

[Time Warner Takeover Pushes Need For Uniform Privacy Regs](#)

By Allison Grande

Law360, New York (October 26, 2016, 2:56 PM EDT) -- AT&T roused privacy advocates in unveiling an \$85.4 billion cash-and-stock takeover of Time Warner over the weekend, a move that steps up pressure to replace the traditional sectorial approach to privacy regulation with more stringent and uniform rules to counter the increasingly blurry lines between the telecom and tech industries.

The deal announced late Saturday will combine New York City-based Time Warner Inc.'s library of content — which includes HBO, Warner Bros., TBS, TNT and CNN — with Dallas-based AT&T Inc.'s huge subscriber base, a tie-up that has not only raised serious antitrust concerns, but also attracted intense scrutiny over how consumer data will be used and protected.

Open internet advocacy group Public Knowledge has questioned whether these data privacy issues would harm consumers, and similar criticisms of the challenges the deal presents for consumers and subscribers have continued to pour in as the week has worn on.

"This proposed deal ... reflects the 'Big Data' and digitally data-driven imperatives that are reshaping the U.S. media system," Center for Digital Democracy Executive Director Jeffrey Chester said in the wake of the news. "Giant broadband ISP networks, such as AT&T's, and content providers [such] as Time Warner, want to join together to both deliver programming and continually gather a host of information about each and every consumer."

While tech-centric companies have long contemplated tie-ups where their large consumer databases are viewed as key assets that could be mishandled in a merger, the proposed AT&T takeover is somewhat unique in that it's a vertical merger that would bring together a common carrier that will soon be subject to broadband-specific privacy rules being finalized by the Federal Communications Commission with an edge provider that falls outside that regime.

"The convergence of the media and technology industries demonstrates the need for updated consumer privacy regulations and laws," said Bradley S. Shear, managing partner of Shear Law LLC.

John Verdi, the Future of Privacy Forum's vice president of policy, agreed that while the U.S. has long had a sectorial approach to privacy regulation that has "worked OK," that framework is beginning to "come under stress."

"These kinds of mergers highlight the need for common safeguards, common rules and

common understandings when it comes to these issues," Verdi told Law360.

Experts characterized the FCC's proposed broadband privacy rules as a good first step toward providing consumers with stronger privacy protections and addressing some potential data misuse concerns raised by the new megadeal.

The FCC first floated broadband-specific privacy rules in March, shortly after the commission issued its Open Internet Order that reclassified broadband providers as common carriers, which are exempt from the Federal Trade Commission's authority.

In the initial version of the rules, the FCC focused on the use of information rather than on how sensitive it is in floating a proposal that would require internet service providers to clearly disclose how customer data is being used, take reasonable steps to protect that information, and notify affected customers within 10 days of discovering a data breach.

But following a flood of feedback from the FTC and a multitude of stakeholders, the FCC earlier this month rolled out a new, less restrictive proposal that would require customers' opt-in consent for ISPs to use and share sensitive information such as geolocation, Social Security numbers, app usage and web browsing history. The rules, which the FCC characterized as more closely aligned with the FTC's privacy approach, also provide for customers to be able to opt out of allowing ISPs to use and share nonsensitive individually identifiable information, such as the customer's service tier.

"From what we can tell, some aspects of the FCC's revised rules have been moving toward a clear and interoperable standard," Verdi said this week, specifically pointing to the FCC's willingness to treat deidentified data in a way that is consistent with how the FTC views the issue.

Given that the merger is still in the works, the FCC's finalized plan — which the commissioners are slated to vote on Thursday — will most likely apply to whatever combined company ultimately comes out of the parties' deal, which could provide the regulator with a prime opportunity to flex its newly robust privacy muscles, attorneys noted.

"It will be interesting to see not only how AT&T develops its response to its obligations under the new privacy regulation, but also whether what it does passes FCC muster," Bernstein Shur Sawyer & Nelson PA shareholder Michael Bosse said. "What better way for the FCC to roll out these new requirements than by saying, 'We're going to show you right off the bat that we've got a standard here, and here's what we're asking or requiring AT&T to do as part of the purchase with Time Warner to meet this standard.'"

However, while the broadband privacy rule is likely to impact the combined entity, it's not the only privacy requirement with which the merged company will have to contend,

experts noted.

Although the revised FCC rule shares some similarities with the approach that the FTC has taken to policing privacy and data security issues over the past decade, there are still substantial differences, including that the FCC rules go well beyond what is required of edge providers — which offer online services or hardware for accessing the internet but are not swept up by the rules — and other providers that fall within the FTC's rather than the FCC's purview.

AT&T and other carriers have taken the FCC to task over what they view as an overly strict opt-in regime, saying in recent public comments that the revised plan risks creating inconsistency across the internet ecosystem and urging the regulator to further relax the rules.

The Future of Privacy Forum in a filing earlier this month also pushed the FCC to ensure that its rules matched other privacy paradigms, while privacy groups like the Center for Digital Democracy have pushed for stronger rules that avoid distinguishing between sensitive and nonsensitive data.

"It's no surprise that AT&T is bitterly opposed to the privacy safeguards up for a vote this coming Thursday at the FCC," Chester said. "They don't want any potential new rules that empower consumers to control what they hope will be a massive influx of data they plan to monetize."

While Chester stressed that AT&T's proposed takeover of Time Warner "underscores why the FCC should pass" the broadband privacy plan, he noted that "what the FCC has proposed is only a partial solution."

"The U.S. needs to enact legislation that creates strong uniform rules across the digital landscape, addressing ISPs, Google and other digital giants, data clouds and others," Chester told Law360. "Consumers deserve a level privacy playing field."

Verdi said that not only would an easily understandable, nationwide privacy standard benefit consumers, but it also may be helpful to businesses that straddle industries and are scrambling to comply with divergent privacy regimes.

"These types of mergers help highlight how some of the barriers between industries are being broken down and why a baseline privacy standard is needed," he said. "For consumers, it's important that they understand that similar rules apply in similar circumstances regardless of the official government characterization of a business as a carrier or edge provider or app developer or platform maker — especially since it's usually superchallenging for consumers to make these sectorial distinctions — and for businesses that want to implement privacy safeguards that they promise consumers, it's better for them to have more clarity when it comes to a compliance regime."

However, this task of simplifying the privacy regulation landscape may prove to be difficult since any meaningful effort at unity would need to come from Congress. While both the Obama administration and lawmakers have put forth comprehensive baseline consumer privacy legislative proposals, they have failed to gain traction and don't look to be moving forward anytime soon.

"The FTC and FCC have been reluctant to do anything that even sounds like they're stepping on each other's toes, so establishing a privacy framework would be great," Bosse said. "But it's hard to see how that harmonization would occur, and I'm skeptical that, despite the size of this merger, that this would act as a catalyst for that to happen."

In raising privacy concerns with AT&T's proposed buyout of Time Warner, privacy advocates have honed in on the treasure trove of personal data that the combined entity would have at its disposal and what the company could do with it.

"This is all about tracking and targeting us regardless of whether we use a mobile device, PC or TV," Chester said. "Through the growing capability of mobile phones to follow and geotarget us everywhere we go — the supermarket, while in a car, or even on the street — these new broadband ISP/mobile/TV giants are extending their powerful digital tentacles further into our lives."

Advocates are also focused on whether the promises that both companies have made to their customers before the merger about how they would handle and protect data will hold up after the deal closes, Verdi noted.

The issue of living up to privacy promises post-merger was recently resurrected with respect to Facebook Inc.'s acquisition of mobile messaging service WhatsApp two years ago.

Spurred by privacy groups, the FTC fired off a letter in 2014 warning WhatsApp and Facebook that it would not hesitate to take swift action if they reneged on the privacy promises they had made to users once the deal closed. Privacy groups recently dusted off this warning after WhatsApp announced in August that it planned to begin sharing more data, including phone numbers, with Facebook in an effort to improve ads and enhance users' experience with both products.

The FTC has said that it will review the change, and other international privacy regulators — including a German data protection authority which last month ordered Facebook to stop using and immediately destroy any data on German users that it had obtained from WhatsApp — have also vowed to look into the new data-sharing arrangement.

"Regulators have a key role to play in not only engaging in the merger review process, but also in having an ongoing oversight and enforcement role of the resulting merged entity to make sure everyone lives up to its promises," Verdi said.

Experts say it's not surprising that these issues have come up and continue to be raised with regularity in the wake of headline-grabbing deals.

"Privacy is a civil rights issue," Shear noted. "When we visit a physical store to buy goods, we can do so without having this information sold to hundreds of other companies. Why isn't this same philosophy when we visit digital stores and buy products online?"

But while these privacy concerns didn't scuttle previous major tech deals like the Facebook buy and are not expected to trip up acquisitions like AT&T's buyout of Time Warner or Verizon's proposed acquisition of Yahoo, which has itself been plagued by its own concerns over a massive data breach at Yahoo and reports that Yahoo assisted the U.S. government with its surveillance activities, experts noted that these issues are unlikely to evaporate anytime soon, given that these megadeals show no signs of slowing.

"As much as we all want to believe that we retain some fundamental privacy rights, either constitutionally or by statutes, it's also true that consumers want more content and to be able to view content on more devices, and those two desires clash with one another," Bosse said. "So, because of the desire for more content and connections, I would expect in the future there will be more megamergers."

--Editing by Katherine Rautenberg and Kelly Duncan.