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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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January 29, 2016

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Chairman Tom Wheeler  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Dear Chairman Wheeler:

I write with questions regarding the Federal Communication Commission (FCC) and what some have described as its problematic and overreaching actions regarding consumer privacy regulation of broadband providers.

As you know, following the FCC's controversial *Title II Order* of February 2015, the FCC's Enforcement Bureau issued an enforcement advisory regarding consumer privacy on May 20th, 2015. In the advisory, the Enforcement Bureau purported to "provide[] guidance to broadband providers about how [it] intend[ed] to enforce Section 222" of the Communications Act, which requires telecommunications carriers to protect customer proprietary network information (CPNI). The Bureau specified that it "intends to focus on whether broadband providers are taking reasonable, good-faith steps, to comply with Section 222." It also contemplated "further guidance and/or adoption of regulations applying Section 222" to broadband.

As Chairman, you have indicated that the FCC was in the process of commencing a rulemaking to establish concrete rules with respect to consumer privacy. In June 2015 speech, you suggested that that the Commission "committed in the [*Title II Order*] to address issues of privacy implicated by consumers' use of the Internet" and that the FCC "will begin that process with a Notice of Proposed Rulemaking in the autumn." You also said in a November interview that the FCC would act on privacy within the "next several months." With the autumn behind us and the winter deadline approaching, I can only assume that the FCC is still contemplating a rulemaking with respect to broadband privacy.

It is not clear that the FCC has the authority to police consumer privacy in the manner contemplated. However, given this background, I would responses to the following questions:

1. The enforcement advisory states that “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.”
  - a. What specifically does the FCC consider to be “reasonable, good-faith steps”?
  - b. What specific legal standard does the FCC apply in determining whether a broadband provider’s activity to protect consumer privacy is “reasonable”?
  - c. What specific actions by a broadband provider would the FCC consider mere “technical details”?
  - d. How does the FCC define CPNI as used in Section 222? Is it coterminous with personal identifiable information (PII)? If not, how does CPNI under Section 222 differ from PII in the eyes of the FCC? What does the FCC believe is its legal authority with respect to the protection of PII?
  
2. How many investigations or inquiries regarding the privacy practices of broadband providers were commenced after release of the *Title II Order*?
  - a. How many remain open?
    - i. Please provide me with:
      1. A list of providers currently under investigation
      2. For each such provider, a description of the alleged conduct that led the agency to initiate an investigation
      3. A list of providers involved in investigations that were closed, and
      4. For each such provider, a description of the conduct under investigation and the resolution.
  
3. On November 5, 2015, the FCC entered into a settlement with Cox Communications, Inc., following a data breach suffered by Cox. This was widely regarded as the FCC’s first privacy and data-security enforcement action against a cable operator. As a condition of settlement, the FCC required Cox to pay a penalty of \$595,000 and to adopt a comprehensive compliance program, including system audits and breach notification systems.
  - a. Is it the FCC’s view that the PII of Cox’s broadband customers is currently covered by the *Title II Order* as interpreted by the May enforcement advisory?
  - b. Were the Cox investigation and settlement undertaken solely pursuant to the Enforcement Bureau’s asserted authority under the *Title II Order* as interpreted by the May enforcement advisory?
  - c. If not, what was the specific legal authority for the Cox investigation and settlement?
  
4. You have said repeatedly that the FCC plans to propose rules pursuant to Section 222 that would impose privacy-related requirements on broadband providers, as contemplated by the *Title II Order*.
  - a. Do you expect to circulate to your colleagues a notice of proposed rulemaking? If so, when?
  - b. Which bureaus and offices within the FCC are participating in the drafting process?
    - i. Are you also consulting or coordinating with executive agencies or other independent agencies within the Federal government? If so, which one(s)?

In addition to your prompt response, I request that you brief my staff on any proposed rules under consideration, including the status of and the legal authority for any rulemaking. I appreciate your attention to this matter, in strict accordance with all existing agency rules, regulations, and ethical guidelines.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Flake", is written over the word "Sincerely,".

Senator Jeff Flake  
Chairman  
Subcommittee Privacy, Technology and the Law

cc Mignon Clyburn, Commissioner  
Jessica Rosenworcel, Commissioner  
Ajit Pai, Commissioner  
Michael O'Reilly, Commissioner

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March 4, 2016

Chairman Tom Wheeler  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Dear Chairman Wheeler:

I write to follow up on my letter to you from January 29, 2016. As you recall this letter regarded the FCC's proposed consumer-privacy regulation of broadband providers under the FCC's controversial *Title II Order*.

In my letter I requested answers to the following questions:

1. The [FCC's May 20, 2015] enforcement advisory states that "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."
  - a. What specifically does the FCC consider to be "reasonable, good-faith steps"?
  - b. What specific legal standard does the FCC apply in determining whether a broadband provider's activity to protect consumer privacy is "reasonable"?
  - c. What specific actions by a broadband provider would the FCC consider mere "technical details"?
  - d. How does the FCC define CPNI as used in Section 222? Is it coterminous with personal identifiable information (PII)? If not, how does CPNI under Section 222 differ from PII in the eyes of the FCC? What does the FCC believe is its legal authority with respect to the protection of PII?
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  - a. Do you expect to circulate to your colleagues a notice of proposed rulemaking? If so, when?
  - b. Which bureaus and offices within the FCC are participating in the drafting process?
    - i. Are you also consulting or coordinating with executive agencies or other independent agencies within the Federal government? If so, which one(s)?

I also requested that you brief my staff on any and all proposed rules under consideration, including the status of and the legal authority for any rulemaking.

While my letter asked for a "prompt response," it did not include a deadline for either your answers or the staff briefing. More than a month has passed without any response from you or the FCC. You have, however, told the Senate Commerce Committee this week that you expect to act on the proposed rulemaking "very soon, and that includes this month."

I am therefore requesting that you provide answers to my questions by March 18, 2016. Given your stated intention to move forward on the rulemaking this month, I would now request that you meet with me in person to explain your proposal. If you are unable to comply with these requests, please provide me a specific explanation as to why you cannot by March 18, 2016.

Sincerely,



Senator Jeff Flake  
Chairman  
Subcommittee on Privacy, Technology and the Law