

Answers to Additional Questions for the Record by Michael O’Rielly, FCC Commissioner
Subcommittee on Communications and Technology
“Oversight of the Federal Communications Commission”
March 22, 2016

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.

Yes.

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 no, which agency should have sole jurisdiction over this issue?

No. The FTC has historically addressed and established a significant body of precedent from overseeing Internet privacy. To ensure that no inconsistencies, confusion, or duplication of efforts occur, it would seem that the FTC should continue to have such jurisdiction, but that is a matter for Congress to determine.

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?

For those consumers who are concerned about Internet privacy, the type of information being collected tends to generate greater privacy sensitivities than the actual company that does the collection. This is borne out by numerous consumer surveys. Moreover, existing privacy laws and regulations for other commercial sectors are based on the sensitivity of the information being used.

4. The legislative history regarding Section 629 shows that Congress rejected the type of approach the FCC is contemplating in the set top box NPRM. The House version of Section 629 included broader language that would have promoted access not only to services “provided by” MVPDs “over” MVPD systems, but also to third-party video and data subscription services provided “by various distribution sources.” However, the Conference Report rejected that broader approach – saying that “[t]he scope of the regulations” cover by the final bill was “*narrowed to include only equipment used to access services provided by multichannel video programming distributors.*” Mr. Wheeler took plenty of time during the vote on the NPRM to read portions of Section 629 of the Act but he conveniently left out this important fact. Can you explain how the FCC approach can be squared with the plain language of Section 629 and the legislative history? Isn’t this Rule ripe for even more litigation?

I disagreed with the Notice of Proposed Rulemaking put forth by the majority of the Commission for this reason and others. If the proposal is adopted, I anticipate that aggrieved parties will

challenge the Commission's action, including its statutory authority to promulgate these rules, in court.

The Honorable Brett Guthrie

- 1. I am concerned that the new set-top box proposal is short-sighted and could potentially hamper long term growth and innovation in the content and video marketplace. I am also concerned that the agency is racing toward premature standardization in this rapidly growing and robust technological area. Do you share these concerns, and can you comment on whether, if we follow the path proposed by the Chairman, we may be foreclosing competing approaches and ultimately harming innovation?**

Yes, I agree with your concerns, and those of many others, regarding the Notice of Proposed Rulemaking on set-top boxes. The item fundamentally ignores where the marketplace is headed, which is towards an application-based platform that eliminates the need for set-top boxes, saves energy, and reduces both consumer and industry costs. Forcing video distributors to comply with outdated and unnecessary requirements, as contained in the NPRM, will slow the pace of distribution mechanisms, hinder innovation and raise the cost of video services for consumers. I am hopeful that the comments received in response to the NPRM will convince the Commission to approach this issue differently.

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?**

No, I can't justify the Commission's position on this matter. I believe that the majority's approach will unnecessarily and harmfully expose thousands of legitimate companies to litigation and financial penalties because of the inability to identify reassigned numbers.

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

I strongly dissented to the 2015 TCPA Declaratory Ruling and Order in part because of the Commission's illogical approach to reassigned numbers.

- 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?**

As stated previously, I strongly dissented to the 2015 TCPA Declaratory Ruling and Order. My disagreement was based, in part, on the Commission's harmful definition of autodialer, which I agree contradicts the current statute and legislative history.

- 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?**

This question may be better answered by Chairman Wheeler and the staff of the Consumer and Governmental Affairs Bureau. I was certainly aware of the Commission's new interpretation of autodialer and specifically raised objections to this definition because of the potential impact on various industries and, therefore, American consumers.

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?**

This question may be better answered by Chairman Wheeler. Generally, I am open to considering efforts to clarify or exempt entities from the Commission's 2015 TCPA Declaratory Ruling and Order, because I believe that item takes a misguided direction and unnecessarily exposes legitimate companies to litigation and financial penalties.

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?**

This question may be better answered by Chairman Wheeler and staff of the Consumer and Governmental Affairs Bureau.

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?**

I do not set the Commission's agenda; therefore, questions regarding the timing of this item may be better answered by Chairman Wheeler. However, the Notice of Proposed Rulemaking, which I approved in part and dissented in part, was released by the Commission on May 6, 2016. I intend to review the record and be prepared to vote on a final item by the August 2016 Congressional deadline.

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?**

This question may be better answered by Chairman Wheeler. I am not aware of any conversations between Commissioners or Commission staff and the Consumer Financial Protection Bureau.

- 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.**

This information would need to be submitted by Chairman Wheeler. I have not been provided any analysis regarding the potential for consumer confusion beyond what is in the order. I do not believe that the Commission sufficiently considered the impact of its decision on numerous entities, including consumers, broadband providers and the functionality of the entire Internet.

- 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 item does not propose regulatory burdens on edge providers. I acknowledge, however, that the lines between broadband providers, edge providers and other entities continue to blur as the marketplace changes. But, under the current proposal, only broadband providers would face new obligations imposed by the Commission, while edge providers’ (e.g., search, email, online advertising providers) privacy practices would be governed by the Federal Trade Commission.

- 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?**

Yes, there is a great likelihood that, if adopted, the Commission’s proposal will favor those companies that do not own broadband networks over those that do. Along with other concerns, this is a curious outcome given the number, size and market share of those current participants in the online advertising space.

- 9. The Chairman’s proposal regarding set top boxes raises many questions on who is ultimately liable for security issues. Under this proposal, any third party box manufacturer – including manufactures from North Korea, Iran, Russia or China – can self-certify and then offer boxes to US consumers with links used to infect consumers in the United States with malware.**

- a. **If those boxes contain malware or pose other security issues, who is ultimately liable to the consumer for losses?**

I agree that the proposals in the Commission's Notice of Proposed Rulemaking pertaining to set-top boxes raise a host of issues and problems, including liability exposure for security lapses and other consumer harms. As proposed, liability would certainly rest with those entities that cause security issues but may also extend to any video distributor forced to provide certain information to third-party box or application providers.