

**Commissioner Mignon L. Clyburn**  
**Response to Additional Questions for the Record**  
**March 22, 2016 Hearing before the Subcommittee on Communications and Technology**  
**“Oversight of the Federal Communications Commission”**

**The Honorable Steve Scalise**

- 1. As you are aware, prior to the FCC's Open Internet Order, ISPs were subject to the FTC's oversight with respect to their privacy practices. Do you believe that consumers' privacy rights were adequately protected during that time? If not, please provide specific examples where consumers' privacy rights were being violated without action by the FTC to remedy the situation.**

Significant data breaches have become almost commonplace and are occurring at unacceptable levels. Safeguarding the privacy of consumers should be a national priority where all branches of government work together to ensure companies are taking measures to stop future breaches from occurring.

Congress, in section 222 of the Communications Act, gave the Federal Communications Commission (FCC) explicit authority over privacy for telecommunications carriers. I believe that we should remain focused on working together to ensure that consumers in America have simple and clear protections when it comes to proprietary information. I commit to continue to work collaboratively with the Federal Trade Commission (FTC) to protect the interests of American consumers.

- 2. Yes or no – do you think it makes sense to bifurcate oversight of the privacy practices of the Internet ecosystem between the FTC and the FCC? If not, which agency should have sole jurisdiction over this issue?**

The FTC and FCC have long shared jurisdiction over the communications ecosystem including issues regarding slamming and cramming, transparency, and security; and have a proven track record of working collaboratively on these and other issues. Recently, for example, the FCC and FTC announced a partnership to improve the security of mobile devices. The bifurcated relationship was established by Congress and in Section 222 of the Act there is an express grant of authority to the FCC regarding privacy. The collaboration between the two agencies has been successful and cooperative and I look forward to continuing to work with the FTC to protect the privacy of American consumers.

- 3. Do you think consumers expect different privacy rules to apply depending on the type of entity collecting their information online rather than the type of information being collected and the intended use of such information? If so, upon what do you base that conclusion?**

As an FCC Commissioner, I believe my role is to implement the applicable statutes and act in a manner that promotes the public interest. Section 222 directs the Commission to ensure that confidential information that network providers have by virtue of their provisioning of telecommunications services is protected. Congress limited the FCC's

authority to the network providers which created an approach where the FTC and FCC share jurisdiction. This approach is similar to the shared jurisdiction the FTC has with other government agencies when it comes to healthcare, education and financial services.

Currently, the FCC is seeking comment on a variety of ways to implement section 222 for broadband Internet Service Providers (ISPs). The Notice of Proposed Rulemaking includes a wide range of options on how best to protect consumer privacy and continue coordination with the FTC. I am proud to stand up for consumers and commit to maintaining an open mind on how best to ensure the FTC and FCC continue work together to protect consumer privacy in the communications ecosystem.

### **The Honorable Mike Pompeo**

**1. On June 18, 2015, the commission adopted a new TCPA Order that many, who are governed by the law, believe will increase the potential for liability. For example, the reassigned phone number issue does not allow a company to rely on the owner's prior consent to avoid TCPA liability. Companies will now need to develop procedures to avoid strict liability for contacting reassigned numbers.**

**a. Can you explain the rationale behind this and why the commission believes that it is the responsibility for companies to use a private commercial database, one that is only accurate 80% of the time, to track reassigned numbers?**

The Commission receives overwhelming numbers of complaints from consumers about robocalls and unwelcomed texts. I voted for our declaratory ruling last year, including the one-call exception, because I believe it realized two objectives: It provided clarity for good business actors in this space while protecting consumers from unwanted communications. The use of a private commercial database is just one of the best practices suggested in the Order that callers can adopt to avoid dialing a reassigned phone number. Specifically, the Order suggests seven different best practices a caller could take, including implementing an interactive opt-out mechanism or establishing procedures for recording wrong number reports received by customer service representatives placing outbound calls.

**b. Do you believe that this additional regulatory burden should be shouldered by companies?**

As I noted earlier, the Commission receives overwhelming numbers of complaints from consumers about the robocalls and texts they receive. The declaratory ruling struck a difficult, but necessary balance between maintaining the consumer protections that the TCPA intended, while taking into account the needs of businesses. The declaratory ruling did not adopt a safe harbor, but I am open to reviewing any ideas to improve our implementation of the TCPA that the Chairman's Office proposes.

**2. Prior to the June 18, 2015 TCPA Order the Commission's interpretation of**

**autodialer, required that equipment be able to dial telephone numbers without human input. Following the Order, it appears that the decision as to what constitutes an autodialer will be made on a case-by-case basis. It would appear that the FCC is adding to the burdens of individuals and businesses by clouding the autodialer issue rather than clarifying. As you know, this is one of the many reasons why we have seen so many lawsuits on this very issue.**

**a. Can you inform the committee as to why the commission adopted this new interpretation and why the change was necessary?**

Under the TCPA, an “automatic telephone dialing system,” often referred to as an “autodialer,” is defined as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” The Commission has consistently interpreted the autodialer definition in a series of decisions since 2003 to mean the *capacity* to dial numbers without human intervention. The Commission’s 2015 TCPA Declaratory Ruling reaffirmed this interpretation by stating that the basic functions of an autodialer are to dial numbers without human intervention and to dial thousands of numbers in a short period of time.

**b. Can you tell the committee whether the impact of the new TCPA Order on specific industries, such as healthcare, was contemplated before making the change what specific issues these industries may face under the new Order the commission considered?**

The 2015 TCPA Omnibus Declaratory Ruling and Order which addressed 19 different petitions, was circulated for public comment and reflects inputs and changes sought by specific industries, including healthcare. For example, the Order provides particular relief for health care providers with time-sensitive health care alerts. The Order granted relief to other industries as well, including banks that seek to alert consumers about time-sensitive matters such as data breaches.

**3. As you are aware, there are a number of petitions before the commission regarding the July 18, 2015 TCPA Order. When can the committee expect the commission to resolve these petitions?**

The Commission is moving as quickly as possible to address the pending TCPA petitions that you reference in your question. Currently, there are two petitions before me and the remaining petitions are under consideration by the FCC’s Consumer and Governmental Affairs Bureau.

**4. The 2015 TCPA Order rejected the use of prior business relationships as a test regarding prior express written consent? What was the rationale for this change and what work has the Commission done to measure the impact the change will have on American businesses?**

Prior to 2012, the Commission used a two-prong test for determining the permissibility of pre-

recorded telemarketing calls to consumers. Under this test, businesses could make such calls to consumers with prior express consent or with an established business relationship (EBR). In February 2012, in an effort to avoid unnecessary duplication of enforcement efforts and ensure consistency with the Federal Trade Commission's rules in this area, the Commission eliminated the EBR exemption for prerecorded telemarketing calls to residential lines. As stated in the Order, this decision was made "based on the record in this proceeding and the volume of complaints filed by consumers that have an established business relationship with the caller, and consistent with the FTC's findings."

**5. Can you explain to the committee the timeline for developing the new regulations required as a result of Section 301(b) of the Bipartisan Budget Act of 2015?**

Section 301(b) of the Bipartisan Budget Act of 2015 requires the Commission to issue a final set of rules no later than August 2nd. In pursuit of this statutory deadline, the Commission adopted a Notice of Proposed Rulemaking (NPRM) on May 4, 2016. I voted to approve this NPRM. The deadline for public comments is June 6 and reply comments must be submitted by June 21. I look forward to carefully reviewing the record as it develops.

**6. The bipartisan letter sent to Chairman Wheeler on November 17, 2015, requested that the FCC work closely with the Consumer Financial Protection Bureau to develop a coordinated approach on the limited number of calls permitted under Section 301 of the Bipartisan Budget Act of 2015. Has the commission done what the letter requested? If not, why the delay?**

Yes, consistent with the statute, the Commission has worked together with the Department of Treasury, along with other interested agencies, including the Consumer Financial Protection Bureau to ensure the successful implementation of Section 301. The NPRM reiterates this point by stating that "Commission staff has consulted Department of Treasury staff, as required by the Budget Act, as well as with the staffs of other interested federal agencies, including those with substantive expertise regarding debtor-creditor relationships." We will continue to work with the CFPB, Treasury, and other interested agencies as we move toward final rules.

**7. The FCC is currently receiving comments on a proposal to impose new privacy regulations on broadband Internet service providers that will not apply to so-called "edge" providers. The FTC currently oversees a successful program to ensure consumer privacy is protected online that, until the Open Internet Order, applied to both access and edge providers.**

- a. Given the disparity between what the FCC has proposed and the FTC's existing regime to ensure online privacy, please provide analysis demonstrating that the Commission has considered whether its imposition of new rules will create confusion for Internet users.**

The FCC is seeking comment on a variety of ways to implement the privacy directives in

Section 222 of the Communications Act for telecommunications services provided by broadband Internet Service Providers. The FCC recently launched a proceeding and a Notice of Proposed Rulemaking that seeks comment on range of options on how best to protect consumer privacy and continue coordination with the FTC. The Notice seeks comment on a variety of proposals, including proposals to harmonize FCC rules with the FTC. I am proud to stand up for consumers and maintain an open mind on how best to ensure the FTC and FCC continue working together to protect consumer privacy in this communications ecosystem.

- b. What impact would application of the FCC's proposed rules to edge providers have on the products and innovations that consumers currently enjoy? Please provide specific examples of popular services that would remain free from impact if the proposed rules were applied to them as well as services that would be impacted.**

The FCC's Notice of Proposed Rulemaking does not propose to apply rules to edge providers. Per the statute, the FCC's jurisdiction under Section 222 is limited to network providers.

- 8. Moody's Investors Services recently reported that the FCC's proposed rules will disadvantage ISPs as they seek to compete with other digital advertisers. Do you acknowledge that the FCC's rules will amount to the FCC picking winners and losers in the digital advertising marketplace? If not, how do you explain Moody's reaction to the FCC's proposal?**

Congress, in section 222 of the Communications Act, directed the FCC to ensure consumer privacy is protected. The FCC is seeking comment on how to implement the directives in section 222 with respect to the telecommunications services provided by broadband Internet service providers. Whether and how digital advertising revenues of a company may be affected is something that entities are free to submit to the record and such entities should explain how these concerns are relevant to the directives of section 222. My mind remains open but I am committed to ensuring that consumer privacy is protected.

### **The Honorable Anna G. Eshoo**

- 1. Some critics of the FCC's set-top box proposal argue that it will restrict access to independent and minority programming. However, groups like the National Hispanic Media Coalition and industry veterans like Robert L. Johnson, who founded BET, have applauded the proposal and argue that it will lead to more content and choice for minority viewers.**
  - a. How do you believe the set-top box proposal will impact independent and minority programming, and why?**

Thank you for the question, Ranking Member Eshoo. What is distressing is the fact that only a handful of diverse channels have had success in being carried by an MVPD. The goal of the Commission's set-top box proceeding is not to make programming or the

relationship with the distributor any more vulnerable than their counterparts, but to increase opportunities, consumer choice and competition in the marketplace. As I stated at the Commission's February meeting, what I hope will occur is that creators of content who have been unable to get MVPD carriage may soon have a means to reach consumers directly. Similar to the way that Internet searches provide consumers with information from various sources, a competitive solution with improved search functionality could allow consumers to find programming that is available over-the-top. I look forward to continuing to engage on this issue, and I hope that the record of this proceeding will help inform this issue.