

**Responses of FCC Commissioner Ajit Pai to  
Additional Questions for the Record**

**The Honorable Steve Scalise**

- 1. Do you think the FCC has the statutory authority to expand the scope of the definition of Customer Proprietary Network Information to include all of the elements proposed in the privacy NPRM?**

Under the majority's reading of section 706 of the Telecommunications Act and the "virtuous cycle" legal theory they advanced in the *Title II Order*, the FCC can take practically *any* action necessary to break down barriers to broadband deployment and adoption. In *The National Broadband Plan* of 2010 and in broadband deployment reports issued since, the FCC has concluded that "privacy concerns can serve as a barrier to the adoption and utilization of broadband." Taken together, the majority's reading suggests the FCC could regulate the privacy practices of every online entity with few if any limitations.

In contrast, I do not support this reading or the "virtuous cycle" legal theory. Accordingly, I do not believe the FCC has such authority.

- 2. I am concerned about the FCC's set-top box proposal in relation to content and copyright protections. I understand the NPRM does not address the path for the three streams that MVPDs must deliver to third parties. Strong authentication in relation to any path is imperative to the protection of content. What is the FCC's proposal on how user authentication will occur? Specifically, where in the NPRM does it address user authentication?**

The FCC's proposed rules do not specify how user authentication will occur. Indeed, the phrase "user authentication" does not appear anywhere in the NPRM.

- 3. 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.**

Our Internet economy is the envy of the world. This is due in part to the uniform, flexible, case-by-case approach that the FTC has applied over the last two decades to online privacy—an approach that has let entrepreneurs of all kinds experiment with business models in a way that has benefited consumers. I agree with FTC Chairwoman Edith Ramirez, who testified to Congress in May that the FTC has "done a very effective job in addressing consumer privacy and ensuring that consumer information is appropriately safeguarded."

- 4. 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. I believe that the FTC, the nation's preeminent federal agency on privacy issues, should have sole jurisdiction over this issue. They have well-established legal authority to do so, and they have a strong track record in privacy regulation, having initiated more than 150 privacy and data security enforcement actions, including actions against ISPs and against some of the biggest companies in the Internet ecosystem.

**5. 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?**

Consumers don't necessarily know which particular online entities can access their personal information, let alone the regulatory classification of those entities. But they do care that their personal information is protected by anyone and everyone who has access to it. I believe Chairman Wheeler put it well when he testified to Congress last November that consumers have "a uniform expectation of privacy."

**The Honorable Brett Guthrie**

- 1. You stated at a recent Appropriations hearing that you believe upcoming spectrum auctions can be accomplished within existing budgets and that the Commission does not require new funding to achieve these objectives. Do you continue to believe that's the case, and if so could you elaborate?**

I am skeptical of the Commission's proposal to raise spending on the auction program to \$124 million for fiscal year 2017. The \$117 million appropriated for fiscal year 2016 was already a record. And it's obvious why: We're holding the world's first incentive auction, an enormously complicated endeavor requiring plenty of resources. But by next year, the incentive auction will likely be over and there's no comparable spectrum auction on the horizon. For this reason, further increasing auction funding by \$7 million is unnecessary.

- 2. 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 share your concerns and believe that the proposal set forth by the Commission will impede innovation. For example, the Commission is proposing to regulate apps that allow consumers to access MVPD programming without a set-top box, and numerous experts have told the agency that such regulations would deter and/or delay the deployment of such apps.

## 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?**

I agree with you that the Commission’s approach to reassigned numbers makes no sense. It imposes a strict-liability standard; that is, callers violate the law after a single attempted call to a number that’s been reassigned to a new subscriber. The majority simply dismissed arguments that this was unreasonable, urging “remedial” measures that actually would harm both businesses and consumers. For instance, the majority suggested that companies worried about liability for reassigned numbers should sue their own customers. As they put it, “Nothing in the TCPA or our rules prevents parties from creating . . . an obligation for the person giving consent to notify the caller when the number has been relinquished,” and “the caller may wish to seek legal remedies for violation of the agreement.”

Because I believed the majority’s approach was not consistent with the TCPA and would harm consumers and businesses alike, I dissented from the decision and advocated instead an expected-recipient interpretation of the law.

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

No. No good-faith actor should be liable for dialing a reassigned number if it has no reason to know that it’s calling a wrong number.

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?**

I did not believe that this change was necessary, which is why I dissented from the Commission’s expansive interpretation of the statutory term “automatic telephone dialing system.” As I explained in my dissent, the Commission’s position is flatly inconsistent with the TCPA. The statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the “capacity” to do. First, it must be able to store or produce telephone numbers to be called using a random or sequential number generator. Second, it must be able to dial such numbers. If a piece of equipment cannot do those two things, then it can’t possibly meet the statutory definition. To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not.

- 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?**

I cannot tell you what my colleagues who adopted the order were thinking. Given the refusal to ensure that the new requirements comported with business realities (in addition to the terms of the statute), it seems doubtful that the broader economic impact of the *Order* was much of a consideration. In any case, I did not support any part of that decision, and predicted that it would make abuse of the TCPA much, much easier so that the primary beneficiaries would be trial lawyers, not the American public.

**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?**

As a minority commissioner, I have no influence on the setting of the Commission's agenda. I do not know whether or when the Chairman will decide to move forward on these petitions.

**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?**

I did not support the *2015 TCPA Order* and cannot speculate on why my fellow commissioners made this decision. As far as I can tell, however, the FCC did no work whatsoever to measure the impact of its *TCPA Order* on American businesses.

**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?**

As a minority commissioner, I have no influence on the setting of the Commission's agenda. I do not know why the Chairman circulated the *Notice of Proposed Rulemaking* when he did nor when he will circulate a *Report and Order* to complete that proceeding.

**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?**

I have not been privy to any communications between the FCC and the Consumer Financial Protection Bureau, so I cannot say whether the Chairman and his staff complied with the bipartisan request to coordinate with CFPB in developing an approach to implement Section 301 of the Bipartisan Budget Act of 2015.

**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.**

I agree that, as Chairman Wheeler testified to the Subcommittee last November, consumers have "a uniform expectation of privacy." I did not support the Chairman's proposal, and I am not aware of any

analysis the Commission has done regarding whether its imposition of disparate rules within the Internet ecosystem will create confusion for Internet users. Unfortunately, this concern has been dismissed in favor of creating a skewed playing field in this area.

- 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 application of the FCC’s proposed rules to edge providers would dramatically and adversely change the Internet as we know it. It would upend the business model of numerous free services like Google’s search engine, Yahoo’s webmail, Facebook’s social network, and Twitter, and it would also make it substantially harder for advertising-supported news sources to stay in business. This is especially true if the FCC adopts its proposal to prohibit search providers from giving consumers anything of value (such as free service) in exchange for their opt-in consent.

- 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?**

I agree that the FCC’s approach strangely singles out new upstarts in the concentrated market for online advertising. There is no good reason to target ISPs for disparate treatment, considering that are nascent competitors that lack market power. As one recent study by President Clinton’s chief counsel for privacy and President Obama’s special assistant for economic policy explained, “The 10 leading adselling companies earn over 70 percent of online advertising dollars, and none of them has gained this position based on its role as an ISP.” That’s because “ISPs have neither comprehensive nor unique access to information about users’ online activity. Rather, the most commercially valuable information about online users . . . is coming from other contexts.” Or as former Democratic Representative Rick Boucher wrote recently, “by the end of this year, 70 percent of Internet traffic will be encrypted and beyond the surveillance of ISPs.” Selectively burdening ISPs confers a windfall to those who are already winning big in the world of online advertising.

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

While your question raises a valid concern, the Commission’s proposed rules do not address the issue of liability under that scenario.

- 10. Commissioner Pai, Congress passed a law last year that said all JSAs are grandfathered for 10 years. In February, as part of a license transfer of TV broadcasters, the FCC forced the company buying the new stations to get rid the JSAs being operated by the company being bought. Chairman Wheeler has said that this fits with the Commission’s precedents on what happens to grandfathered media properties.**

**My question is: aren’t all of the precedents cited by the Chairman to get rid of JSAs simply the Commission getting rid of grandfathered entities that they (the commission) had previously granted? This grandfathered protection, for JSAs, that is being done away with**

**is inherently different because Congress, not the FCC, granted it. Can you give me an example where Congress has explicitly stated that one thing should happen, in this case the 10 year grandfathering of JSAs, and the FCC has done the exact opposite? Are there any examples where a law passed by Congress is superseded by a precedent of the FCC?**

A law passed by Congress supersedes any contravening administrative precedents. And with respect to the FCC precedents cited by the Chairman, as you have pointed out above, none of them involve agreements that had been explicitly grandfathered by Congress.

In my view, the Commission has blatantly and deliberately violated the law passed by Congress last year regarding the grandfathering of JSAs. Many times, courts have found that the FCC has acted unlawfully in promulgating rules or rendering decisions in adjudications. But I have difficulty coming up with an example where Congress was as clear as it was here regarding the grandfathering of JSAs and the FCC did the exact opposite. For that reason, the Commission's action here evidences a contempt for Congress that I have never before seen. I hope Congress acts—again—to safeguard JSAs and make crystal clear that the agency must respect and follow the overwhelming bipartisan will of America's elected officials.

**The Honorable Chris Collins**

- 1. I want to understand the timetable the set top box proposal contemplates. The Commission has proposed that MVPDs comply with new rules within two years after adoption. That would include time for independent standards bodies to come up with new standards, *plus* the time for the testing of those standards, plus the time to design and develop devices or apps and redesign of MVPD networks to act on those standards.**
  - a. Given the history of video-related standards and the length of time they typically take to develop, can you explain what evidence the FCC looked at to decide that two years would be sufficient time for all of those steps to happen? Did they even ask engineers if this was plausible?**

I share your concern that it is highly unlikely that consensus standards could be developed in time for Commission's proposed rules to be implemented two years after their adoption. Indeed, the Commission's NPRM does not contain any explanation of how all of the steps that you outlined above could be completed within two years. I do not know whether the Commission asked engineers if two years would be a plausible timeframe, but experts have indicated to me that it is probably unrealistic.

- b. Does the Commission's set-top box NPRM call for the adoption of the "Google" standard if one isn't written in time? What incentive would there be for one side to negotiate a standard if they just have to wait out the process to get their way?**

In its NPRM, the Commission did not specify what would happen if an Open Standards Body failed to develop a standard in time. It did ask, however, whether the Commission should adopt a "fallback" or "safe harbor" set of specifications under such circumstances, and in particular, whether such specifications should be those proposed by supporters of the Commission's proposal. If the Commission were to decide that an impasse within the Open Standards Body would lead to the imposition of standards supported by Google and other supporters of the Commission's proposal, then I agree that would obviously create an incentive for those entities to create an impasse.



**The Honorable Kevin Cramer**

- 1. Commissioner Pai, I want to express deep concern over the set top box NPRM and its implementation of the AllVid approach. It severely harms copyright and content providers by forcing their product to be handed over without their consent. It also forces an MVPD to hand over viewing data without the consumers consent and allows a 3<sup>rd</sup> party device to use that data without consent. That is a huge mistake. I am also particularly concerned with smaller rural providers. Can you please explain how the commission plans to address the burden these rules may have on smaller video providers?**

I share your concerns about the impact of the Commission's proposed rules on smaller video providers. For example, the American Cable Association recently told the Commission that these proposed rules would force over 200 small providers to exit the video market or go out of business altogether. I do not know whether or how the Commission plans to address this concern. Notwithstanding recent experience in this and other areas, my hope is that the Commission will listen to the strong bipartisan chorus opposing its proposal and abandon it.