

FCC Broadband Privacy Rules Set ISPs Apart On Liability

By **Allison Grande**

Law360, New York (March 11, 2016, 10:21 PM ET) -- The Federal Communications Commission on Thursday rolled out a proposed set of privacy and data security rules for Internet service providers that go well beyond requirements found in other industries, exposing broadband providers to increased regulatory and legal exposure and fueling concerns about the commission's ability to effectively regulate privacy issues.

FCC Chairman Tom Wheeler previewed the long-awaited broadband privacy rules, which the full commission will consider during its March 31 open meeting, in a three-page fact sheet that stressed the importance of ensuring that consumers have the tools they need to make informed choices about how their data is used and shared and that this information is adequately protected.

If adopted, the new rules — which are built on the three core principles of choice, transparency and security — would require broadband service providers to obtain affirmative opt-in consent for the use and sharing of data that has not been specifically collected for the purpose of providing communications-related services, take reasonable steps to protect that information, and notify affected customers within 10 days of discovering a data breach.

"The principles supporting the new rules — choice, transparency and security — are relatively straightforward and conceptually uncontroversial," Dorsey & Whitney LLP partner Robert Cattanach said. "It is how the FCC intends to apply them that will create some consternation among Internet service providers."

One of the primary concerns among broadband providers is the stringency of the new proposed rules, which include a robust opt-in requirement for the use and sharing of certain types of data and a breach reporting deadline of 10 days for consumers and seven days for the FCC that is significantly shorter than the notification timetable set by any state or federal statute.

"The fact that the FCC wants to impose very specific and pretty onerous regulations on a subset of the Internet ecosystem is a surprise," Mayer Brown LLP partner Howard Waltzman said. "If this was an attempt to take a holistic view toward online privacy, it's failed because it only targets a subset of the Internet ecosystem."

While broadband providers have steadily been ramping up their focus on privacy and data security in recent years, having a new set of more rigorous requirements will force broadband providers to re-evaluate their practices and expose them to expanded avenues of risk, attorneys say.

“I would imagine that we’ll see more regulation from the FCC in the future,” Foley & Lardner LLP partner Mike Overly said. “What these rules show is that this is a matter that is of growing importance obviously in the U.S., but also all over the world, and we are going to see continuing regulation in this area, and it is going to get tighter and not looser.”

The FCC has already proven that it can be a force in the privacy arena. The regulator began aggressively enforcing privacy and data security violations in 2014 with actions against Verizon Communications Inc. and telecoms TerraCom Inc. and YourTel Inc., and continued to build on this prowess in 2015 with data security cases against AT&T Inc. and Cox Communications Inc.

With more stringent rules now slated to be imposed on broadband providers, the regulator is likely to feel only more empowered on the enforcement front, attorneys say.

“A lot of folks weren’t expecting to see prescriptive rules like this,” Sheppard Mullin Richter & Hampton LLP partner Dave Thomas said. “What these rules say to me is that the FCC is really flexing its enforcement muscles and that it’s likely that it will continue along the path both with detailed regulations as well as rigorous enforcement.”

The new privacy rules may also play a role in the courtroom, where companies are increasingly facing privacy and data security claims as customer awareness grows and plaintiffs begin to have more success with creative legal theories, attorneys say.

“These rules are going to become part of the fabric of what is considered reasonable, and in the event of a lawsuit are something that the court is going to look to and litigants are going to point to in order to say that a company wasn’t substantially materially compliant with their privacy and data security obligations,” Thomas said.

The proposal is also likely to further inflame the already raging debate over which agency should take the lead in regulating privacy in the U.S., attorneys say.

“The argument for a long time has been that the FCC doesn’t have the expertise to enforce privacy and data security rules,” Waltzman said. “So when the commission puts a proposal out there with requirements such as having to notify the FCC within a week and consumers within 10 days of a breach, which is much more stringent than any other requirement out there, that raises questions about whether they do have the expertise to be making and enforcing these kinds of rules.”

The FCC began crafting broadband-specific privacy rules last year, after the commission issued its Open Internet Order that reclassified broadband providers as common carriers, a decision that is currently being challenged in federal court.

Since the FCC took the reclassification step, which largely removed broadband providers from the FTC’s jurisdiction, the question of how far the FCC can and should go to take up a mantle that has long been worn by the FTC has only grown in intensity.

Both FTC Commissioner Maureen Ohlhausen and FCC Commissioner Michael O’Rielly have voiced concerns about the FCC’s ability to address complex privacy matters, and industry groups have echoed the doubts in pushing the FCC to fall in line with the FTC’s approach to privacy regulation.

“The rules raise this tension and sort of makes you wonder whether the FTC is going to feel compelled to be a lot more aggressive and prescriptive even in the absence of rulemaking authority to mirror what the FCC is doing,” Waltzman said.

In pushing for a framework similar to the one employed by the FTC, broadband providers have argued that consumers should have “consistent and predictable privacy protections” that apply across the broad Internet ecosystem, a hope that has been all but dashed by Thursday’s proposal.

“What’s troubling about the rules is that they assume that ISPs have access to a plethora of information that they increasingly don’t have access to anymore,” Waltzman said. “They may know the website you visit, but because of technological advances such as encryption, they won’t necessarily know what you looked at and what you posted.”

Imposing vastly different rules for different parts of the Internet ecosystem is likely to not only to lead to a competitive advantage for those not bound by the rules, but also may not provide much of a benefit to consumers who are unlikely to take the time to exercise their new rights or understand the nuances between industries, attorneys predicted.

“If consumers get educated of what the rules will be for ISPs, they may be lulled into a false sense that those rules will apply to whatever they do on the Internet,” Waltzman said.

The rules now move to what is sure to be a contentious notice and rulemaking process, which is likely to determine just how much they will shake up the Internet ecosystem.

"What's interesting will be what's yet to come," Cattanach said. "A very major initiative has been undertaken, and there'll be some struggle over whether it's going to finish up the way it started or if some things are going to be rolled back. Because once an agency stakes out a territory like this, the devil will be in the details."

--Editing by Mark Lebetkin and Philip Shea.

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