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MARK WALKER, CHAIRMAN
RSC THE REPUBLICAN STUDY COMMITTEE

S. J. Res. 34 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Federal Communications Commission relating to "Protecting the Privacy of Customers of Broadband and Other Telecommunications Services"

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FLOOR SCHEDULE:

Expected to be considered on March 28, 2017, subject to a closed rule.

TOPLINE SUMMARY:

S.J. Res. 34 would use the Congressional Review Act to provide for the disapproval of the Federal Communication Commission's (FCC) rule governing internet service provider privacy practices.

COST:

A Congressional Budget Office (CBO) estimate is not yet available.

CONSERVATIVE CONCERNS:

There are no substantive concerns.

- **Expand the Size and Scope of the Federal Government?** No.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

In December 2016, the FCC issued a new rule regarding how internet service providers (ISP) could collect, use, and disseminate user information. ISPs, by virtue of providing access to users, possess large amounts of data regarding users' location, browsing history, sensitive personal information submitted online, and other data. ISPs make use of this data to sell targeted advertisements.

The rule would require ISPs to obtain explicit "opt-in" consent from users before using or sharing, even in aggregated from, information related to geographic location, financial information, health information, information regarding children, Social Security numbers, web browsing history, app usage history, and the content of user communications. Less sensitive information not covered by the aforementioned categories would be eligible for use by the ISP unless the user explicitly "opts-out".

This rule would treat ISPs significantly different than other web services. Individual websites, such as Google or Facebook, are regulated by the Federal Trade Commission, and not the FCC. These companies are

governed by separate regulations that do not require the same type of "opt-in" consent or information differentiation between sensitive and non-sensitive information. By treated ISPs differently than these web services that already collect and utilize significant amounts of user information, the FCC rules create a disjointed, non-uniform regulatory scheme that is both unfair and confusing for consumers. Further, the regulation exercises authority outside of the FCC's jurisdiction and in way that is contradictory and superfluous to existing law. Specifically, the use and disclosure of the contents of electronic communications is not governed by the FCC's enabling statute, the Federal Communications Act, but rather by portions of the criminal code. Specifically, 18 USC 2511 prohibits the disclosure or use of the content of electronic communications without the consent of the user, and provides for fines, imprisonment, and civil liability for any violation. Under this law, the user's consent can be expressed in a variety of ways rather than in the paternalistic "opt-in" consent required by the FCC rule. Importantly, the validity of the consent and the actions of the ISP under the title 18 prohibition is subject to adjudication in a court of law, with commensurate due process and evidentiary standards, and not at the whim of federal bureaucrats. More information on the FCC rule and interaction with current law is available from the Competitive Enterprise Institute.

S.J. Res. 34 would disapprove of the FCC regulation.

The Congressional Review Act provides an expedited legislative process for Congress to disapprove of administrative rules through joint disapproval resolutions. Regulations issued by executive branch departments and agencies, as well as issued by independent agencies and commissions, are all subject to CRA disapproval resolutions. In order for a regulation to take effect, the issuing agency must produce a report to Congress. Generally, Congress then has 60 days to pass a resolution of disapproval under the CRA. However, this timeline is shifted in circumstances when rules are submitted to Congress within 60 legislative days of adjournment. In this case, the clock for the 60-day consideration timeline will restart 15 days into the 115th Congress, giving Congress the full window for consideration. While the parliamentarian will determine the exact cut off day after which rules may be subject to the CRA, Congress will be able to consider rules going back to roughly mid-May. Regulations that are successfully disapproved of will then either not go into effect or will be looked at as if they have not gone into effect. The CRA also prevents any new regulation that is substantially similar to a disapproved regulation from being promulgated in the future, absent action from Congress. Rules must be disapproved of on a rule-by-rule basis, and must be disapproved of in their entirety.

Under the CRA process, if a joint resolution is introduced in the Senate within the permitted time period and the resolution is not reported from committee on a timely basis, 30 Senators may petition to bring the resolution to the floor. This resolution would not be subject to the filibuster. When debate commences, the Senate must fully consider the resolution before moving on to any other business, with only 10 hours of debate. Finally, enactment of a joint resolution under the CRA would require a majority vote in each chamber and a presidential signature. Though the CRA has only been used once, in 2000 against Clinton-era ergonomic regulations, conditions today are largely the same as they were that year – with Republicans securing control of the House, Senate, and presidency.

COMMITTEE ACTION:

S.J.Res. 34 was introduced by Sen. Jeff Flake (R-AZ) on March 7. It was passed in the Senate on March 23 by a vote of 50-48.

ADMINISTRATION POSITION:

A Statement of Administration Policy is not yet available.

CONSTITUTIONAL AUTHORITY:

Measures originating in the Senate do not require a constitutional authority statement.

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