

Broadband Privacy Plan Still Flawed, Carriers Tell FCC

By Jenna Ebersole

Law360, Washington (October 17, 2016, 5:42 PM EDT) -- Three of the nation's top mobile carriers have told the Federal Communications Commission that they have concerns about the agency's revised privacy plan for broadband providers unveiled earlier this month, all urging the commission to follow the example of other regulators.

AT&T, Verizon and T-Mobile told the FCC in separate meetings last week that it should make changes to the latest plan in order to align with the Federal Trade Commission's model, according to ex parte filings posted publicly Friday and Monday. Chairman Tom Wheeler has touted the plan, slated for an Oct. 27 vote, as being more similar to the FTC's approach by looking at the sensitivity of data to be used or shared when determining the level of consumer consent.

But T-Mobile and AT&T said the FCC's plan risks creating inconsistency across the internet ecosystem.

"An overly prescriptive privacy regime, including an unnecessarily broad scope of sensitive data subject to opt-in requirements, may prevent consumer-friendly innovation without offering any significant corresponding privacy benefit to consumers," T-Mobile told FCC staff and aides to Wheeler, Commissioner Jessica Rosenworcel and Commissioner Ajit Pai.

The FCC has appropriately eased its plan for data security and breach notification requirements, T-Mobile also said. But other changes to make the plan match the FTC's approach are needed.

The agency should only label health data, financial data, children's information, precise geolocation data and Social Security numbers as sensitive, but should exclude web-browsing and app-usage information unless it falls under those other categories, the carrier said. That would match the FTC's comments in the proceeding, the filing said.

"The inclusion of all web-browsing and app-usage data will have a significant impact on both interest-based advertising and first-party marketing programs, all of which provide great value to consumers in the form of discounts, convenient features and other new and innovative services, and all of which will continue to be permissible for edge providers under the FTC's opt-out regime," T-Mobile said.

Edge providers like Facebook and Google offer online services or hardware for accessing the internet, but are regulated by the FTC instead of the FCC.

Notice requirements, including timing, should be flexible, T-Mobile said, and the FCC should allow a "reasonable implementation period."

In a brief filing on a phone call with the FCC staff, AT&T pushed for a framework matching the FTC's, focusing on the "potentially harmful uses of consumer data."

"Customers do not expect different rules to apply to the various entities within the internet ecosystem, specifically with regard to the treatment of web-browsing history and first-party marketing," AT&T said, also urging the FCC to consider the complexity of the plan when setting an effective date.

According to its filing, Verizon told an aide to Commissioner Michael O'Rielly last week that the sensitivity-based approach has benefits and the FCC should follow the FTC's approach on data stripped of identifying information. Providers should be allowed to market services directly to customers without obtaining opt-in or opt-out consent, Verizon also said.

"If consumers do not want to receive such marketing, they may opt out of marketing using other mechanisms, such as companies' do-not-call lists," Verizon said.

The FCC should also let providers share information with affiliates that honor consumer choices, and the agency shouldn't address the issue of arbitration clauses in consumer contracts, Verizon said.

The company added that voice and broadband telecom service rules should be harmonized as well, business customers should be allowed to "bind themselves" to differing regimes, and the FCC should install at least an 18-month implementation window.

The proposed rules are the culmination of the FCC's efforts to apply the Communications Act's privacy requirements to broadband service providers after reclassifying them as common carriers, which are largely exempt from FTC authority.