FCC Chairman Outlines Proposal for New Broadband Privacy Rules

October 9, 2016

On October 6, 2016, Federal Communications Commission (FCC or Commission) Chairman Tom Wheeler published a blog entry on the Commission's website outlining proposed privacy rules for broadband Internet Service Providers (ISPs). The proposed rules are scheduled to be considered by the full Commission at its monthly meeting on October 27, 2016. These rules come after the Commission received substantial public comment on its March notice of proposed rulemaking (discussed in an earlier blog post) from stakeholders representing consumer, public interest, industry, academics, and other government entities including the Federal Trade Commission (FTC). The proposed rules appear to soften several elements of the Commission's initial proposal, which received considerable industry criticism.

The actual text of the proposed order is not available, however, a fact sheet along with the Chairman's blog post outlines the details of the proposal. Under the proposal, mobile and fixed broadband ISPs would have the following requirements:

- **Clear Notification**. ISPs would be required to notify consumers about the type of information they collect; explain how and for what purposes that information can be shared or used; and identify the types of entities with which they share information. ISPs will also be responsible for providing this information to customers when they sign up for a service and regularly informing them of any significant changes. The Commission's Consumer Advisory Committee will be tasked with creating a standardized privacy notice format that will serve as a "safe-harbor" for those ISPs that choose to adopt it.

- **Information Sensitivity-Based Choice**. ISPs must get a customer's "opt-in" consent before using or sharing information deemed sensitive. Geo-location information, children's information, health information, financial information, social security numbers, web browsing history, app usage history, and communications content are the broad categories of data that would be considered sensitive. All other individually identifiable customer information would be deemed non-sensitive, and will be subject to an "opt-out" approval requirement. For example, the use of service tier information to market an alarm system would be considered non-sensitive and opt-out policies would be appropriate, consistent with customer expectations. Finally, the rules will infer consent for certain purposes identified in the Communications Act, including the provision of broadband service or billing and collection.

- **Security.**

    - *Protection*: ISPs must take reasonable measures to protect consumer information from vulnerabilities. To help ensure reasonable data protection efforts, ISPs may: a) adopt current industry best practices; b) provide accountability and oversight for security

practices; c) use robust customer authentication tools; and d) conduct data disposal consistent with FTC best practices and the Consumer Privacy Bill of Rights.

- *Breach Response*: ISPs must notify customers when data is compromised in a way that results in unauthorized disclosure of personal information. ISPs must notify a) the customer no later than 30 days after discovery of the breach; b) the FCC no later than 7 business days after discovery; and c) if it affects more than 5,000 customers, the FBI and U.S. Secret Service no later than 7 business days after discovery.

The proposal addresses other issues, such as,

- sharing and using de-identified information consistent with the FTC framework;
- the use of take-it-or-leave-it data usage or sharing policies; and
- heightened disclosure requirements for discount plans based on consent to data use.

The proposal emphasizes its focus on broadband services. The proposed rules will not apply to the privacy practices of websites or apps, including those operated by ISPs for their non-broadband services, as the Commission believes this is the purview of the FTC. This is particularly notable in light of the recent 9th Circuit AT&T decision, which has further blurred the boundaries of the FCC and FTC's jurisdiction (addressed in an earlier blog post). In that case, the Court determined that the FTC's "common carrier exemption" is "status-based," and as such exempts telecommunications carriers (like ISPs) from FTC jurisdiction, regardless of whether the company in question is engaging in common carrier activities. Presumably, the 9th Circuit's reading of the common carrier exemption would extend to websites and apps provided by an ISP, although Chairman Wheeler appears to take a different reading in his privacy proposal.

In response to Chairman Wheeler's proposal, FTC Chairwoman Ramirez expressed her pleasure with the FCC's efforts to protect consumer privacy.

We will be tracking this proceeding as it develops, and will follow up with a client advisory when the Commission releases its final rules.