

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing before the Senate Judiciary Subcommittee on Privacy, Technology and the Law
On “Examining the Proposed FCC Privacy Rules”
May 11, 2016

The FCC’s proposed rule on broadband privacy takes an important step to help consumers make informed decisions about the use of information about their activities online. Countless Americans now rely on online technology throughout our daily lives: for communicating with loved ones, shopping for our families, interacting with service providers like doctors and financial institutions, and browsing the Internet to learn about the world. While technology has brought great benefits to consumers, our private information is more dispersed – and less under our control – than ever. How we maintain consumer privacy while gaining the benefits of technology is one of the most pressing policy questions of our time.

As the “gatekeepers” through which users transmit information to and from the web, Internet Service Providers (ISPs) have comprehensive access to their customers’ online lives. They know the websites we visit; how long we spend on those sites; when and where we access the web; and even where we take our mobile phones. ISPs see their customers’ activity even if users switch devices or alternate between browsers. And consumers who dislike their ISP’s privacy protections have little choice but to accept them, because a lack of competition leaves users with few, if any, alternative providers.

The FCC has long protected the use of consumers’ personal information by telephone networks. The rules in place for those providers reflect consumers’ expectation of privacy in their personal communications, and prevent companies from abusing information that consumers have no choice but to share. The protections that exist for information shared with telephone networks are even more necessary when it comes to the comprehensive, data-rich information shared with ISPs. The FCC’s proposed rulemaking recognizes and appropriately responds to that reality.

The FCC’s notice of proposed rulemaking (NPRM) raises important questions, and I hope today’s hearing will help clarify some answers. One issue that I hope the FCC will carefully weigh is the mechanism through which users “opt in” to particular data sharing practices. An “opt-in” rule is meaningless if consumers are expressly or effectively required to opt in as a condition of using their ISP, or if the “opt-in” is misleadingly buried in pages of contractual fine print. Many consumers have extremely limited choices, if any, in selecting an ISP. The FCC’s final order must ensure that consumers “opt in” only if they have made a willing and informed choice to do so.

A second, related issue also involves contractual fine print. The FCC seeks comment on whether to prohibit ISPs from binding their customers to forced arbitration clauses, which prevent consumers from banding together with other customers or seeking justice in court if they are wronged by their provider. Studies have shown that forced arbitration has a direct chilling effect on consumers’ ability to enforce their rights and hold companies accountable. I commend the FCC for recognizing this fact, and urge the Commission to take strong steps against forced arbitration.

Some have criticized the FCC's proposed rulemaking for unfairly targeting ISPs when a vast amount of personal information is also collected by so-called "edge providers" – websites, search engines and applications that have access to personal information about what we read, send, and store online. That issue is beyond the scope of the FCC's rulemaking, but it remains an issue of pivotal importance. Consumers expect and deserve a reasonable degree of privacy and security in the information they share over the Internet. That is why I introduced the Consumer Privacy Protection Act, which requires companies that store sensitive personal or financial information to meet threshold consumer privacy and data security standards to help keep information they store about their customers safe. Enacting this legislation would be an important step to ensure that Americans' privacy is respected not just by ISPs, but by the countless online service providers with which we now share information in every facet of our daily lives. American consumers deserve no less.

There is another rulemaking pending before the FCC that is also poised to affect consumers' privacy interests: the FCC's proposal to increase competition in the market for set-top boxes, through which cable television customers access their cable content. I have long supported efforts to promote meaningful competition in the set-top box market, knowing that customers will benefit from increased choice in how they interact with their cable programming. However, the benefit of increased choice should not come at the expense of important privacy protections that currently apply to set-top boxes, which receive extensive information about customers' viewing habits. I am also tracking closely the impact the FCC's proposal would have on content creators, to ensure that their rights are fully protected as third-party platforms make their content available. As the FCC opens up the market for set-top boxes, consumers and programmers should have the same rights and protections that they have today.

It is fitting that the Federal Trade Commission (FTC) and FCC are appearing jointly for today's hearing. Both the FTC and the FCC have an essential role to play in protecting the privacy interests of Americans. One important question is how the two agencies interact and whether FCC regulation is unnecessary in light of the FTC's general enforcement power. For me, the answer to that question is clear. Although both agencies have much to contribute, in the specialized area of broadband privacy, case-by-case enforcement by the FTC cannot substitute for clear rules created through the expert rulemaking process at the FCC. The certainty that comes from FCC rulemaking on broadband privacy will help ensure that consumers are protected and that companies can invest in broadband technologies knowing the rules of the road. The FCC's rulemaking is a commonsense approach that ultimately protects consumers and enhances competition.

I thank the Subcommittee for holding this hearing on an important matter that will ultimately affect all American consumers. I look forward to the witnesses' testimony.

####