

## FCC Dives Headfirst Into Privacy

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What happens when an agency that lacks significant experience regulating data privacy assumes responsibility for regulating data privacy?

The Federal Communications Commission is in the process of answering that question, as it struggles over the extent to which it should regulate the data privacy practices of fixed and mobile broadband Internet Service Providers (ISPs).[1]

### Background

Until recently, the data privacy practices of broadband ISPs were subject to the oversight of the Federal Trade Commission. This is because in a series of decisions beginning more than a decade ago, the FCC classified broadband ISPs as providers of “information service.”[2] This regulatory classification meant that broadband ISPs were subject to only minimal regulation by the FCC. It also meant that they were subject to the jurisdiction of the FTC, as Section 5 of the FTC Act does not restrict that agency’s authority over providers of “information service.”

But earlier this year, the FCC changed the regulatory classification of broadband ISPs and deemed them to be providers of “telecommunications service.”[3] The FCC did this to bolster its authority over these entities so it could more easily impose “open Internet” or net neutrality regulations on them.

But one consequence of this action was that it had the effect of eliminating the FTC’s jurisdiction over broadband ISPs. This is because Section 5 of the FTC Act expressly excludes from that agency’s authority the ability to regulate “common carriers,” which include providers of “telecommunications service.”[4] As a consequence, the FCC’s decision to reclassify broadband ISPs as providers of “information service” to accomplish one regulatory objective (net neutrality regulation) had the practical effect of undermining another (excluding them from FTC oversight).

### The FCC’s Data Privacy Authority

It is against this backdrop that the FCC now finds itself in the awkward position of regulating the data privacy practices of broadband ISPs for the first time. The FCC recognized that its reclassification of broadband ISPs as providers of “telecommunications service” would leave them without a privacy regulator, so the FCC now is stepping into that void.[5]



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This is easier said than done. As an initial matter, the FCC has little experience regulating data privacy. Although a few provisions in the Communications Act speak to consumer privacy issues, they do so in a narrow and targeted way.[6] Moreover, the FCC has spent little time over the years considering data privacy issues, and certainly not to the same degree as the FTC. That is not to say that the FCC is incapable of regulating data privacy; rather, it simply has not done so, in large part due to the limits of its authority under the Communications Act and the fact that, in the broadband context, the FTC had the issue covered.

All of that is now changing. Indeed, by reclassifying broadband ISPs as providers of “telecommunications service,” the FCC is subjecting these entities to Section 222 of the Communications Act, which has long governed certain data privacy practices of telephone companies. But the extent to which Section 222 can and will apply to broadband ISPs is a question that the FCC has yet to answer fully.

### **Section 222 and Its Limits**

Section 222 governs “customer proprietary network information” or “CPNI.”[7] CPNI is a defined term, but it basically amounts to information about a subscriber’s use of his or her telephone service, including the date, duration and destination of each call, the type of service used, and similar technical information.[8] Although Section 222 includes a privacy component, it was enacted as part of the Telecommunications Act of 1996 in large part to ensure that incumbent telephone companies could not use subscriber data to gain an unfair advantage over new entrants by knowing which products and services to market to those subscribers.[9]

The FCC has rules in place that implement Section 222’s provisions.[10] Although these rules have been the subject of debate and more than a few appeals, they today form a framework that regulates telephone company use of a certain class of subscriber data. Last year, the FCC made an effort to expand the reach of Section 222 by interpreting its provisions to impose a data security obligation for a broader segment of subscriber data (“proprietary information”), but that interpretation has not been without controversy and it is unclear whether, if challenged, it could withstand judicial scrutiny.[11]

The FCC has promulgated regulations to implement Section 222, but because those regulations were drafted with only telephone companies in mind, the FCC has recognized that they should not be applied to broadband ISPs.[12] The FCC has said that it expects to initiate a new rulemaking proceeding in the near term to address this concern, but in the meantime it has provided very little guidance on precisely what data privacy requirements apply to broadband ISPs.

### **So What Requirements Apply?**

The FCC has stated that it believes the statutory requirements of Section 222 will apply to broadband ISPs if and when the agency’s net neutrality ruling becomes effective on June 12, 2015, but even that has left many questions unanswered.

As a consequence, the FCC held a workshop this past April to solicit feedback on the issues it should be considering as it goes about developing a data privacy framework for broadband ISPs.[13] More recently, the FCC issued an Enforcement Advisory stating that until further FCC guidance is provided or rules are adopted, “broadband providers should employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protections.”[14]

Many in the industry are struggling to decipher precisely what that means. It seems clear that if a broadband ISP makes certain representations in its privacy policy, it must honor them. That has long

been a fundamental precept to consumer data privacy law. But what does “providing protections in line with ... core tenets of basic privacy protections” mean? And how much discretion should broadband ISPs be free to exercise in making that judgment?

### **Can a Cogent Framework Emerge?**

The FTC has long served as one of the foremost authorities on consumer data privacy practices. Much of this has to do with the breadth of the FTC’s authority under Section 5 of the FTC Act — to police “unfair or deceptive acts or practices in or affecting commerce” — and with the proactive approach the FTC has taken on data privacy for more than a decade.[15]

One reason the FTC has managed to provide much guidance in such a relatively short period of time is because it has embraced its role as an enforcement agency. Indeed, by combining the very broad (and seemingly evolving) sense of what Section 5 means in the data privacy context with a case-by-case approach to enforcement, the FTC has managed to generate a body of “case law” from which certain privacy principles have emerged. Although this approach has not been without its detractors, it has enabled the FTC to avoid one of the most challenging tasks a regulator faces: developing prescriptive rules to govern rapidly evolving technologies and practices with which no government has been able to keep pace.

The FCC generally has avoided taking a case-by-case approach to regulation. Its *modus operandi* instead has been to investigate an issue, solicit industry input, and draft regulations that provide a framework for industry conduct. This approach has worked well in the past. It has enabled stakeholders to provide meaningful input into the process, and as a consequence the FCC’s regulations often have reflected an appropriate and carefully calibrated balance. Whether the FCC will be able to accomplish that same objective here is something we will have to wait and see.

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[1] *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 80 FR 19737, GN Docket 14-28, FCC 15-24, ¶1466 (March 12, 2015) (“Open Internet Order”).

[2] *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (classifying Internet access service over cable systems), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“DSL Reclassification Order”) (classifying broadband Internet access service over wireline facilities); *Appropriate Regulatory Treatment for Broadband Access to the*

*Internet Over Wireless Networks*, WT Docket No. 087-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (classifying broadband Internet access service over wireless networks); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (classifying broadband Internet access service over power lines).

[3] Open Internet Order at ¶12 (classifying broadband ISPs as providers of telecommunications service).

[4] 15 U.S.C. §45(a)(2); 47 U.S.C. §153 (53).

[5] *Cf.* DSL Reclassification Order at ¶148 (“Consumers’ privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on telecommunications service”). Open Internet Order at ¶463 (“[t]he Commission has long supported protecting the privacy of users of advanced services, and retaining this provision thus is consistent with the general policy approach.”)

[6] *See, e.g.*, Communications Act, 47 U.S.C. §151, *et seq.*, at Section 222 (Privacy of Customer Information, CPNI); Section 1001, *et seq.* (*Interception of Digital and Other Communications, CALEA*), Section 551 (Protection of Subscriber Privacy, Cable); Section 227 (Restrictions on Use of Telephone Equipment, TCPA); Section 605 (Unauthorized Publication or Use).

[7] 47 U.S.C. §222.

[8] *Id.* at §222(h)(1).

[9] *In the Matter of Implementation of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 12513, 61 FR 26483 at ¶24 (rel. May 17, 1996) (“[o]ur reading of the 1996 Act prohibits carriers that are established providers of certain telecommunications services from gaining an unfair advantage by using CPNI to facilitate their entry into new telecommunications services without obtaining prior customer authorization”).

[10] 47 C.F.R. §§ 64.2001 - 61.2011.

[11] *In the Matter of TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability for Forfeiture, File No.: EB-TCD-13-00009175, FCC 14-173 (rel. Oct. 24, 2014).

[12] Open Internet Order at ¶467; *Open Internet Privacy Standard: Enforcement Bureau Guidance: Broadband Providers Should Take Reasonable, Good Faith Steps to Protect Consumer Privacy*, FCC Enforcement Advisory (May 20, 2015) (“Open Internet Enforcement Advisory”).

[13] *FCC Staff Announce Agenda for Public Workshop on Broadband Consumer Privacy*, Public Notice (Apr. 22, 2015); *Public Workshop on Broadband Consumer Privacy* (Apr. 28, 2015), *available at* <https://www.fcc.gov/events/wcb-and-cgb-public-workshop-broadband-consumer-privacy>.

[14] Open Internet Enforcement Advisory at p.2.

[15] 15 U.S.C. §45(a)(1).

