

# Trump Administration and the Washington Regulatory Environment - What Can We Expect?

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Recap of the First 100 Days

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# RECAP OF THE FIRST 100 DAYS



## Recap of the First 100 Days

- [January 20](#): FCC Chairman Tom Wheeler resigns, Commissioner Ajit Pai becomes Chairman.
- [January 25](#): Following resignation announcement by former FTC Chairwoman Edith Ramirez, Commissioner Maureen Ohlhausen designated Acting Chairman by the President.
- [February 6](#): FTC settlement with smart-TV manufacturer Vizio announced.
- [February 17](#): Jessica Rich, Director of FTC's Bureau of Consumer Protection, resigns. Thomas Pahl becomes Acting Director.
- [April 3](#): FCC Broadband Privacy Rules repealed by Congress.
- *Frequently discussed, but not yet issued – President Trump's Executive Order on Cybersecurity*



# NEW LEADERSHIP AT THE FTC



## New Leadership at the FTC

Act. Chmn. Ohlhausen on Changing Enforcement Priorities:



“First, I will re-focus the agency on our bread-and-butter fraud enforcement mission. Stopping fraudulent schemes has long been the core of the FTC’s consumer protection mission.”

Act. Chmn. Ohlhausen, Speech to ABA 2017 Consumer Protection Conference -  
[https://www.ftc.gov/system/files/documents/public\\_statements/1069803/mko\\_aba\\_consumer\\_protection\\_conference.pdf](https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf)



## New Leadership at the FTC

Act. Chmn. Ohlhausen on Changing Enforcement Priorities:

“Second, I will make sure our enforcement actions address concrete consumer injury. . . The agency should focus on cases with objective, concrete harms such as monetary injury and unwarranted health and safety risks.”

“I’ve consistently raised concerns that a notice- and-choice approach to privacy may not adequately protect consumers from misuse by companies that assemble bits of non-sensitive consumer information into a potentially sensitive mosaic of a consumer. We ought to consider supplementing notice-and-choice with a harms- based approach to privacy.”

Act. Chmn. Ohlhausen, Speech to ABA 2017 Consumer Protection Conference -  
[https://www.ftc.gov/system/files/documents/public\\_statements/1069803/mko\\_aba\\_consumer\\_protection\\_conference.pdf](https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf)



## New Leadership at the FTC

Act. Chmn. Ohlhausen on Changing Enforcement Priorities:

“Similarly, our data security cases are on their strongest legal and policy footing when they address clear and concrete consumer injury. But the FTC has ventured onto less sure ground, and into areas where consumer injury is not as well understood. **Consequently, one of my major priorities over the next few months will be to deepen the FTC’s understanding of the economics of privacy.** This includes studying consumer preferences and the relationship between access to consumer information and innovation.”

Act. Chmn. Ohlhausen, Speech to ABA 2017 Consumer Protection Conference -  
[https://www.ftc.gov/system/files/documents/public\\_statements/1069803/mko\\_aba\\_consumer\\_protection\\_conference.pdf](https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf)





## New Leadership at the FTC

### Selections from Act. Chmn. Ohlhausen's Past Approaches to Privacy Enforcement

- [\*Dissent in Nomi Technologies\*](#) (2015): “The record now before the Commission confirms that the FTC should not have adopted this complaint and order because it undermines the Commission’s own goals of increased consumer choice and transparency of privacy practices and because the order imposes a penalty far out of proportion to the non-existent consumer harm.”
- [\*Concurrence in Vizio, Inc.\*](#) (2017): “But here, for the first time, the FTC has alleged in a complaint that individualized television viewing activity falls within the definition of sensitive information. . . . This case demonstrates the need for the FTC to examine more rigorously what constitutes “substantial injury” in the context of information about consumers.”
- “No” vote in [\*D-Link\*](#) (2017): No statement issued, but complaint alleged only a significant risk of, and not actual, consumer harm.



## New Leadership at the FTC

### CID Reform?

“In addition to re-focusing on fraud enforcement and concentrating on consumer injury, I have a third near-term reform: **I will work to reduce unnecessary regulatory burdens and provide additional transparency to businesses.** Consumers benefit greatly from free and honest markets, and free and honest markets depend on entrepreneurs and their businesses. We can and should protect consumers while reducing burdens on legitimate business.”

Act. Chmn. Ohlhausen, Speech to ABA 2017 Consumer Protection Conference -  
[https://www.ftc.gov/system/files/documents/public\\_statements/1069803/mko\\_aba\\_consumer\\_protection\\_conference.pdf](https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf)



## New Leadership at the FTC

### CID Reform?

- Act. Chm. Ohlhausen has [recently spoken](#) about reforming the CID process:
  - “We want to protect consumers and we want to maintain competition, but we also have to be sensitive to burdens on legitimate business.”
  - “[A]re our requests for information more burdensome than they need to be? Can we streamline some of these things?”
- [Press Release](#) on “Process Reform Initiatives”:
  - “New groups within the Bureau of Competition and the Bureau of Consumer Protection are working to streamline demands for information in investigations to eliminate unnecessary costs to companies and individuals who receive them.”



# REACTION TO THE FCC BROADBAND RULE



## Reaction to FCC Broadband Rule

Joint [Editorial](#) from Chairman Pai and Act. Chmn. Ohlhausen :

“Let’s set the record straight: First, despite hyperventilating headlines, Internet service providers have never planned to sell your individual browsing history to third parties. That’s simply not how online advertising works. And doing so would violate ISPs’ privacy promises. Second, Congress’s decision last week didn’t remove existing privacy protections; **it simply cleared the way for us to work together to reinstate a rational and effective system for protecting consumer privacy.**”

Pai, Ohlhausen, “No, Republicans didn’t just strip away your Internet Privacy Rights,” The Washington Post (April 4, 2017).



## Reaction to FCC Broadband Rule

Be careful what you wish for . . .

- In addition to the Congressional repeal of the Broadband Privacy Rule, the FCC has initiated a proceeding reversing net-neutrality rules that classify broadband providers as “common carriers.”
  - This move would effectively hand regulation of ISPs back over to the FTC.
- FTC’s action against Vizio: Complaint charged that Vizio collected “the sensitive television viewing activity of consumers or households”
- *If television viewing activity is “sensitive,” is Internet activity or browsing history also sensitive?*
  - This extension may not happen under the current FTC’s leadership, but the seeds have been sown by the Vizio action.
  - Such an extension would capture more than just broadband providers – it *could* extend to anyone collecting and using consumer internet activity without opt-in consent.



## Reaction to Repeal of the FCC Broadband Privacy Rule

### States Rush In

- Two states – Minnesota and Nevada – had laws on the books covering ISPs and the privacy of subscriber data. MN's law specifically includes "Internet or online sites visited by a consumer" in its definition of "personally identifiable information." See § 325M.01.
- Another 12 states (and Minnesota, again) have considered legislation, with bills in 8 states apparently still viable.
- These laws generally require the ISP to obtain the customer's consent before collecting or using information about the customer's use of the internet (Alaska, Minnesota, Massachusetts, New York, Rhode Island, South Carolina, Wisconsin) or direct a state regulatory authority to make regulations to similar effect (Vermont).



## Reaction to FCC Broadband Rule

### Template State Legislation?

Many of the bills being considered by the states contain language like the following – requiring consent and prohibiting the ISP from conditioning service on customer consent.

“Notwithstanding any other general or special law to the contrary, **no telecommunications or internet service provider** that has entered into a franchise agreement, right-of-way- agreement, or other contract with the commonwealth of Massachusetts or a political subdivision, or that uses facilities that are subject to such agreements, even if it is not a party to the agreement, or otherwise operates in the commonwealth of Massachusetts **may collect, use, disclose or otherwise disseminate, personal information from a customer resulting from the customer’s use of the telecommunications or internet service provider without express written approval from the customer.** No such telecommunication or internet service provider shall add an additional surcharge for customers that do not provide their express written approval, and said providers shall not refuse to provide services to a customer on the grounds that the customer has not approved collection, use, disclosure or other forms of dissemination of the customer’s personal information.” – MA Bill S.2053.





# STATEMENTS FROM THE STATES



## Statements from the states

### Stepping up enforcement?

- State AGs have already begun actions to resist President Trump's policy priorities across a number of fronts.
  - If FTC enforcement slackens (or appears to slacken) under current administration, State AGs will likely step up activity to fill that void.
- Mandatory breach reporting requirements in many states means State AGs may know of security incidents before the FTC does.
- State AGs coordinate activity through National Association of Attorneys General and other formal and informal meetings.



## Statements from the states

### What do State AGs want?

- Proactive outreach – consider introducing key personnel to AG staff.
  - Establish trust and a relationship prior to any incident. Build goodwill.
  - Identify points of contact at the company for the AG to increase chance of an informal resolution to a question or inquiry
- Demonstrate or discuss new products and service offerings to elicit feedback.
  - CT Attorney General George Jespen recently [praised](#) Google and Apple for demonstrating Google Glass and Apple Watch with his team and answering questions before releasing the products.



**QUESTIONS?**