



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 14, 2016

The Honorable Jeff Flake
Chairman
Subcommittee on Privacy, Technology & the Law
United States Senate
413 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Flake:

Thank you for your letters regarding the newly adopted broadband privacy rules.

At the October 27 Open Meeting, the Commission voted to adopt rules protecting consumers' broadband privacy. As I have said in prior letters, consumers in today's digital world deserve the ability to make informed choices about their online privacy. Before the Commission adopted the Broadband Privacy Order, there were no rules outlining how broadband Internet access service providers may use and share their customers' private information. Consumers are now empowered to decide how their information is used and shared by their telecommunications carriers. And the broadband privacy rules ensure that consumers have the increased choice, transparency, and security that they deserve.

In your letter dated October 13, you expressed concern that the Commission was not seeking additional comment from stakeholders on the proposed broadband privacy rules. The Commission's rulemaking process, which has been followed for years by both Democratic and Republican Chairs, is designed to give stakeholders and members of the public ample opportunity to engage in a transparent and vigorous discussion. This produced the "voluminous record" that I mentioned at the May subcommittee hearing you chaired on broadband privacy. This process is also designed to give commissioners a three-week period to discuss in confidence the substance of an item before final decisions are released. This process is commonplace for administrative agencies, and ensures that the FCC adheres to the Administrative Procedure Act, which requires us to consider and address all comments received on our proposals.

As you know, upon circulating the proposed broadband privacy rules to my fellow Commissioners, I published a fact sheet and blog post describing the proposed rules to allow the public to understand and engage with us on the broadband privacy issues before the Commission. Stakeholders continued to meaningfully provide the Commission with input on the publicly available information before the October 27 Open Meeting. And, notably, after the fact sheet and blog post were released, FTC Chairwoman Edith Ramirez issued a supportive statement, stating, "I am pleased to see the FCC moving forward to protect the privacy of millions of broadband users across the country. The FTC . . . provided formal comment to the

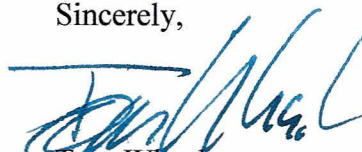
FCC on the proposed rulemaking, and I believe that our input has helped strengthen this important initiative.”

In your letter dated October 24, you expressed concern that the adopted broadband privacy rules violate the First Amendment’s protection of commercial speech. In adopting Section 222 of the Communications Act, Congress identified a substantial government interest in protecting the privacy of customers of telecommunications services. The Commission’s Order adopting and revising rules pursuant to Section 222 recognizes and honors that same substantial interest. As we explain in the Broadband Privacy Order, the sensitivity-based framework, which gives customer the tools needed to make decisions about their telecommunications carriers’ use and sharing of their information, meets the three-part test for regulation of commercial speech outlined in the *Central Hudson* case you reference.

Your letter also expressed concern that including web browsing and app usage in the Commission’s category of sensitive information is confusing for consumers and could create an unfair advantage for established actors in the online-advertising marketplace. I can assure you that consumers’ interests and expectations were at the heart of this proceeding. As I have said before, a consumer who hires a carrier to deliver information does not believe that he or she is consenting to the carrier’s use of that information for other purposes. However, the adopted rules do not prohibit broadband Internet access providers from using or sharing their customers’ information—they simply require broadband Internet access providers to ask for permission first.

I appreciate your interest in this matter. Your views are very important and I have asked that your letters be included in the record of the proceeding. Please let me know if I can be of any further assistance.

Sincerely,



Tom Wheeler