administration's Approach to Consumer Privacy. Scholars Geoffrey Manne, Kristian Stout, and Dirk Auer urge the agency to avoid legislation mandating tight controls on private companies' use of consumer data akin to the EU's General Data Protection Regulation (GDPR).

Although the US does not have a single, omnibus, privacy regulation, this does not mean that the US does not have "privacy law." In the US, there already exist generally applicable laws at both the federal and state level that provide a wide scope of protection for individuals, including consumer protection laws that apply to companies' data use and security practices, as well as those that have been developed in common law (property, contract, and tort) and criminal codes.

In addition, there are specific regulations pertaining to certain kinds of information, such as medical records, personal information collected online from children, credit reporting, as well as the use of data in a manner that might lead to certain kinds of illegal discrimination.

Getting regulation right is always difficult, but it is all the more so when confronting evolving technology, inconsistent and varied consumer demand, and intertwined economic effects — all conditions that confront online privacy regulation. Given this complexity, and the limits of our knowledge regarding consumer preferences and business conduct in this area, ICLE's evaluation suggests that the proper method of regulating privacy is, for now at least, the course that the Federal Trade Commission (FTC) has historically taken: **case-by-case examination of actual privacy harms, without ex ante regulations, coupled with narrow legislation targeted at problematic uses of personal information.**

Many (if not most) services on the Internet are offered on the basis that user data can, within certain limits, be used by a firm to enhance its services and support its business model, thereby generating benefits to users. To varying degrees (and with varying degrees of granularity), services offer consumers the opportunity to opt-out of this consent to the use of their data, although in some cases the only way effectively to opt-out is to refrain from using a service at all.

Critics of the US approach to privacy sometimes advocate for a move to an opt-in regime (as is the case in the GDPR). But the [problem is that](#) "[o]pt-in' provides no greater privacy

protection than 'opt-out' but imposes significantly higher costs with dramatically different legal and economic implications." In staunching the flow of data, opt-in regimes impose both direct and indirect costs on the economy and on consumers, reducing the value of certain products and services not only to the individual who does not opt-in, but to the broader network as a whole. Not surprisingly, these effects fall disproportionately on the relatively poor and the less technology-literate.

U.S. privacy regulators have generally evidenced admirable restraint and assessed the relevant tradeoffs, recognizing that the authorized collection and use of consumer information by data companies confers enormous benefits, even as it entails some risks. Indeed, the overwhelming conclusion of decades of intense scrutiny is that the application of ex ante privacy principles across industries is a fraught exercise as each firm faces a different set of consumer expectations about its provision of innovative services, including privacy protections.

This does not mean that privacy regulation should never be debated, nor that a more prescriptive regime should never be considered. But any such efforts must begin with the collective wisdom of the agencies, scholars, and policy makers that have been operating in this space for decades, and with a deep understanding of the business realities and consumer welfare effects involved.

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