



United States of America
Federal Trade Commission

Reactions to the FCC's Proposed Privacy Regulations
Remarks of Maureen K. Ohlhausen¹
Commissioner, U.S. Federal Trade Commission

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Thank you to Kelley Drye & Warren for inviting me to participate in the 2016 Advertising and Privacy Law Summit. Modern advertising, particularly online advertising, is a very productive use of data about consumers. Online advertising has, in turn, fueled the internet as we know it today – bursting with free, useful platforms that are supported. Of course, use of consumer data can raise privacy concerns. Privacy is a complex regulatory issue, in part because of proposed rulemaking, or NPRM, which proposes to regulate the privacy and data security practices of Broadband Internet Access Service providers commonly known as ISPs.

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¹ The views expressed in the remarks are my own and do not necessarily reflect the views of the Federal Trade Commission, its staff, or any other Commissioner.

² In re Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Notice of Proposed Rulemaking, 31 FCC Rcd 2500 (Apr. 1, 2016), <https://www.fcc.gov/document/press-releases-proposed-rules-protect-broadband-consumer-privacy> (NPRM).

summarize those two filings, which describe the differences between the FTC's established approach and the FCC's proposed approach.

Staff's Comment. BCP's comment supported the overall goal of the FCC rulemaking, which is to protect the privacy and security of information about consumers, but criticized the method proposed to achieve those goals.

As the comment recognized, consumer data is a valuable resource that can benefit both businesses and consumers. The advertising industry knows this well. Beneficial uses of consumer data go far beyond targeted advertising, of course. In the ISP context, such benefits could include lower prices and improved security and services. Regulatory restrictions on use of consumer data may foreclose these benefits, imposing significant costs on consumers—a fact often overlooked by advocates who may have different privacy preferences than average consumers. Of course, as staff's comment notes, consumers do value privacy, and the collection, use, and sharing of consumer data creates some risks that should be addressed.

Staff's comment describes how

privacy in emerging areas, coordinate on privacy efforts internationally, and advocate for policies about privacy and data use that improve consumer welfare.

As staff explains, and as I note in my separate statement⁹, the FTC built its privacy program on the long-established legal principles of unfairness and deception.¹⁰ This framework focuses on the sensitivity of consumer data and particular promises made about data collection and use, rather than on what type of entity collects or uses that data. The FTC recommends opt in consent for unexpected collection or use of consumers' sensitive data such as Social Security numbers, financial information, and information about children. The FTC's framework applies to any entities, including browsers and Internet platforms, that access such sensitive information.

This approach reflects the fact that consumer privacy preferences differ greatly depending on the type of data and its use. On one hand, consumer preferences are uniform with regard to certain uses of sensitive data. For example, the overwhelming majority of consumers object to entities accessing their financial or medical data without permission. On the other hand, we know from experience as well as academic research – including a recent Pew

⁹ See FED. T

study – that for uses of non-sensitive data, such as advertising, people have widely varying privacy preferences¹¹.

Obtaining or giving consent can be burdensome, not only for businesses, but also for consumers. Reading a notice and making a decision takes that, in the aggregate, can be quite substantial¹². To maximize consumer benefits, regulation should minimize costs. One key way to do this is to set defaults so that those who value the choice most highly incur the time and effort of making an active decision, and those who do not care as much are not burdened by an unnecessary interaction. This means that setting opt-in or opt-out so that the default position matches typical consumer preferences for that type of data and use. For advertising based on non-sensitive information, this generally means an opt-out approach. For uses of sensitive information, this generally means an opt-in choice.

Let me be clear on this point: FTC experience demonstrates that more onerous privacy regulation does not always benefit consumers. Some, however, believe that stringent regulation adds costs to business but only provides benefits to consumers because privacy preferences vary widely, regulation can impose significant costs on consumers. Consumers who wish to receive targeted advertising or to benefit from services funded by advertising are harmed by regulation that increases the difficulty of using information. As a result, if a regulation imposes defaults that do not match consumer preferences, it imposes unnecessary costs on consumers without improving consumer outcomes. The burdens imposed by restrictive

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and overinclusive.¹⁶ The proposed PII definition improperly includes data that is not reasonably linkable to an individual.¹⁷ Conversely, the NPRM's proposal for emergency sharing ~~and~~ potentially expose sensitive information to abusive family members.¹⁸ Furthermore, staff explains, the NPRM risks harming consumers because it doesn't require affirmative express consent for retroactive material changes to privacy policies.¹⁹ Staff also questions the NPRM's strict liability standard for data breaches.²⁰ And staff expresses concern that the proposed data breach rules would result in over-notification and unnecessarily truncated times for breach investigations.²¹

Staff also details perhaps the most fundamental difference between the two approaches: the treatment of the sensitivity of consumer data.²² The FCC's approach does not consider the sensitivity of different types consumer data, and therefore does not necessarily reflect consumers' privacy preferences. Instead

As I further noted in my separate statement, a ban on discounts for ad-supported would not only reduce consumer choice – it might eliminate one viable way to increase broadband adoption. Such a ban would prohibit even a fully informed consumer from trading some of her data for a discount on her broadband bill. Yet when would broadband subscribers explain why they have not adopted broadband, they primarily high cost not privacy concerns.³⁴