

## FCC Won't Give Broadband Cos. A Free Pass On Privacy Risks

By Allison Grande

*Law360, New York (May 29, 2015, 2:41 PM ET)* -- The Federal Communications Commission recently warned broadband providers they won't be exempt from regulatory action while the agency drafts specific privacy rules for the industry, a warning that attorneys say should spur these companies to assess their privacy risks despite a lack of clarity from the regulator about their specific obligations.

In a May 20 enforcement advisory, the commission put broadband providers on notice that even though the agency refused in its recent Open Internet Order to extend existing "telephone-centric" privacy rules implementing Section 222 of the Communications Act to broadband providers, these entities are still responsible for compliance with the statutory provisions of the section.

With the Open Internet Order set to take effect on June 12, the commission advised broadband providers to take "reasonable, good faith steps" to comply with the core customer privacy protections outlined in Section 222, a directive that makes it clear that these companies can't afford to wait around for the commission to craft specific rules for broadband providers.

"Despite its acknowledgement that Section 222 was enacted in a different era to address a different type of carrier, the FCC is not backing off from its mandate to enforce broadband Internet consumers' privacy protections under the statute," said Ulmer & Berne LLP data privacy and information security practice co-chair Fran Goins. "Even though the FCC has stated it will not apply its existing 'telephone-centric' rules to broadband providers, these providers will still be held accountable if they fail to implement reasonable, good faith steps to protect customers' private information."

In order to meet the obligations laid out by the FCC, attorneys advise that broadband providers take immediate steps to assess whether the privacy protections they have in place for customer proprietary network information are adequate to safeguard the confidentiality of that data and are consistent with what they are telling their customers about those protections.

"What the advisory seems to indicate is that for privacy, what the FCC is looking at is effort," Kelley Drye & Warren LLP partner Steven Augustino said. "It's like your middle school math problems. It's not as important what answer you end up with as it is that you show your work."

While broadband providers are still likely to face scrutiny from the regulator if there is a security breach or consumer complaint about an alleged failure to safeguard their data, companies that have made an effort to review their procedures and document their findings are likely to fare better than those that have failed to do anything, Augustino noted.

"Going through the process of doing a risk assessment and creating a compliance plan is likely to lead to better outcomes," he said.

For many broadband providers, the mere exercise of evaluating privacy risks may prove to be relatively simple, considering that these companies have long been subject to similar obligations, including their duty under Section 5 of the Federal Trade Commission Act to refrain from engaging in unfair and deceptive practices, attorneys noted.

While Section 222 contains more specific privacy-related requirements than Section 5, the latter statute could prove extremely useful as broadband providers — which were brought under Section 222 due to the FCC's decision in its Open Internet Order to reclassify them as common carriers, a distinction over which the FTC has no authority — adjust to their new obligations.

"The enforcement advisory doesn't necessarily dictate a change in broadband providers' practices as much as it suggests that they need to continue to be reasonable in their judgments about how they collect, use and share data ... until such time that they are given more clarity about what the rules of the road will be," said Yaron Dori, the co-chair of Covington & Burling LLP's communications and media practice group.

Although broadband providers shouldn't have too much trouble getting a grasp on their privacy practices, where the challenge is likely to lie is on the lack of specificity offered by the commission in its advisory about what exactly broadband providers need to do to stay out of hot water, according to attorneys.

"The advisory creates even greater uncertainty about what the commission expects of broadband providers with respect to consumer privacy," Mayer Brown LLP partner Howard Waltzman said.

Attorneys specifically point to the commission's main declaration that between the time that the Open Internet Order takes effect and specific privacy rules for broadband providers are implemented, the enforcement bureau "intends to focus on whether broadband providers are taking reasonable, good faith steps to comply with Section 222, rather than focusing on technical details."

While the statement provides a clear message that companies need to be taking immediate action, it does little to explain exactly what they should be doing, according to attorneys.

"The enforcement bureau is saying that 'reasonableness' will be its guide, but what the bureau considers to be 'unreasonable' privacy protection for broadband customers remains to be seen," BuckleySandler LLP attorney Stephen Ruckman said.

The commission further muddied the water with its next sentence, in which it elaborates that the bureau "intends that broadband providers should employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protection."

"There's no way to know what the agency means by 'core tenets of basic privacy protection,' and in some ways, what those tenets are is being debated in every country around the world right now," Dori said. "So the notion that broadband providers would somehow understand what the FCC specifically has in mind is a bit challenging."

In electing to focus on the spirit rather than technical details of Section 222, the commission is building on a broader shift apparent in its enforcement activities during the past year from basing its actions on specific rules and clear obligations to a regime that is based on broad principles that are subject to interpretation, Augustino noted.

"The shift has greatly expanded the scope of what the FCC considers suitable for enforcement and has led to much more significant fines," he said.

Wielding its broad authority, the commission has significantly increased its prowess as a privacy enforcer, hitting TerraCom Inc. and YourTel America Inc. with a **\$10 million fine** in October in its first foray in data security and following up that action with a **record \$25 million settlement** with AT&T Services Inc. to resolve claims that the phone carrier failed to adequately safeguard the personal data of nearly 300,000 customers.

"Given the FCC's recent \$25 million fine against AT&T, it's clearly a front-burner issue for the commission," said Craig A. Newman, chair of the privacy and data security practice at Patterson Belknap Webb & Tyler LLP.

However, as Newman pointed out, the task of defining how Section 222, a privacy statute clearly geared toward telephone providers, will apply within the "more layered and complex environment of the Internet will be challenging, to say the least," leaving broadband providers in a sort of limbo while they struggle to meet the commission's expectations without more specific guidance.

In its advisory, the FCC extends a rare offer to provide informal as well as formal guidance to broadband providers that approach them, an option that could provide some relief as these companies figure out how to best comply with Section 222 at the current time.

"The presumptive safe harbor offered to providers who request such guidance should go a long way to assist them in navigating these muddy waters," Goins said.

However, the practice of seeking out guidance is not without pitfalls, considering that it remains uncertain what the commission will do with the inquiry and whether the advice will hold any weight if the company does encounter trouble later, attorneys say.

But whether or not broadband providers choose to take the guidance path, which the FCC noted that it would take as a sign a company is acting in good faith, attorneys advise that the best way for companies to avoid scrutiny before more specific rules come into place is to be able to demonstrate to the regulator that they are taking privacy obligations seriously.

"The message to me is that if you're engaging in work and putting in the effort, you're likely to survive this first round of scrutiny," Augustino said.

--Editing by Katherine Rautenberg and Philip Shea.