



Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O’Rielly
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

May 25, 2016

RE: Docket No. 16-106, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services

Dear Chairman and Commissioners:

Thank you for requesting public comment on the April 1, 2016 *Notice of Proposed Rulemaking (NPRM)*. I write both as a citizen and a behavioral economist, one with over 20 years’ experience in research and practice.

On September 15, 2015 President Obama issued an Executive Order, mandating that Executive departments and agencies seek the advice and counsel of behavioral scientists when setting, implementing, and evaluating policies that affect the public.¹ This is prudent, because human behavior often *seems* to defy logic. The truth is that our behavior has a ‘logic’ all its own, but it certainly is not fully rational. When setting standards in arenas where the quirks of human behavior reign – like communication - it is essential to set rules based on how people actually are, rather than how we wish or expect them to be. History is littered with policies that failed or even backfired due to inaccurate assumptions about how people would respond.²

Thus, I am compelled to raise questions about several aspects of the proposed rules, as well as to urge the Commission to follow the President’s lead and bring the voices of behavioral scientists into the conversation. There are several areas in which I believe work remains to be done. Let us begin with “opt-in/opt-out” and transparency, both of which are based on a faith in cognition that is unwarranted.

The power of the default: why “opt-in/opt-out” is not a choice at all.

- The FCC’s proposed rules reflect a set of assumptions closely associated with neoclassical (a/k/a “Chicago School”) economics. However, since the 1930’s, these assumptions have been challenged, powerfully, by data about how people actually make decisions. Neoclassical economics adheres tightly to the ‘rational man’ hypothesis, which asserts that people make decisions logically, on the basis of self-interest, guided by information. One can see this belief reflected in the Commission’s belief that full transparency will help people make better decisions.

1 [Executive Order \(2015\) Using Behavioral Science Insights to Better Serve the American People |whitehouse.gov](#)

2 Think: [Prohibition](#), Nixon’s “Madman” theory.

- Yet, despite abundant evidence of its failings³, faith in the ‘rational man’ hypothesis has been remarkably persistent – until quite recently. Over the past twenty years the emergence of Behavioral Economics has challenged its central tenets very powerfully, using data.⁴ The field gained full recognition when Kahneman and Tversky, two Princeton psychologists, won the 2002 Nobel Prize in Economics for their work on decision-making under uncertainty. Behavioral Economics’ challenges to neoclassical economics are detailed in the paper entitled *On the Limits of Rational Choice Theory*, which is probably the article one should read first.
- Research in Behavioral Economics has shown that most of the time, peoples’ decisions do not conform to a model in which people are information seeking rational actors, guided by self-interest. In particular, where the decision is complex, the stakes are high - and/or the arena is unfamiliar, people are more likely to procrastinate or avoid a decision. In effect, the individual ‘chooses’ avoidance – and ends up being assigned whatever the system’s designers have designated as the proxy for ‘no answer.’ Whoever defined that proxy becomes the *de facto* decision maker.
- The dramatic impact of what would appear to be a small difference in the wording of a form is demonstrated by the classic study, [Do Defaults Save Lives?](#) as well as many others. Importantly, however, opt-in falls far short of offering the kind of informed choice the Commission may be hoping for. In [Defaults, Framing, and Privacy](#)¹, the authors state:

Different forms of action assume different types of knowledge on the part of market participants. On one hand market based solutions suggest that consumers have well articulated ideas of the value of their personally identifying information...

We might expect the format of the question to make no difference. They might simply be retrieving well thought out prior preferences. However, there is evidence that consumers do not fully understand the implications of their choices. There is a large literature showing that when consumers’ values are not well articulated, the format of questions can make a large difference in what consumers say (Kahneman et al. 1993). This is because consumers are not simply recalling a previously calculated preference, but instead are generating the response on the spot in response to the question (Fischhoff 1991; Payne et al. 1992; Slovic 1995).

- In short, by using a binary opt-in, opt-out choice set, and by deciding on its own which choices will be opt-in and which will be opt-out, the FCC is not offering people *more* choice, it’s offering them *less* – in effect, deciding for them.

Complexity and Decision Paralysis

Complexity can be a major deterrent to decision-making - and more pointedly, to effective decision-making. Feeling confused is unpleasant. As a result, most people simply avoid the experience – and along with it, thoughtful decision making.

Moreover, when faced with too many choices, even the most skilled, intelligent people punt, opting - by default - for the ‘no choice’ choice, designed by the architects of the decision. Alternatively, they fail to make thoughtful choices, devolving to habit.

³ Examples: the South Sea Bubble, the Internet Bubble, the Housing Bubble, and more.

⁴ Much of the data became accessible only after increases in computing power and speed made it possible to perform large, elaborate calculations at vastly lower cost.

Transparency is no panacea.

- Judge Louis Brandeis' famous quote, "Sunlight is the best disinfectant" is often used to argue for greater transparency. However, few know the full quote (it is: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.") Even fewer are aware that it comes from a book, entitled *Other People's Money*⁵ published in 1914. We will never know whether Brandeis intended the statement to apply to arenas beyond banking.
- In many cases, disclosure has no effect on behavior. In some, it counteracts effective decision-making. Research has shown that transparency is only effective in preventing deception when the information shared is *meaningful* and *comprehensible to the recipient*. In fact, transparency can be a deterrent to understanding when the information 'shared' is highly technical, overly detailed, and/or jargon-laden (to the extent that most people would need to enlist the services of network engineers and telecom lawyers to make sense of it). Moreover, sharing information with people when they have no effective way to query or affect the system leads merely to disillusionment and inaction.

Interestingly, the research suggests that what people are seeking is not "choice" but comprehensibility and control. Recently, some approaches that offer both have been developed. Most notably, they make the choices small and sequential. In [Enhanced active choice: A new method to motivate behavior](#), the authors report results from a test of this method, which seems to hold great promise.

What is privacy?

When setting policy, "I know it when I see it" is not an acceptable response. If the goal is to protect peoples' privacy, we need to define it in order to know when or whether we have achieved it. There is a good deal of current, empirical research that reveals the central elements of this intangible but meaningful concept, while showing how to measure its most important piece parts. Sometimes, in the heat of the Internet privacy fracas, we can forget that privacy was a human need long before we had telecommunications at all. There is a lovely 1970 article, "[Privacy, A Behavioral Concept](#)," that illuminates the need for an operating definition better than do many of the more contemporary, telecommunication-related works. In **Figure 1** on page four, you will find a summary table from the article that shows some of the more important dimensions of what we call 'privacy.'

The public's need for privacy protection would be well served by a clear, measurable operating definition of privacy. Otherwise, policy makers will be shooting at a target whose dimensions shuttle back and forth between "unknowable" and "shifting."

I hope this is helpful. All the links in this document are live, so you should be able to easily download anything you wish to read. That said, please do call on me if you have questions or need further information.

Sincerely Yours,

/s/ Sara C. Wedeman, Ph.D.
sara@behavioraleconomics.net
(267) 825-4044

5 Brandeis, L.D. (1914) [Other People's Money](#), The Brandeis School of Law, University of Louisville

Figure 1

TYPES OF PRIVACY	SITUATIONAL CONTINGENCIES			
	Antecedent Factors	Organismic Factors	Behavioral States	Environmental Factors
Solitude	Pressure of multiple role-playing; role incompatibility; interpersonal incompatibility; defeat.	Relief from visual observation; self-evaluation; unmasking oneself; performance of bodily functions.	Physical withdrawal from secondary associates, primary and reference groups; defensive responses and verbal reports.	Degree of crowdedness and confinement; design and arrangement of space; environmental props to control informational flow; location; single person.
Intimacy	Role relations and interpersonal compatibility or incompatibility.	Need for close, relaxed, frank relationships; egalitarian sharing of confidences.	Physical seclusion from secondary associates and public; anticipatory preventive responses; full range of occupancy and defense responses.	Degree of crowdedness and confinement; design and arrangement of space; environmental props to control informational flow; location; small group.
Anonymity	Role responsibilities demanding full adherence to expected behavior; anonymous relation.	Need to escape personal identification and responsibility of full rules of behavior and role; anonymous sharing of confidences.	Psychological and physical blending with the public; self-markers and verbal reports.	Control of informational flow through merging into the situational landscape—use of open space, mass numbers of people and objects; anonymous interviews, questionnaires, and so on.
Reserve	Reciprocal reserve and indifference; mental distance to protect the personality.	Need to limit communication about the self.	Psychological barriers against unwanted intrusion; defense through self-markers and verbal reports.	Control of informational flow through self-restraint and willing discretion of others.