



Executive Memorandum

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THE HUTCHINSON PRIVACY COMMISSION ACT: A SMART FIRST STEP

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Concerns over online access to personal and private information have quickly moved the issue to the forefront of Internet-related activities in Congress. Representative Asa Hutchinson (R-AR) has introduced the Privacy Commission Act (H.R. 4049) specifically to create a Commission for the Comprehensive Study of Privacy Protection. This 17-member bipartisan commission would examine federal policies that affect personal privacy as well as the overall issue of online privacy in today's rapidly expanding e-commerce market.

Creating such a commission would be an important first step for Congress in addressing these issues. Beyond this step, however, Congress should exercise caution in responding to concerns about online access to personal information. Current self-regulatory privacy policies developed and implemented by business and industry are working, and the commission would provide a foundation for the objective examination of other privacy issues. It might well also constrain the zeal of those in the regulatory community who want to regulate online activities now before the facts are in.

The Hutchinson privacy commission proposal offers a more enlightened approach—based on a thorough study of the current situation—that would provide policymakers with the necessary analysis on which to base future decisions about online privacy and subsequent Internet regulation. Privacy issues are multi-dimensional and differ greatly by industry sector and complexity. Congress

should not rush to address one area of the privacy debate in a way that could have unintended effects on other areas of the Internet economy.

Congress and the Administration should recognize that the scope of a privacy commission's work will be central to its findings and that the fluid Internet environment could make some of its recommendations immediately obsolete. Thus, while creating the Hutchinson privacy commission would be a step in the right direction, strengthening a few provisions in H.R. 4049 would provide commission members with the opportunity to develop recommendations that are timely, comprehensive, and inclusive, and enable them to avoid the pitfalls previous commissions encountered.

To strengthen H.R. 4049, Congress should:

1. **Require the commission to include a member of the academic community.** Past congressionally established commissions often included an academic with expertise in a particular subject. The proposed commission would not. At least one member of this commission should repre-

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sent the academic community with expertise in both government-to-citizen privacy policies and business-to-consumer concerns.

2. Ensure that small business is represented.

Online privacy policies affect all levels of government as well as all types of businesses. One valuable lesson from the recently completed Internet Tax Commission (ITC) is that small business needs to have its interests represented on commissions dealing with e-commerce. While state and local governments were more than adequately represented on the ITC, small business was not. The Hutchinson commission should include several small Internet business representatives, or at least a member of a trade association that represents their interests.

3. Reduce the number of Administration representatives on the commission. The federal government's self-serving bias for regulation could inhibit debate and jeopardize any real consensus the commission might attain on privacy issues. Moreover, the explosive growth of e-commerce has occurred with little to no government intervention in the market. Simply put, market forces, not the federal government, created the new economy. Thus, the number of Administration representatives should not overshadow the number of business representatives on the commission. The number of four stipulated in H.R. 4049 should be reduced, preferably to one but no more than two.

4. Provide logistical and administrative support.

Commissions need logistical and administrative support to proceed in an efficient and effective manner. Members of the ITC spent several meetings just debating how to support their efforts, and months of fruitless administrative bickering passed before they got down to the real work. To prevent a repeat of such problems, H.R. 4049 should ensure that there is adequate funding for the commission's administrative functions and that decisions on administrative matters can be made promptly.

5. Establish voting procedures that prevent gridlock. Both the ITC and the Medicare Commission encountered major problems when Administration officials decided to abstain from casting critical votes on important tax or health issues that required a supermajority to be a formal recommendation to Congress. Casting a vote would have established the Administration's position on those issues. All Hutchinson commission recommendations would require a simple majority. This, however, does not avoid the hazard of members' refusing to vote. For internal decision-making purposes, the commission should rely on a simple majority. To make formal recommendations to Congress, however, it should adopt a litmus test of 60 percent of votes cast to achieve a supermajority. Those who have abstained from voting should not be counted in the total.

For example, if a vote on a formal recommendation to Congress required a supermajority of the commission rather than a simple one, and four of the 17 members abstained from voting while the remaining members voted 8 to 5 in favor, the recommendation would not move forward. A supermajority of 11 would not have been achieved. However, under a 60-percent-of-votes-cast litmus test, the supermajority would be based on a quorum of 13. The 8 affirmative votes would constitute a supermajority, allowing the recommendation to go to Congress. Those who lacked the courage to vote on the measure would not be allowed to undermine the will of the rest of the commission.

Strengthening H.R. 4049 in these ways would enable the privacy commission to operate more efficiently and effectively, and policymakers to gain a better understanding of Internet privacy issues. A leap into online privacy regulation without a thorough examination of the issues would be a mistake that could injure the new economy for years by restraining Internet innovation and creativity.

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