

FCC privacy rule highlights need for congressional action, experts say

(October 24, 2016) - No matter what the Federal Communications Commission decides, the issues raised by its controversial proposed regulation on broadband privacy will likely trigger litigation, legislation and probably more regulation for years to come.

Now scheduled for an Oct. 27 vote, the regulation would establish tougher privacy rules for internet service providers, which are under the FCC's jurisdiction, than the rules applied to websites, social media and the rest of the internet economy, which falls under the Federal Trade Commission's more flexible privacy regime.

The convergence of players in the business of moving and using data — exemplified by the potential merger of AT&T and Time-Warner — makes different regulatory regimes increasingly unworkable and problematic, but the FCC and privacy advocates appear bent on any privacy gains they can get.

"It's obviously imperfect, but it's better than no solution," said Marc Rotenberg, president and executive director of the Electronic Privacy Information Center, at a Capitol Hill briefing on Monday.

Broadly speaking, the battles of the future will be fought over leveling the playing field, either by rolling back the FCC regulation and extending FTC jurisdiction over internet providers, or by bringing the FCC's more rigorous privacy rules to all sectors of the internet economy.

Hesitant to predict whether the rule will be adopted, modified or postponed, a panel of experts at the Capitol Hill briefing was more certain about the rule's eventual aftermath. The point of drawing congressional staffers and others together, four days before the vote, was to start influencing the decision-making that will take place in months and years to come.

"We need to quicken the pace, we need to start the conversation," said Tim Sparapani, an internet industry lobbyist who represents CALinnovates, a technology advocacy group that co-sponsored the luncheon briefing. "We think the Telecommunications Act of 1996 ([PL 104-104](#)) should be rewritten" to make it more tech-neutral in a world where distinctions between voice and data services have blurred.

"The answer to all of this is legislation," said Berin Szoka, president of TechFreedom, a free-market technology think tank that also sponsored the briefing. One obvious solution, he added, is to repeal the common carrier exemption in the FTC Act (PL 63-447), which put internet providers under FCC jurisdiction when the FCC reclassified them as common carriers.

Otherwise, "you can imagine all kinds of fact patterns where these rules cause problems and skew the market," Szoka said.

For instance, it is likely the FCC's final privacy rule will say internet protocol addresses are "sensitive information" that requires consumers to give their consent in advance for that information to be used or sold by their internet provider.

That could lead to a situation where a broadband provider would have to get opt-in consent if they want to show consumers a video, Szoka said.

Furthermore, Szoka said he expects in the future the FCC will use its authority to promote broadband service to argue its privacy rules should extend to other internet firms. "It's only a matter of time," he said. "This is simply a roadmap for what happens to other companies," noting Google opposes the privacy rule even though it would gain a competitive advantage over internet providers in competing for advertising dollars, at least for now.

EPIC's Rotenberg said the biggest implication of the FCC regulatory controversy is that "we need a privacy agency in the United States. There's too much confusion."

He noted the Department of Homeland Security merged several agencies in the aftermath of the Sept. 11 terrorist attacks. "The moment has come now in the U.S. to do the same thing with data protection."

By Paul Merrion, CQ Roll Call

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