U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

June 10, 2016

TO: Members, Subcommittee on Communications and Technology

FROM: Committee Majority Staff

RE: Hearing on "FCC Overreach: Examining the Proposed Privacy Rules"

On Tuesday, June 14, 2016, at 10:15 a.m. in 2123 Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing entitled "FCC Overreach: Examining the Proposed Privacy Rules."

I. WITNESSES

- Doug Brake, Telecommunications Policy Analyst, Information Technology and Innovation Foundation;
- Jon Leibowitz, Co-Chair, 21st Century Privacy Coalition; and,
- Paul Ohm, Professor, Center on Privacy and Technology, Georgetown University Law Center.

II. BACKGROUND

The internet is a platform for rapid innovation and has transformed the ways consumers act: how we communicate, acquire information, and engage in commerce. As consumers engage in a growing number of services offered through the internet, companies will have access to more personal and sensitive information of their users. Consumers rely on companies to keep their personal information safe and secure, yet as the internet marketplace continues to expand and evolve, concerns surrounding privacy remain. The purpose of this hearing is to examine the Federal Communications Commission's (FCC or Commission) recently proposed rules on privacy requirements for broadband internet service providers.

Customer Proprietary Network Information (CPNI)

Section 222 of the Communications Act of 1934 established the customer proprietary network information (CPNI) requirements for telecommunications carriers regulated by the FCC.[1] CPNI includes telephone provider-held information such as when, where, or to whom a customer places a call and to what particular services a customer subscribes.[2] The nature of the

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[1] *See* 47 C.F.R. § 64.2009.
[2] CPNI is defined as "(A) information that relates to the quantity, technical configuration, type, destinations, location, and the amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-

business relationship allows carriers to use certain data to ensure accurate services are provided to the customer, for billing purposes, and to market enhancements to the customer's current service. The protections adopted under Section 222 require carriers to receive approval from customers prior to sharing CPNI with another company, using either an "opt-out" notice or "opt-in" approval.

FCC Open Internet Order

In February 2015, the FCC voted to reclassify broadband internet access service (BIAS) as a telecommunications service through the Open Internet Order.[3] As a result, broadband internet service providers would be regulated under Title II of the Communications Act as common carriers. Although the Order concluded that Section 222 should apply, the FCC was "not persuaded that the Commission's current rules implementing Section 222 necessarily would be well suited to broadband internet access."[4] To that end, the FCC decided to forbear from applying the CPNI rules to BIAS pending the adoption of rules in a separate rulemaking proceeding.

The Open Internet Order immediately created uncertainty for BIAS providers and consumers. By choosing to regulate BIAS providers as common carriers, the FCC removed the service from the jurisdiction of the Federal Trade Commission (FTC), the federal agency that has policed consumer privacy protections on the internet since its inception.[5] The FTC's experience in implementing a wide range of rules and regulations through case-by-case enforcement has resulted in over 500 cases protecting consumer information and ensuring their privacy online.[6] However, the common carriage exemption in the FTC Act precludes the FTC from bringing actions against telecommunications common carriers. Notably, before the Open Internet Order was adopted the FTC regulated all members of the internet marketplace under the same framework.

FCC Privacy NPRM

On March 10, 2016, FCC Chairman Tom Wheeler circulated a notice of proposed rulemaking (NPRM) on internet service provider (ISP) customer privacy. The proposed rules, which apply exclusively to ISPs, would place new regulations on BIAS providers in the name of

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customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer carrier." 47 U.S.C. § 222(h)(1).

[3] *In the Matter of Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, GN Docket No. 14-28, (March 12, 2015) (*Open Internet Order).* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf

[4] *Open Internet Order* at para 467.

[5] Section 5 of the Federal Trade Commission Act expressly exempt common carriers from FTC jurisdiction. *See* 15 U.S.C. § 45 (a)(2).

[6] Letter from Edith Ramirez, Chairwoman, FTC, to Vèra Jourová , Commissioner for Justice, Consumers, and Gender Equality, European Commission (Feb. 23, 2016), *available at*

protecting the privacy of customers of broadband and other telecommunications services.[7] The rules propose extending the current requirements established by Section 222 by expanding the definition of personal consumer data. In addition to CPNI, Customer Proprietary Information (Customer PI or CPI) would include personally identifiable information, or any information that is "linked" or "linkable" to the customer. "Linkable" data is given a broad definition in the NPRM, including but not limited to: IP addresses, device identifiers, traffic statistics, application usage data, race, religion, demographic information, internet browsing history, and shopping records. The FCC also proposed significant changes to the current consent structure for customers. Providers are able to share customer data only for the very narrow purposes of billing and providing services; any other use of data would require opt-in consent from the customer. Additionally, the proposal adopts a new data security and breach notification regime.

III. DISCUSSION

Concerns with the FCC's approach to privacy vary, from legal experts that question the FCC's rationale for the rules and raise concerns that the FCC's rules are a violation of the First Amendment guarantee of free speech, to those in the business community concerned with the economic and social consequences of the FCC's regulatory approach.

A. Consumer Welfare Concerns

Some of the more pointed criticisms of the FCC's proposed rules come from commenters and legal scholars who note that the FCC's rules simply will not protect consumers online any better than the FTC's approach and, in fact, could harm efforts to promote broadband deployment.

Professor Peter Swire of the Georgia Tech Scheller College of Business notes that the assertions that underpin the FCC's decision to regulate ISPs in the first place are flawed. Professor Swire's Working Paper on this issue directly refutes the FCC's premise that ISPs have a unique relationship with consumer data on the Internet – the basis of the FCC's approach to ISP privacy. The NPRM states that the new restrictions should be applied to broadband providers because "ISPs are the most important and extensive conduits of consumer information and thus have access to very sensitive and very personal information."[8] However, privacy experts disagree with this premise, stating that "ISP access to user data is not comprehensive — technical developments place substantial limits on ISP's visibility[,]" and other companies — including so-called edge providers — "often have access to more information and a wider range of user information than ISPs."[9]

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[7] *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106 (April 1, 2016). https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-39A1.pdf

[8] *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services* at para 2.

[9] Working Paper: Online Privacy and ISPs, ISP Access to Consumer Data is Limited and Often Less than Access by Others, The Institute for Information Security & Privacy at Georgia Tech *available at* http://www.iisp.gatech.edu/working-paper-online-privacy-and-isps

Moreover, former FTC Chairman Jon Leibowitz notes that imposing a broad opt-in requirement will lose meaning for consumers not accustomed to the number of notices and requests for use of information that would follow should the rules be adopted. Leibowitz recommends a more consistent approach to provide strong protections and more choices for consumers. The proposed rules "if adopted, would undercut benefits to the very consumers it seeks to protect."[10]

Finally, others have raised the potential adverse impacts on the internet economic framework, asserting the rules would "shoehorn business models," and that "opt-in imposes additional cost on consumers and hurts competition – and it may not offer any additional protections over opt-out."[11] Groups ranging from the advertising community to representatives of minority interests note that the Commission's approach to privacy would stifle innovative business models in a variety of areas, harming competition and broadband deployment.[12]

B. Constitutional Concerns

Professor Lawrence Tribe of Harvard Law School, a leading constitutional scholar, questions the constitutionality of the FCC's proposed rules.[13] Professor Tribe considered the FCC's proposed approach under the established judicial review framework for government restrictions on commercial speech[14] and found the proposal violates the constitutional guarantee of freedom of speech.[15] Under the test established by *Central Hudson Gas & Electric Corp v. Public Serv*ice *Commission of New York,* the courts will review restrictions on commercial speech with a three-pronged test:

1. "whether the asserted governmental interest is substantial,"
2. "whether the regulation directly advances the governmental interest asserted," and
3. "whether it is not more extensive than is necessary to serve that interest."[16]

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[10] Comments of Jon Leibowitz, *See* http://apps.fcc.gov/ecfs/document/view?id=60002014604.
[11] Comments of the International Center for Law & Economics and Scholars of Law & Economics. *See* http://laweconcenter.org/images/articles/icle-fcc_privacy_nprm_comments_final.pdf
[12] *See, e.g.* Filed in the WC Docket No. 16-106, Digital Advertising Alliance Comments, (May 27, 2016); Direct Marketing Association Comments; Interactive Advertising Bureau Comments (May 27, 2016); Multicultural Media, Telecom and Internet Council, Blacks in Government (BIG), Consumer Policy Solutions, Hispanic Technology and Telecommunications Partnership (HTTP), LGBT Technology Partnership, National Black Caucus of State Legislators (NBCSL), National Coalition on Black Civic Participation, National Organization of Black County Officials, National Puerto Rican Chamber of Commerce Comments (May 27, 2016); National Association for the Advancement of Colored People (NAACP), League of Latin American Citizens, National Action Network, Public Policy Institute & Media and Telecom Project, SER-Jobs for Progress National, Inc. National Coalition on Black Civic Participation Comments (May 26, 2016).
[13] *See* Comments of CTIA, NCTA, and USTelecom, WC Docket No. 16-106 (filed May 27, 2016) ("Tribe Comments").
[14] *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) ("*Central Hudson*")
[15] Tribe Comments at 14-33.
[16] *Central Hudson* at 566.

First, the courts will look to whether the government has properly asserted that the restriction on speech furthers a substantial governmental interest. Professor Tribe summarizes relevant case law:

> One of the enduring principles of Central Hudson is that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). That burden "is not satisfied by mere speculation and conjecture," id. at 770, or by "anecdotal evidence and educated guesses," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). In *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994), for example, the Court explained that the State's "concern about the possibility of deception in hypothetical cases is not sufficient," id. at 145, and demanded actual evidence of the harm the State sought to address, id. at 145 n.10. "Given the state of this record – the failure of the Board to point to any harm that is potentially real, not purely hypothetical – we are satisfied that the Board's action is unjustified." Id. at 146.
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> The *U.S. West* decision enforced this evidentiary burden in finding that the FCC's prior CPNI rules did not comply with *Central Hudson*. The Tenth Circuit explained that merely reciting the term "privacy" did not establish a substantial governmental interest: "When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest." *U.S. West*, 182 F.3d at 1234. The court opined that the government cannot satisfy "the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it." Id. at 1234-35.

Professor Tribe goes on to demonstrate that the FCC's proposed rules suffer the same failings as were present in *U.S. West* and would not satisfy the first prong of the *Central Hudson* test.[17] Moreover, Professor Tribe goes on to note that even if the FCC were to meet the first prong of the Central Hudson test, the selective, under-inclusive nature of the proposed rules would fail the second prong of the test – that the rules be tailored and advance the interest identified.

Finally, the third prong of the Central Hudson test requires that the actions taken to protect consumer privacy not be more burdensome than to serve the interest. Any assertions by the Commission that its rules meet this test are belied by the fact that, prior to the reclassification of broadband as a telecommunications service, the FTC's notice and choice regime – a

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[17] Id. at 20-21.

significantly less burdensome restriction on the internet ecosystem – advanced the interests the FCC now purports to further.[18]

C. Congressional Concerns

On June 1, 2016, Energy and Commerce Committee Chairman Fred Upton, Communications and Technology Subcommittee Chairman Greg Walden, and Commerce, Manufacturing, and Trade Subcommittee Chairman Michael Burgess wrote to Chairman Wheeler expressing concern with the proposed rules. The letter points to the potentially negative impacts for consumers ranging from delayed innovation to deferred deployment, stating that "rather than serve the public interest, these new rules will create public confusion."[19] Committee leaders urged the FCC to reconsider its approach and "create a more consistent privacy experience for consumers by mirroring the FTC's successful enforcement-based regime."[20]

Furthermore, a bipartisan group of seven Energy and Commerce Committee Members wrote to the FCC with similar concerns. The letter commends the FTC privacy framework, writing the "holistic and consistent approach struck the right balance: consumers' use of Internet services and applications has continued to increase and consumers' privacy has been protected."[21] However, the FCC proposal of "inconsistent treatment of consumer data could actually undermine consumers' confidence in their use of the Internet due to uncertainty regarding the protections that apply to their online activities." Committee Members urged the FCC to meet consumers' privacy expectations by considering a more balanced approach.

IV. STAFF CONTACTS

If you have any questions, please contact David Redl or Charlotte Savercool of the Committee staff at (202) 225-2927.

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[18] Id. at 33-38.

[19] Letter from The Honorable Fred Upton, the Honorable Greg Walden, and the Honorable Michael Burgess to the Honorable Tom Wheeler, Chairman Federal Communications Commission, June 1, 2016 available at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/letters/20160601FCC.pdf

[20] Id.

[21] Letter from the Honorable Bobby Rush, the Honorable Pete Olson, the Honorable Gene Green, the Honorable Gus Bilirakis, the Honorable Leonard Lance, the Honorable Kurt Schrader, and the Honorable Renee Ellmers, Congress of the United States, to the Honorable Tom Wheeler, Chairman Federal Communications Commission, May 25, 2016.