

Chicago Daily Law Bulletin®

Volume 163, No. 110

Serving Chicago's legal community for 162 years

FCC privacy rules rollback brings quick response from states, lawmakers

Even before President Donald Trump signed into law the resolution rolling back the Federal Communication Commission's broadband privacy rules on April 3, the headlines were blaring consumer privacy alarms claiming internet companies can now "collect and sell consumer data."

The resolution, which passed almost completely down party lines in the Senate and the House of Representatives last month, not only scrapped the privacy and data security regulations for broadband internet service providers adopted by the FCC in the last months of the Obama administration before they could take effect, but the resolution also effectively bars the FCC from attempting to enact similar regulations in the future.

Federal law has regulated privacy in telephone communications for decades, but privacy and data security regulations were not adopted for broadband internet service providers (ISP) by the FCC until the end of October under then-Chairman Tom Wheeler. Commissioner Ajit Pai, now the agency's chair, opposed the rules when they were introduced.

The FCC's privacy rules, which were to go into effect later in 2017, aimed to establish a framework requiring customer consent for ISPs to use and share their customers' personal information. The framework was calibrated to the sensitivity of the information.

The rules incorporated the controversial inclusion of browsing history and apps usage as sensitive information, requiring opt-in consent. The rules also included data security and breach notification requirements.

The rules provided guidelines on steps ISPs should consider taking, such as implementing rel-

evant industry best practices, providing appropriate oversight of security practices, implementing robust customer authentication tools and adopting guidelines for the proper disposal of data consistent with Federal Trade Commission best practices and the Consumer Privacy Bill of Rights.

The rules also contained data breach notification requirements to both consumers and law enforcement to encourage ISPs to protect the confidentiality of customer data.

But the Privacy Rule was nullified under the procedure established by the Congressional Review Act, which allows Congress to undo or "disapprove" recently passed regulations.

The next day, The Washington Post published an opinion piece co-authored by the heads of the FCC and the Federal Trade Commission that sought to tamp down what they termed "a wildfire of misinformation" about the rollback.

In their opinion piece, Pai, the new FCC chair, and Maureen K. Ohlhausen, the FTC acting chair, addressed misconceptions about the rollback.

According to the op-ed, the now-nullified FCC Privacy Rule would have created "a fractured privacy framework" under which ISPs would have been subject to one standard and content providers would have been subject to another standard. The two agency heads asserted that the rollback clears the way for a reversal of the 2015 decision by the FCC to treat the internet like a public utility and to classify ISPs as "common carriers" — removing them from the FTC's jurisdiction.

In particular, the chairs emphasized that the rollback didn't remove any existing privacy pro-

PRIVACY, TECHNOLOGY AND LAW



**NERISSA
COYLE
MCGINN**

Nerissa Coyle McGinn is a Chicago-based partner at Loeb & Loeb LLP. Her practice focuses on matters involving the convergence of advertising and promotions, emerging media, technology, and privacy law, as well as intellectual property law, focusing on trademark clearance and counseling. She can be reached at nmcginn@loeb.com.

tections, "it simply cleared the way for us to work together to reinstate a rational and effective system for protecting consumer privacy." In addition, ISPs have never sold, and never plan to sell, individuals' browsing history to third parties, they pointed out.

The FCC and FTC chairs have indicated the agencies will work together to give the authority to regulate consumer internet privacy back to the FTC.

"What we have at the moment is a rapid implementation of a 'no cops on the beat' approach to privacy and data security ..."

"We need to put the nation's most experienced and expert privacy cop back on the beat, and we need to end the uncertainty and confusion that was created in 2015 when the FCC intruded in this space," the chairs wrote in their opinion piece. "In short, the Obama administration fractured our nation's online privacy law, and it is our job to fix it."

Not everyone at the federal agency level agrees with this, however. Commissioner Terrell McSweeney — the only Democrat left at the FTC — has criticized the reversal.

"What we have at the moment is a rapid implementation of a 'no cops on the beat' approach to privacy and data security," she said at an event at New America's Open Technology Institute. McSweeney noted that based on a federal appeals court ruling from August 2016, the FTC does not have jurisdiction over common carriers. The agency will not be able to enforce consumer privacy and security unless and until Congress passes new legislation to give the FTC power over ISPs — broadband, cable and wireless carriers.

In the interim, "control over who gets our sensitive information rests in the hand[s] of very few large companies which are the gatekeepers for our connections to modern life."

In the wake of the congressional vote in favor of the rollback, broadband ISPs that had maintained the FCC Privacy Rule handicapped them against companies like Google and Facebook, took pains to reassure con-

sumers about the safety of their personal data.

AT&T, Comcast and Verizon each stated on their corporate blogs that the privacy of consumer data always has been and always will be a priority. They also said

they did not sell individual web browsing histories prior to the enactment of the rules, and they had no intention of doing so now that the rules had been scrapped.

The broadband ISPs further pointed out that their businesses continue to be governed by Section 222 of the Communications Act, the Children's Online Privacy Protection Act, the Electronic

Communications Privacy Act and state privacy and data security laws.

Some legislators are not convinced.

Several states are considering taking new steps to protect consumer privacy.

Illinois legislators are reviewing a bill that would require the operator of a commercial website or online service that collects Illinois consumers' personally identifiable information to notify customers about its personal information sharing practices.

The proposed Right to Know Act also would require operators to notify customers when disclosing their personal information to a third party.

Two other privacy protection measures are also before Illinois lawmakers. The proposed Geolo-

cation Privacy Protection Act would bar a private entity from collecting, using, storing or disclosing geolocation information collected from a location-based app on an individual's mobile device without affirmative express consent.

Second, the proposed Microphone-Enabled Devices Act would require a private entity to give written notice and obtain the informed consent of the user before enabling the microphone in users' internet-connected devices.

Other states initiating their own privacy protection measures include California and Connecticut, which recently updated regulations that restrict government access to online communications; Nebraska and West Virginia, which last year passed laws limiting companies' monitoring of employees' social media

accounts; and Hawaii and Missouri, which are looking at privacy regulations targeting employees, tenants and students.

At the federal level, Sen. Ed Markey, D-Mass., introduced a bill a few days after the resolution became law to undo the repeal and reinstate the regulations. Although the bill is co-sponsored by 10 Democratic senators, few appear to believe the last-ditch attempt to stop the rollback will gain support.

House Republicans have already sent a letter to the FCC to handle ISP privacy issues during the transition until the FTC's authority over internet privacy is re-established. "An FCC approach that mirrors the FTC will continue to protect consumers in this tumultuous time," according to the letter signed by 50 House Republicans

to the FCC chairman.

"Until such time as the FCC rectifies the Title II [of the Communications Act] reclassification that inappropriately removed ISPs from the FTC's jurisdiction, we urge the FCC to continue to hold ISPs to their privacy promises."

As both the approval and the opposition to the rollback show, the agencies will need to work transparently and be ready to provide clarification along the way to address the inevitable questions and concerns.

In the meantime, as the federal government moves forward to develop a new privacy protection framework under the FTC, individual states may promulgate laws to protect consumer privacy online but also could generate conflict among the states and with the FTC's new framework.