

1 EXAMINING THE PROPOSED FEDERAL COMMUNICATIONS

2 COMMISSION PRIVACY RULE

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4 WEDNESDAY, MAY 11, 2016

5 United States Senate,

6 Subcommittee on Privacy, Technology, and the Law,

7 Committee on the Judiciary,

8 Washington, D.C.

9 The Subcommittee met, pursuant to notice, at 2:32 p.m.,
10 in room SD-226, Dirksen Senate Office Building, Hon. Jeff
11 Flake, Chairman of the Subcommittee, presiding.

12 Present: Senators Flake, Hatch, Lee, Grassley, and
13 Franken.

14 OPENING STATEMENT OF HON. JEFF FLAKE, A U.S. SENATOR
15 FROM THE STATE OF ARIZONA

16 Chairman Flake. This hearing will come to order. We
17 are here today to discuss the Federal Communications
18 Commission's proposed privacy rules that are currently in
19 the notice and comment phase.

20 The FCC, under its most recent net neutrality order,
21 created a vacuum in privacy enforcement when it reclassified
22 broadband as a "common carrier" under Title II of the
23 Communications Act. Previously, the FTC had successfully
24 enforced privacy against broadband providers. Except for
25 the net neutrality order, the FTC would still be doing that.

1 Over the last 10 years, the FTC has brought a number of
2 enforcement actions against broadband providers; however,
3 none were as a result of privacy violations. Given that,
4 many wonder what justifies the new proposed rules, which are
5 a significant deviation from the FTC's approach and more
6 burdensome as well. In fact, there are widespread concerns
7 that these proposed rules are another step in the FCC's
8 attempt to become the policeman of the Internet.

9 These rules will also have a number of problematic
10 consequences. First and foremost, the proposed rules will
11 impose unnecessary and static regulations on a dynamic and
12 innovative Internet ecosystem. Would we have the same
13 Internet today if these prescriptive rules were imposed a
14 decade ago? I am concerned that we would not.
15 Additionally, it is likely that these regulations would only
16 confuse consumers and give them a false sense of security.
17 Finally, there are serious legal questions surrounding the
18 proposed rules. In particular, are they consistent with the
19 Fifth Amendment?

20 To discuss these issues, we have assembled what I
21 believe to be the perfect panel. We have the Chairpersons
22 and minority members of both the FCC and the FTC to provide
23 their perspective. I thank them for appearing here today.
24 I look forward to the testimony.

25 Senator Franken will give his opening statement, and

1 then I will swear in and introduce the witnesses.

2 OPENING STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR

3 FROM THE STATE OF MINNESOTA

4 Senator Franken. Thank you, Mr. Chairman, and I want
5 to thank you for holding today's hearing on the FCC's
6 proposed rules and the very important issue of consumers'
7 online privacy.

8 Chairman Wheeler, Chairwoman Ramirez, Commissioners Pai
9 and Ohlhausen, thank you for appearing before our
10 Subcommittee.

11 A little over a year ago, the FCC voted to preserve a
12 free and open Internet. It was a very exciting moment for
13 supporters of net neutrality, and that means it was a very
14 exciting moment for a whole lot of people.

15 Nearly 3 million consumers and business owners spoke
16 out and urged the FCC to adopt rules that would ensure the
17 Internet remain the platform of free expression, innovation,
18 and economic growth that it always has been. It was a very
19 exciting moment for me and remains one of the highlights of
20 my career in the United States Senate.

21 Many of my colleagues and I long fought for strong
22 rules, and we argued that these rules should be grounded in
23 the FCC's authority under Title II of the Communications Act
24 if they were to survive judicial scrutiny and withstand the
25 test of time.

1 Now, that very question is currently before the D.C.
2 Circuit, and we could see a decision from the court any day
3 now. But as we await that ruling, the FCC has a job to do.

4 Since the Open Internet Order went into effect, the FCC
5 has had a responsibility to implement privacy rules to
6 protect consumers, promote competition, and ensure that
7 broadband providers are given certainty with respect to
8 their obligations under Section 222 of the Communications
9 Act. So I commend the FCC for starting this necessary
10 process.

11 For my part, I believe Americans have a fundamental
12 right to privacy. They deserve both transparency and
13 accountability from companies that have the capacity to
14 trade on the details of their lives. And should they choose
15 to leave personal information in the hands of those
16 companies, they certainly deserve to know that their
17 information is being safeguarded to the greatest degree
18 possible.

19 Now, this transparency and accountability should come
20 from all the companies that have access to Americans'
21 sensitive information. This includes telecommunications
22 providers like Comcast and AT&T, but also edge providers
23 like Google, Facebook, and Amazon. I have repeatedly
24 pressed website operators and other online service providers
25 to ensure that their customers have more information about

1 the data being collected about them, about how the data are
2 being used and whether the data are being shared or sold to
3 third parties.

4 Here, however, the FCC has an obligation to
5 specifically address broadband providers' collection and use
6 of Americans' personal information, and we are talking about
7 a whole lot of personal information. ISPs have easy access
8 to Americans' unencrypted online communications and browsing
9 histories as well as Internet usage patterns which can
10 provide a lot of insight into people's daily lives and
11 habits. Practically speaking, this means that Comcast knows
12 exactly what ails you when you visit WebMD's Symptom Checker
13 or that you recently experienced a major life event when you
14 are browsing maternity clothes on Target.com. It also means
15 that Comcast can tell if your home Internet connection,
16 which may be silent during the day, suddenly starts seeing
17 increased use between the hours of 9:00 and 5:00. Combine
18 that information with the browsing history of employment
19 bulletins, and Comcast can infer that you have recently lost
20 your job.

21 Simply put, ISPs know the most intimate details of our
22 lives, and even worse, Americans have no choice but to hand
23 over this information or forgo access to broadband,
24 something we have repeatedly recognized as an essential
25 service in today's world.

1 proposed privacy rules for broadband Internet service
2 providers. Unlike many of my colleagues, I believe that the
3 FCC's 2015 Open Internet Order, which unilaterally
4 reclassified broadband providers as "common carriers" under
5 Title II of the Communications Act, was a serious overstep
6 of the agency's statutory authority.

7 Now, this major policy shift with far-reaching
8 implications well beyond the FCC's current jurisdiction
9 should have been made by Congress. For decades, the FTC has
10 been effective at enforcing and protecting consumers on the
11 Internet. Now, however, the FCC's misguided Open Internet
12 Order will strip the FTC of regulatory enforcement authority
13 over Internet providers.

14 Why is the FCC, which has less capacity and less
15 expertise in this area, not following the FTC's well-
16 established and effective privacy policy regime? Rather,
17 the FCC is proposing privacy rules that apply exclusively to
18 Internet service providers, creating a potentially confusing
19 and unfair set of rules for both consumers and businesses.

20 Now, I am concerned that these proposed rules, which do
21 not apply to edge providers, will allow competing entities
22 to collect the same consumer data while subjecting some but
23 not all to a completely different system of rules and
24 regulations.

25 Second, I am following closely the issues surrounding

1 the so-called set-top box rules proposed by the FCC.
2 Technological advancements have provided consumers with
3 almost limitless options to watch pay for content on an
4 array of smart TVs and other devices. Now, streaming
5 technologies have freed consumers from costly and cumbersome
6 set-top boxes. To date, the fast-growing streaming market
7 has forced cable and Internet service providers to be more
8 nimble and competitive, unleashing greater innovation and
9 consumer choice.

10 This Committee has exclusive jurisdiction over
11 intellectual property rights protections. As such, I
12 continue to be concerned about how the proposed set-top box
13 rules will impact video content. Unfortunately, many
14 believe that if it is on the Internet, it must be free. But
15 producing and distributing video content is not only costly,
16 it also requires a legal framework to license that content.

17 Approaches that ignore the need for licensing or
18 undercut existing licensing agreements will, in my view,
19 increase costs for consumers, reduce choices, and discourage
20 innovation. I strongly urge you to keep this in mind when
21 considering the set-top box issue.

22 Third, I would like to comment briefly on the Charter-
23 Time Warner merger which the FCC voted to approve last week
24 with conditions. Commissioner Pai, you dissented from the
25 Commission's decision on the ground that the conditions the

1 Commission imposed have nothing to do with the merits of
2 this transaction. Rather, you said the conditions are about
3 the Government micromanaging the Internet economy.

4 Now, this is not the first time you have raised
5 concerns that the Commission has improperly used merger
6 conditions to micromanage the Internet. Last summer, for
7 example, you dissented from the Commission's decision to
8 impose 17 pages of conditions on the AT&T-DirectTV merger,
9 saying the conditions had nothing to do with the transaction
10 at hand and characterizing them as "the forced tribute that
11 the company must offer to mollify the Capitol."

12 Commissioner Pai, I want you to know I share your
13 concerns. In fact, I have been troubled recently by a
14 number of Commission actions that, in my view, have sought
15 to extend the Commission's authority beyond statutory bounds
16 and to push administration priorities in a one-sided way.

17 Now, I am, unfortunately, unable to stay and ask you
18 questions today, but I will be submitting some for the
19 record, so I will look forward to the responses of all four
20 of you. And I just want to express my gratitude that all of
21 you are willing to be here today to help us understand these
22 issues better. I hope we can make some headway together,
23 and, of course, I am going to do everything in my power to
24 try and make sure that we live within the framework of the
25 laws.

1 Thanks, Mr. Chairman.

2 Chairman Flake. Thank you. Thank you, Senator Hatch.

3 It is the custom to swear witnesses in. If you will
4 stand? Do you affirm that the testimony you are about to
5 give before the Committee will be the truth, the whole
6 truth, and nothing but the truth, so help you God?

7 Mr. Wheeler. I do.

8 Mr. Pai. I do.

9 Ms. Ramirez. I do.

10 Ms. Ohlhausen. I do.

11 Chairman Flake. The record will show they all answered
12 in the affirmative. I will go ahead and introduce all of
13 you together and then turn to opening statements.

14 Chairman Tom Wheeler is the 31st Chairman of the FCC, a
15 position he has held since November 4, 2013. For over three
16 decades, Chairman Wheeler has been involved with
17 telecommunications networks and services as a policy expert,
18 an advocate, and a businessman. Prior to joining the FCC,
19 Chairman Wheeler was managing director of Core Capital
20 Partners, a venture capital firm investing in early-stage
21 Internet Protocol-based companies. He served as president
22 and CEO of Shiloh Group, LLC, a strategy development and
23 private investment company specializing in
24 telecommunications services and co-founded SmartBrief, the
25 Internet's largest electronic information service for

1 vertical markets. Chairman Wheeler is a graduate of the
2 Ohio State University and is a recipient of its Alumni
3 Medal.

4 Commissioner Ajit Pai has been a Commissioner at the
5 FCC since May 14, 2012. Between 2007 and 2011, Commissioner
6 Pai held several positions in the FCC's Office of General
7 Counsel, serving most prominently as Deputy General Counsel.
8 Prior to being sworn in as Commissioner, Pai worked in the
9 Washington, D.C., office of Jenner & Block, where he was a
10 partner in the Communications Practice. Commissioner Pai
11 has served in all three branches of the Federal Government:
12 clerking for the Honorable Martin Feldman of the U.S.
13 District Court for the Eastern District Court of Louisiana,
14 serving in a number of roles in the Department of Justice,
15 as well as working as Chief Counsel on the Senate Judiciary
16 Committee. Commissioner Pai received a B.A. from Harvard
17 University with honors and a J.D. from the University of
18 Chicago where he was editor of the University of Chicago Law
19 Review. Thanks for being here.

20 Chairman Edith Ramirez was sworn in as Commissioner for
21 the Federal Trade Commission on April 5, 2010, and was
22 designated to serve as FTC Chairwoman effective March 4,
23 2013. Prior to joining the Commission, Ramirez was a
24 litigation partner in the Los Angeles firm of Quinn Emanuel
25 Urquhart & Sullivan. Before that, Ramirez was an associate

1 at Gibson, Dunn & Crutcher in Los Angeles. She clerked for
2 the Honorable Alfred T. Goodwin in the United States Court
3 of Appeals for the Ninth Circuit. Ramirez graduated from
4 Harvard Law School cum laude where she served as editor of
5 the Harvard Law Review and holds a Bachelor's degree from
6 Harvard College. You will probably get along well with the
7 guy to my left here, my far left here. Just kidding. Just
8 joking.

9 [Laughter.]

10 Chairman Flake. Harvard jokes.

11 Senator Franken. I get it.

12 [Laughter.]

13 Chairman Flake. Commissioner Maureen Ohlhausen has
14 served as a Commissioner for the Federal Trade Commission
15 since April 4, 2012. Prior to joining the Commission, she
16 was a partner at Wilkinson Barker Knauer, where she focused
17 on FTC issues, including privacy, data protection, and
18 cybersecurity. She previously served on the Commission for
19 11 years, most recently as Director of the Office of Policy
20 Planning from 2004 to 2008, where she led the FTC's Internet
21 Access Task Force. From 1998 to 2001, she was an attorney
22 advisor for former FTC Commissioner Orson Swindle, advising
23 him on competition and consumer protection matters. Before
24 coming to the FTC, Commissioner Ohlhausen spent 5 years on
25 the U.S. Court of Appeals for the D.C. Circuit, serving as a

1 law clerk for Judge David B. Sentelle and as a staff
2 attorney. Commissioner Ohlhausen graduated with distinction
3 from George Mason University School of Law and graduated
4 with honors from the University of Virginia.

5 Thank you all for being here. We appreciate it. I
6 know it is an effort to get you all here. Chairman Wheeler,
7 if you will start the testimony, and if all of you will
8 summarize your testimony in about 5 minutes, we will include
9 the longer version for the record.

10 Chairman Wheeler.

1 STATEMENT OF THE HONORABLE THOMAS WHEELER,
2 CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION,
3 WASHINGTON, D.C.

4 Mr. Wheeler. Thank you very much, Mr. Chairman. It is
5 a privilege to be here and to be with our colleagues from
6 the Federal Trade Commission.

7 You know, the FTC in 2012 set forth some key privacy
8 concepts in their report, and the money sentence, if you
9 will, in that report is this: Broadband networks are "in a
10 position to develop highly detailed and comprehensive
11 profiles of their consumers, and to do so in a manner that
12 may be completely invisible."

13 But this is not the first time that society has had to
14 deal with this kind of a technological challenge to privacy.
15 Making a phone call also generates similar information about
16 the consumer. Long ago, however, society dealt with the
17 problem through an FCC rule prohibiting non-network
18 exploitation of information created by the consumer's use of
19 the phone network. This policy has been in effect for
20 decades. The issues are not new, nor is the FCC's
21 expertise.

22 Here is an example of how that works. When the
23 consumer picks up the phone and calls, for instance, Air
24 France, the phone company is prohibited by FCC rule from
25 selling that information to tour services or hoteliers in

1 France unless the consumer expressly grants permission. It
2 should be the same thing with the privacy of online
3 information. Going to the airlines' website should be no
4 different than going to their switchboard.

5 Now, of course, the airline may decide to do something
6 with the consumer's information themselves. But there has
7 long been a big difference between the information created
8 by the consumer's transaction with a third party, which is a
9 matter of choice, and the information the consumer has no
10 choice but to provide in order for the network to connect
11 them with that third party.

12 Thus, the proposal on which we are currently seeking
13 comment welcomes the innovation created by digital networks
14 while retaining the values and the rights that have
15 traditionally applied to network operations, and those
16 values are simple. The information the consumer generates
17 in order for the network to function is the property of the
18 consumer. Just because the consumer hires the network to
19 deliver them to a service does not mean that the network can
20 unilaterally take ownership of that information that the
21 consumer provides. And what a trove of information it is.

22 Here is what one ISP says they collect: "A combination
23 of information from wireless and WiFi locations, TV viewing,
24 calling and text records, website browsing and mobile
25 application usage, and"--as if that is not enough--"other

1 information we have about you and other customers."

2 Now, there are two things that jump out from that
3 extensive list. One, nothing on that list is the network's
4 information. It is the consumer's information that has been
5 provided to the network so the network can operate. And,
6 second, there is no choice. This is a "This is what we do,
7 take it or leave it" situation for the consumer. And the
8 FTC's privacy report specifically called out this issue of
9 take it or leave it for broadband Internet access, saying,
10 "Consumers' privacy interests ought not to be put at risk by
11 such one-sided transactions."

12 Now, we respect the network's desire for new revenue
13 from selling digital information created by the operation of
14 the network. But they should not be able to redefine the
15 responsibilities of a network simply because the networks
16 switch from analog to digital. Our proposal provides that
17 networks can use the consumer's information, but they must
18 first get permission from the party whose information it is--
19 the consumer. They cannot sell something that is not
20 theirs.

21 Nor should consumers be forced to waive their privacy
22 to get service. The networks need to seek permission of the
23 party whose information it is. And further adhering to
24 well-established principles, our proposal only applies to
25 network providers.

1 In the Air France phone call example, what the airline
2 may do with the consumer's information is a transaction
3 separate from the consumer's transaction with the phone
4 company to deliver the call. We do not regulate those with
5 whom the network terminates--in the vernacular of today, the
6 "edge providers." And this, by the way, includes network
7 affiliates acting as edge providers. And we have never
8 asserted jurisdiction over edge providers and do not assert
9 it now.

10 Finally, we are in the midst of building a record in
11 this proceeding, as you indicate, Mr. Chairman. In keeping
12 with good process, we put forth proposals to focus the
13 debate and the comments. But it is a proposal, not a
14 conclusion. And we have asked multiple questions about the
15 proposal, its assumptions and details. We will, of course,
16 build any final proposal on the record that is established
17 in that regard. We look forward to this hearing to further
18 enrich our consideration.

19 Thank you, sir.

20 [The prepared statement of Mr. Wheeler follows:]

1 Chairman Flake. Thank you, Chairman.

2 Commissioner Pai.

1 STATEMENT OF THE HONORABLE AJIT PAI, COMMISSIONER,
2 FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON,
3 D.C.

4 Mr. Pai. Chairman Flake, Ranking Member Franken,
5 members of the Subcommittee, thank you for holding this
6 hearing today. It is a privilege to appear before you
7 alongside our distinguished colleagues from the Federal
8 Trade Commission. And thank you as well for giving me the
9 opportunity to testify about the Federal Communications
10 Commission's proposal to selectively regulate Internet
11 privacy.

12 Every day, millions of Americans enjoy the freedom that
13 the Internet provides. One reason has been United States'
14 historic commitment to light-touch, technology-neutral
15 regulation when it comes to Internet privacy. Startups have
16 not had to hire an attorney to navigate complex Federal
17 rules. And entrepreneurs have been free to invent and
18 discover new ways to monetize their services without fear of
19 government standing in the way of profitability.

20 As the Nation's preeminent Federal agency on privacy
21 issues, the Federal Trade Commission deserves significant
22 credit. For two decades, it has applied a unified approach
23 to all online actors. The FTC has been quite active,
24 carrying out more than 150 privacy and data security
25 enforcement actions, including actions against ISPs and

1 against some of the biggest companies in the Internet
2 ecosystem. And it has been so successful that the U.S.
3 Government has touted the FTC's work to the European Union
4 as sufficiently robust to protect online consumers against
5 predatory privacy practices.

6 But, unfortunately, the FCC tore apart the FTC's
7 unified framework 13 months ago when it reclassified
8 broadband as a public utility. There is now a gaping hole
9 in our privacy protections--a hole that needs to be
10 refilled.

11 How best to do that? I cannot put it any better than
12 Chairman Wheeler did, testifying before Congress in November
13 plaintiff 2015: Because consumers deserve "a uniform
14 expectation of privacy," the FCC "will not be regulating the
15 edge providers differently" from ISPs.

16 But ignoring that commitment to Congress, the FCC
17 decided in March 2016 to target ISPs, and only ISPs, for
18 stringent regulation--regulation far more invasive and
19 prescriptive than the FTC's case-by-case approach. For
20 several reasons, this approach does not make sense. Or as
21 President Obama's first FTC Chairman and most recent FTC
22 General Counsel put it, the FCC's proposed rules would do
23 little to promote the cause of privacy.

24 First, it makes no sense to give some companies greater
25 leeway under the law than others when all may have access to

1 the very same personal data. Search engines log every query
2 you enter. Social networks track every person you have met.
3 Online video distributors know every show that you streamed.
4 And yet the FCC burdens one niche of the marketplace with
5 asymmetric regulation. This disparate approach does not
6 benefit consumers or the public interest. It simply favors
7 one set of corporate interests over another.

8 Second, the FCC's approach strangely singles out new
9 upstarts in the concentrated market for online advertising.
10 As President Clinton's Chief Counsel for Privacy and
11 President Obama's Special Assistant for Economic Policy have
12 recently explained, "The 10 leading ad-selling companies
13 earn over 70 percent of online advertising dollars, and none
14 of them has gained this position based on its role as an
15 ISP." And he continued: That is because "ISPs have neither
16 comprehensive nor unique access to information about users'
17 online activity. Or as former Democratic Representative
18 Rick Boucher wrote recently, "by the end of this year, 70
19 percent of Internet traffic will be encrypted and beyond the
20 surveillance of ISPs." Selectively burdening ISPs confers a
21 windfall to those who are already winning big in the world
22 of online advertising. As former FTC Chairman Leibowitz and
23 General Counsel Nuechterlein put it, "The Big Data
24 marketplace will carry on--except, ironically, the FTC will
25 have insulated its largest players from ISP competition."

1 Third, the FCC's proposal may signal the end for ad-
2 based discounts on online services. The agency put in its
3 crosshairs "'free' services in exchange for information" as
4 well as programs that offer consumers discounts on their
5 broadband service in exchange for consent to use web
6 browsing data to tailor a customer's ads. I do not see how
7 denying consumers such choices is in their interest.

8 Finally, everyone in the online ecosystem should
9 recognize that the FCC's decision to target ISPs is a
10 calculated political choice. In crafting its online privacy
11 regulations, the agency relied on Section 706 of the
12 Telecommunications Act. Under the majority's reading of
13 that section, the agency has the power to take practically
14 any action it believes necessary to break down barriers to
15 broadband deployment and adoption, including regulating edge
16 providers.

17 Now, to be clear, I do not support the majority's
18 reading, but regulating the privacy practices of ISPs and
19 only ISPs is like eating half a meal. At some point the FCC
20 will want to come back to the table.

21 Chairman Flake, Ranking Member Franken, members of the
22 Subcommittee, thank you once again for holding this hearing.
23 I look forward to answering your questions and working with
24 you and your staff in the time to come.

25 [The prepared statement of Mr. Pai follows:]

1 Chairman Flake. Thank you, Commissioner Pai.

2 Chairwoman Ramirez.

1 STATEMENT OF THE HONORABLE EDITH RAMIREZ,
2 CHAIRWOMAN, FEDERAL TRADE COMMISSION, WASHINGTON,
3 D.C.

4 Ms. Ramirez. Chairman Flake, Ranking Member Franken,
5 and members of the Subcommittee, I am pleased to appear
6 before you today with my colleague Commissioner Maureen
7 Ohlhausen and also alongside Chairman Wheeler and
8 Commissioner Pai.

9 Today we face new challenges in protecting consumer
10 privacy. With every tap of a smartphone, website search, or
11 online post, data is being collected about consumers. While
12 uses of data count for tremendous benefits to consumers, the
13 increasingly ubiquitous collection and use of data is
14 largely invisible and becoming ever more difficult for
15 consumers to control.

16 Studies show that consumers care about privacy and want
17 more control over their person information. In a recent
18 survey by the Pew Research Center, 91 percent of those
19 surveyed said that they feel they have lost control over how
20 their personal information is collected and used by
21 companies. I think it is vital that consumers have control
22 over the collection and use of their personal information
23 and that this information is protected appropriately.

24 Over the last several decades, the FTC has undertaken
25 numerous law enforcement, policy, and education initiatives

1 to address consumer privatization and ensure that consumer
2 information is adequately protected.

3 The Commission has used its primary authority under the
4 FTC Act to take enforcement action against companies that
5 have engaged in unfair or deceptive practices involving the
6 privacy and security of consumer information. The FTC also
7 enforces sector-specific statutes that protect health,
8 credit, financial, and children's information.

9 Our enforcement actions address a wide range of
10 practices, including deceptive claims about how companies
11 collect, share, and use personal information; the failure to
12 provide reasonable security for consumers' personal
13 information; and violations of Do Not Call and other
14 telemarketing rules. Our enforcement actions send an
15 important message to companies about the need to protect
16 consumers' privacy and safeguard their data in both the
17 physical and digital worlds.

18 The FTC has also pursued numerous policy initiatives to
19 enhance consumer privacy. For instance, the FTC has hosted
20 workshops to examine the privacy and security implications
21 of emerging technologies and business models, including
22 comprehensive tracking by companies across the Internet
23 ecosystem, Big Data, the Internet of Things, and cross-
24 device tracking. We have also issued a number of reports
25 recommending best practices that we encourage companies to

1 adopt.

2 Much of our policy work today builds on recommendations
3 from the Commission's 2012 Privacy Report, which sets forth
4 key privacy principles that we believe ought to apply across
5 diverse technologies and business models. In that report we
6 urge companies to be more transparent about their collection
7 and use of data, to use privacy by design and implement
8 privacy and security protections at the outset of product
9 development, and to provide consumers with simple and clear
10 ways to exercise choice over the collection and use of their
11 data. The FTC has applied these principles to a broad array
12 of emerging technologies and business practices, including
13 the Internet of Things, facial recognition, and data
14 brokers' practices.

15 Given the breadth of issues the FTC addresses, we
16 frequently cooperate with other Federal and State agencies.
17 We have an extensive history of cooperation with the Federal
18 Communications Commission, including in connection with the
19 enforcement of the Do Not Call rule and efforts to stop
20 unauthorized charges on mobile phones.

21 In 2014, for example, looking closely with the FCC and
22 State authorities, we entered into two important mobile
23 cramming settlements with AT&T and T-Mobile that resulted in
24 important injunctive relief and hundreds of millions of
25 dollars in consumer redress.

1 Last year, we formalized our collaboration with the FCC
2 by entering into a Memorandum of Understanding to facilitate
3 coordination, and earlier this week, both agencies announced
4 coordinated studies of security in the mobile ecosystem. In
5 our study, we seek to learn how mobile device manufacturers
6 and operating systems provide security updates to address
7 vulnerabilities.

8 The FCC in turn will examine common carriers' policies
9 regarding mobile device security updates. Our goal in
10 working together is to use our complementary expertise and
11 authority to protect consumers as effectively and
12 efficiently as possible, avoid duplication, and promote
13 consistency.

14 I commend the FCC for focusing on the important issue
15 of consumer privacy. The FTC is carefully considering the
16 FCC's proposed rules governing the privacy of consumer
17 information collected by broadband Internet access service
18 providers, and we do intend to file a comment.

19 In closing, I want to reiterate the FTC's commitment to
20 protecting the privacy and security of consumers' data. We
21 look forward to continuing to work with the FCC and with the
22 Subcommittee on this important issue.

23 Thank you.

24 [The prepared statement of Ms. Ramirez follows:]

1 Chairman Flake. Thank you, Chairwoman Ramirez.
2 Commissioner Ohlhausen.

1 STATEMENT OF THE HONORABLE MAUREEN OHLHAUSEN,
2 COMMISSIONER, FEDERAL TRADE COMMISSION,
3 WASHINGTON, D.C.

4 Ms. Ohlhausen. Chairman Flake, Ranking Member Franken,
5 members of the Subcommittee, thank you for this opportunity
6 to appear before you today with my FTC and FCC colleagues.

7 We are here because of a side effect of the FCC's Open
8 Internet Order, which reclassified broadband as a common
9 carrier service. The FTC Act has a common carrier
10 exception, and the FCC's order thus halted my agency's
11 decades-long bipartisan efforts to protect consumers of
12 Internet service.

13 Stepping into the gap that the order created, the FCC
14 now proposes to regulate broadband ISP privacy practices in
15 a manner different from and more restrictive than the
16 privacy framework the FTC has long applied to the entire
17 Internet ecosystem, which includes social networks, search
18 engines, ad networks, online retailers, mobile apps, mobile
19 handsets, and ISPs.

20 As our written testimony details, the FTC is the
21 primary U.S. privacy and data protection agency and probably
22 the most active enforcer of privacy laws in the world. We
23 have brought hundreds of privacy- and data security-related
24 cases in all segments of the Internet ecosystem, including
25 against ISPs and large it companies. In my brief time, I

1 want to highlight two qualities of the FTC's privacy
2 approach that make it particularly effective.

3 First, the FTC seeks to protect consumers' particular
4 privacy preferences. Research and our experience show that
5 consumers differ in how they weigh privacy concerns about
6 their sensitive and non-sensitive information and other
7 important values, such as variety, convenience, and cost.
8 Thus, it is vital to calibrate opt-in/opt-out requirements
9 to reflect general consumer preferences about particular
10 types of information. So, for example, requiring opt-in
11 consent for non-sensitive information when most consumers
12 would prefer a simple notice or opt-out choice adds cost and
13 inconvenience without benefits for the majority of
14 consumers.

15 To match consumers' privacy preferences, the FTC takes
16 a two-tiered approach. In some areas, consumer preferences
17 are nearly uniform. For example, consumers generally want
18 to be asked for permission to use their sensitive personally
19 identifiable information, such as medical information or
20 real-time location data and information about children.
21 Without consent, uses of such sensitive personal information
22 are likely to cause a substantial unavoidable consumer harm
23 that is not outweighed by benefits to competition or to
24 consumers and, thus, be unfair under Section 5 of the FTC
25 Act.

1 Therefore, the FTC's unfairness authority establishes a
2 privacy baseline for practices that most consumers agree
3 require consent. And, accordingly, we have brought cases
4 when companies fail to obtain consent for using consumers'
5 sensitive information.

6 For many other data practices, such as targeted
7 advertising based on less sensitive information, consumer
8 preferences are not uniform. In fact, they vary widely. In
9 these situations, companies can and do offer a variety of
10 choices to satisfy these varying preferences. Using our
11 deception authority, we bring a case when a company makes
12 and then breaks a privacy promise to a consumer that
13 materially affects that consumer's decisions. This approach
14 promotes an honest marketplace with a wide range of consumer
15 privacy practices.

16 The second quality of the FTC's privacy work that I
17 would like to highlight is our case-by-case enforcement.
18 Some criticize this approach because we have not established
19 prescriptive rules, but I believe the FTC's privacy
20 leadership is a result of, and not in spite of, our prudent
21 case-by-case privacy approach. Investigating and pursuing
22 hundreds of cases has given the FTC an unparalleled hands-on
23 understanding of privacy problems. Our cases test our
24 principles against real facts. Our approach allows us to
25 adapt to evolving technologies and changing business models.

1 In our cases, we have studied how consumers react to
2 specific privacy promises and practices. And in each of our
3 hundreds of investigations, we have evaluated the actual or
4 potential harm to consumers of a company's practices and the
5 benefits, if any. So our case-by-case approach, far from
6 being a weakness, is one of our great strengths.

7 To conclude, the FTC's privacy framework has served
8 consumers well for decades. Our case-by-case, technology-
9 neutral approach respects consumers' preferences, allowing
10 consumers to balance the use of their sensitive and non-
11 sensitive information against other benefits as they see
12 fit. Thus, I believe our approach provides an excellent
13 model for protecting privacy in the least restrictive or
14 burdensome way.

15 Thank you, and I look forward to your questions.

16 [The prepared statement of Ms. Ohlhausen follows:]

1 Chairman Flake. Thank you all for your testimony. I
2 will start with the questions.

3 Chairman Wheeler, a couple of questions about the scope
4 of FCC's regulatory authority, if you could answer yes or
5 no, if possible, on this. Does the FCC have the authority
6 to enact these proposed privacy rules under Section 706 of
7 the 1996 Act?

8 Mr. Wheeler. We are asserting these rules under Title
9 II. Section 706 is something we have asked questions about
10 in the proceeding itself, but this is a Title II proceeding.

11 Chairman Flake. Not asserting under 706 at all?

12 Mr. Wheeler. We are asking questions about it. 706
13 clearly has a bearing on this, but we are doing this under
14 Section 222 of Title II.

15 Chairman Flake. Does Section 706 of the 1996 Act
16 provide the FCC with the authority to impose these privacy
17 rules on edge providers?

18 Mr. Wheeler. We have said repeatedly that we do not
19 believe or intend to assert jurisdiction over edge
20 providers.

21 Chairman Flake. Commissioner Pai, based on your
22 understanding of the position as it relates to 706, do you
23 agree?

24 Mr. Pai. Senator, I do not. I think that while the
25 intention of the agency might be not to apply the

1 regulations at this time to edge providers, the virtual
2 cycle theory that the FCC relied upon both in February 2015
3 and in the current Notice of Proposed Rulemaking is
4 certainly elastic enough to encompass edge providers within
5 the scope of any privacy regulations.

6 Chairman Flake. Thank you.

7 Chairman Wheeler, Commissioner Pai in his testimony
8 stated that you testified before Congress that because
9 consumers deserve a "uniform expectation of privacy," the
10 FCC would not be regulating edge providers differently than
11 ISPs. Is this new rule, is this proposed rule consistent
12 with that statement?

13 Mr. Wheeler. So as Commissioner Pai reported, I said
14 that we will not be regulating edge providers. The
15 expression "different from the network" is an issue that we
16 are today--that what is sought to be done today is to change
17 the nature of the role of the network to be one that is
18 similar to an edge provider, and that is where we draw the
19 line; that American consumers have for decades expected,
20 because of an FCC rule, that the information that they give
21 to the network is their information, not the network's
22 information, and that ought to continue in this environment
23 as well. And, no, we do not intend to regulate the edge.
24 And I find myself in a fascinating position with my
25 colleague here that he is now the expansive interpreter of

1 the statute and I am the conservative interpreter of the
2 statute. We do not intend to regulate the edge.

3 Chairman Flake. Mr. Pai, do you have any thoughts on
4 that?

5 Mr. Pai. Certainly not the characterization, which I
6 do not share, but more seriously to the question, I think
7 the Chairman's exchange last November is very telling
8 because the question was: "Don't consumers have a uniform
9 expectation of privacy no matter what they are doing or no
10 matter who they are dealing with in the online ecosystem?"
11 The answer there--and I agreed with the Chairman at the
12 time--was yes, and that is why the FCC would not adopt a
13 different approach. But the FCC's approach in March of this
14 year was dramatically different. Singling out ISPs for
15 unique and intrusive privacy regulations I think is both
16 obviously a betrayal of that commitment but, more
17 fundamentally, it does not recognize what the White House
18 recognized in the 2012 Privacy Report when it said that it
19 was critical for privacy regulation to be technologically
20 neutral and to reflect a consistent set of consumer
21 expectations.

22 Chairman Flake. If I take my phone into my home, say I
23 have flown home to Arizona, which I do frequently, and I
24 turn it on airplane mode or turn the wireless off, and I get
25 home and forget to turn wireless back on, or an hour later I

1 turn the wireless on so I am covered by broadband part of
2 the time and an edge provider or cellular service the other,
3 am I regulated differently depending on when I turn my
4 wireless on or off? Commissioner Pai?

5 Mr. Pai. Senator, certainly the access to information
6 that both ISPs and edge providers would have would vary
7 dramatically. For example, if you took your smartphone home
8 and you logged on to your WiFi network, if you then took it
9 on the road and were connected to a cell tower on the way to
10 the Senate, if you are in the Senate, you are connected to
11 the Senate's WiFi network, and if you decided to go to a
12 coffee shop and log onto their WiFi network, you might have
13 the same device but be using multiple different ISPs across
14 multiple different platforms. The one entity that would
15 have consistent access to all of your information would be
16 your edge provider.

17 For example, if it were an Android smartphone--I cannot
18 see it from here--it would be Google in that case. And that
19 is part of the reason why I have argued and why President
20 Obama's counsel, Peter Swire, in his Privacy Report argued
21 that ISPs have a small and diminishing access to the
22 information that consumers have when they go online.

23 Mr. Wheeler. Let me answer your question specifically.
24 Chairman Flake. Okay.

25 Mr. Wheeler. Because you deserve an answer. One, when

1 you turn your phone on to be a phone, it is under the
2 telephone aspects of Section 222 of the Communications Act,
3 and you have privacy rights and expectations. The question
4 is: Why is it that the same device in your hand when you
5 then say, okay, I am going to go to the Internet, sorry, all
6 that information does not belong to you anymore, it belongs
7 to the network? That is the point that we are getting at
8 here.

9 So you are spot on, when you have a device, one
10 function you have privacy protection, the other function you
11 do not. And all we are saying is that there needs to be
12 equivalency between those two.

13 Chairman Flake. Thank you. I will follow up on this
14 in my questions later. I am out of time.

15 Senator Franken?

16 Senator Franken. Yes, I just want to clarify this,
17 because it seems like there may be a different
18 interpretation of your answer. My understanding is that the
19 question you answered in which the Commissioner Pai quoted
20 you was you were asked that in an ideal world would
21 consumers have a uniform expectation of privacy, to which
22 you said yes, but immediately said they do not have--you do
23 not have jurisdiction over edge providers, and that they are
24 different from ISPs.

25 Mr. Wheeler. Thank you, sir. That is correct. You

1 have put it in the full context.

2 Mr. Pai. Senator, I have the transcript. I would be
3 happy to enter it into the record if you would like. There
4 is no mention about a lack of jurisdiction in response to
5 Congressman Long's question.

6 Senator Franken. It is not up to me.

7 Mr. Wheeler. But we are stipulating here that we do
8 not have--that we are not exercising this jurisdiction.

9 Senator Franken. Okay. Well, so let me ask about
10 that, then. This is about the jurisdiction under Title II?

11 Mr. Wheeler. Correct.

12 Senator Franken. Okay. So that is the issue here.
13 Let me ask about sort of the distinction here. So is
14 basically the argument that you are making, Commissioner
15 Pai, and I am inferring Commissioner Ohlhausen, that you do
16 not want these privacy safeguards for ISPs or you want
17 lesser safeguards for ISPs or you want more for edge
18 providers? I am a little confused about what your goal is
19 here. I think that consumers have some basic privacy
20 rights, and which direction are you going here?

21 Ms. Ohlhausen. Senator, you point out some very
22 interesting points that I think raise--

23 Senator Franken. Thank you.

24 [Laughter.]

25 Senator Franken. I always like compliments from the

1 witnesses.

2 Ms. Ohlhausen. First of all, is there a consistent
3 approach across the Internet? Will a consumer who is
4 engaged in something of a seamless transaction who is not
5 seeing these different parts understand what the privacy
6 protections are for this part of their message or that part?
7 If they opt out of targeted advertising, will they still get
8 targeted advertising through their browser or through the
9 sites? Things like that. So there is a value to
10 consistency, having a consistent approach between the FTC
11 and the FCC, because the FCC now is overseeing ISPs.

12 Then the second question is: Is that line being drawn
13 in the right place? And based on the FTC's long approach in
14 this area, what we have determined is that opt-in consent is
15 appropriate and a good idea for sensitive information. But
16 then for non-sensitive information, when used for things
17 like targeted advertising, that an opt-out approach is more
18 consistent with consumers' expectations.

19 Senator Franken. I understood that from your
20 testimony.

21 Ms. Ohlhausen. Yes.

22 Senator Franken. My question is: Are you saying that
23 you want--the question here is because of the way the rule
24 is written now--and it is out for comment, obviously--the
25 ISPs, because they are common carriers under Title II, are

1 regulated the same way phones are? That is what was
2 Chairman Wheeler's testimony. And you are saying and
3 Commissioner Pai seems to be saying that you want this to be
4 consistent. And so my question is: Do you want the ISPs to
5 have less regulation in terms of privacy? Or do you want
6 the edge providers to have more?

7 Ms. Ohlhausen. What I would say is, based on the
8 research that we have done and the approaches that we have
9 taken in this area, that it would be a slightly different
10 standard based on the type of information, whether it is
11 sensitive information or not.

12 Senator Franken. I got it. Can I hear from
13 Commissioner Pai? And then I am sure we will continue.

14 Mr. Pai. Thanks for the question, Senator. My
15 position is pretty simple. I would associate myself with
16 Commissioner Ohlhausen in full. And I would also say that
17 my goal is to return to the light-touch regulatory framework
18 that the FTC applied across the entire it ecosystem. And I
19 would associate myself as well with the White House when it
20 said in 2012 that the key here, the twofold key, is to
21 provide, and I quote, "a level playing field for companies
22 and a consistent set of expectations for consumers." And I
23 would argue the Internet economy we have is due in part to
24 the fact that we relied heavily on--exclusively on the
25 privacy expertise the FTC had developed, which was tailored

1 to consumer preferences. That is a better way to go, I
2 think, than the preemptive and prescriptive and selective
3 approach that the FCC is proposing to do.

4 Senator Franken. So I did not quite get an answer to
5 my question, but I think that was closer, if I interpret it
6 right. But I am over my time, and we will come back for
7 another round, I am sure.

8 Thank you, Mr. Chairman.

9 Chairman Flake. Thank you.

10 Senator Lee?

11 Senator Lee. Thank you, Mr. Chairman. Thanks to all
12 of you for being here today.

13 Commissioner Ohlhausen, I would like to start with you.
14 The FCC's privacy proposal would, of course, leave the
15 regulation of edge providers like Google and Yahoo and
16 Facebook to your agency. But, of course, the FTC's approach
17 to privacy monitoring has been in place for years and was
18 applied to ISPs before the FCC declared that they were
19 common carriers.

20 Do you think the FTC's regime has worked to compel
21 providers to protect privacy interests? Do you think they
22 have done an adequate job of that?

23 Ms. Ohlhausen. I do think the FTC has been very
24 effective. We have had a long history of bipartisan
25 support. We have brought, you know, well over 100 cases in

1 this area. We have put some of the biggest players, you
2 know, under order to the agency, so I think we have been
3 effective in this space.

4 Senator Lee. Do you see any reason that ISPs in
5 particular need to be or should be held to a higher
6 regulatory standard as compared to other Internet companies
7 that participate in the consumer data market?

8 Ms. Ohlhausen. Well, going back to our 2012 report,
9 which others have mentioned, what we said in that report is,
10 to the extent that large platforms such as ISPs--but we also
11 included operating systems, browsers, and social media--seek
12 to comprehensively track consumers' online activities, that
13 might raise heightened privacy concerns, and we did have a
14 workshop on that issue. So I would say it is not unique to
15 ISPs.

16 Senator Lee. Okay. You see some distinction there,
17 but not necessarily one that should make a difference?

18 Ms. Ohlhausen. Right. In my view, it goes back to
19 what type of information do they have about consumers. Is
20 it sensitive information or is it non-sensitive information?
21 And then how are they using it?

22 Senator Lee. Right. Commissioner Wheeler, it has been
23 brought to my attention that a letter that was sent to you
24 recently regarding potentially thousands of comments that
25 have been filed with respect to your agency's privacy

1 proposal, that those have been submitted, and yet they
2 appear to be missing from the public document. Now, this
3 letter contends that more than 2,200 comments have been
4 submitted since April 26th through your online commenting
5 platform. And yet as of Tuesday evening, this docket showed
6 only 26 filings--26 filings as compared to 2,200 comments
7 submitted.

8 Now, I would like to submit that letter for the record.

9 Chairman Flake. Without objection.

10 Senator Lee. Thank you.

11 [The letter follows:]

12 / SUBCOMMITTEE INSERT

1 Senator Lee. So, Mr. Wheeler, can you explain why
2 these comments have not appeared on the public docket in a
3 timely manner?

4 Mr. Wheeler. Yes, sir. My understanding is that there
5 is some software glitch with the group that was downloading
6 these documents en masse and that there was something in the
7 software that they were using to download that did something
8 strange to our system, but that we are in the process of
9 remedying this so that, in fact, they will be all online.

10 Senator Lee. Okay. So it is just a glitch. It is a
11 glitch that you are working on.

12 Mr. Wheeler. Yes, sir.

13 Senator Lee. It is a glitch that you are willing to
14 commit to fixing to ensure that they get posted.

15 Mr. Wheeler. Yes, sir.

16 Senator Lee. Okay. And then, Commissioner Wheeler,
17 you have a parallel regulatory action pending as it relates
18 to set-top boxes. There, Google has submitted comments
19 saying that the FTC privacy regulations are adequate to
20 police the collection of personal information in set-top
21 boxes. Do you agree with that? And if not, why not?

22 Mr. Wheeler. Thank you, Senator. Obviously, these are
23 two separate proceedings, but what we want to make sure
24 happens is that the requirements in Section 631 and 338
25 which are applied to cable and satellite providers to

1 protect privacy also apply to anyone who is providing a
2 competitive set-top box and that we work together with our
3 colleagues at the FTC on an enforcement mechanism for that.
4 And to the extent that Google believes they should be exempt
5 from that, at least one Commissioner disagrees with that.

6 Senator Lee. Okay. And how do you see that playing
7 out? How do you see that being--

8 Mr. Wheeler. We are developing--we have the same kind
9 of notice and comment proceeding on that underway right now,
10 sir.

11 Senator Lee. Okay. Thank you very much.

12 Thank you, Mr. Chairman.

13 Chairman Flake. Chairwoman Ramirez, had these
14 regulations that the FCC has proposed been in effect during
15 the past couple of decades that the FTC has been regulating
16 privacy, would we see the innovation that we have seen in
17 the Internet if these more stringent, prescriptive rules had
18 been in place?

19 Ms. Ramirez. Chairman Flake, I am afraid that it is
20 difficult to answer that question. I know that we are in
21 the process of evaluating the proposed rule that the FCC is
22 considering. What I can tell you is the way that we have
23 sought to balance innovation and consumer protection, and
24 while there are still questions that we are looking at as to
25 whether ISPs ought to be treated differently in this

1 particular instance than other companies in the ecosystem,
2 the framework that we have applied is one that focuses on
3 the nature of the information that is being collected and
4 used and, in particular, the sensitivity of that information
5 and also looking at consumer expectations.

6 Chairman Flake. Commissioner Pai?

7 Mr. Wheeler. Senator, could I--oh. If you are working
8 that, I just want to--

9 Chairman Flake. Sure, you bet. After Commissioner
10 Pai.

11 Mr. Pai. Senator, we cannot say for sure, but I think
12 it is a fair statement to argue that the Internet economy
13 that we have that is the envy of the world is due in part to
14 the fact that the FTC applied a uniform framework, a very
15 flexible case-by-case approach that allowed entrepreneurs
16 across the ecosystem to experiment consistent with consumer
17 preferences. And I think that is part of the reason why, as
18 Chairwoman Ramirez pointed out in a very perceptive speech
19 last November, that there are things like cross-device
20 tracking that can supply some benefits to consumers: if you
21 are looking for shoes on your home computer and then you get
22 a discount on your smartphone, or if you are watching a show
23 on your TV, and then you transition to your mobile device.
24 Those are the kinds of things that I think have been very
25 healthy for the Internet economy, and there is no telling

1 how much poorer consumers would be if we had artificially
2 restricted the use of that kind of cross-device information.

3 Chairman Flake. Thank you.

4 Chairman Wheeler?

5 Mr. Wheeler. Thank you, Mr. Chairman. The Internet
6 began on a common carrier basis. The Internet began--the
7 first DARPA trials as well as the early Internet itself was
8 all on telephone networks using dial-up modems, and those
9 activities were subject to the FCC's privacy protection
10 rules at the very same time the Internet went like this
11 [indicating].

12 Chairman Flake. Commissioner Pai?

13 Mr. Pai. Senator, if I could just point out, the early
14 dawn of the commercial Internet was not exactly the time we
15 think of as the most robust in terms of entrepreneurship and
16 innovation. That explosion has come with the two decades of
17 experience with the FTC at the helm.

18 Secondly, it is important to remember that some of the
19 people who really pioneered Internet access, broadband
20 adoption, and the like were not regulated as common
21 carriers--AOL, for example. I know now it seems hard to
22 remember the days of the CD-ROMs being sent to our homes,
23 but that was the gateway to the Internet for millions of
24 people, and that was unregulated under Title II service.

25 Mr. Wheeler. On, but it was over. AOL was delivering

1 over the dial-up Internet. And if the question--I think I
2 understood the question to say would the kind of regulation
3 that we are proposing, if it had been proposed in the--
4 imposed in the early days of the Internet, would we have had
5 the growth? And I am saying to you that AOL and all of
6 these other services that, as Commissioner Pai has just
7 said, were the beginning of the Internet and the takeoff of
8 the Internet, all happened on a common carrier network that
9 had privacy expectations.

10 Chairman Flake. Well, my concern would be that I
11 certainly--I assume that AOL, the old service I used to
12 have, that we could very well see the growth, the slow
13 growth under this kind of regime. I am just wondering if we
14 would see the growth that we have seen in the past couple of
15 years and expect to see over the next several years with
16 more innovation possible.

17 Commissioner Ohlhausen, the FTC, as you mentioned, has
18 a long history of dealing with privacy issues. You went
19 through a lot of process to build these regulations to
20 determine how you would regulate--a series of workshops,
21 privacy experts were called in, advocates, industry
22 stakeholders--then issued a draft staff report, took
23 comments before adopting a final report. This was all in
24 the report in 2012.

25 The FCC, on the other hand, held one workshop a year

1 ago and then a year later issued this complex PRM with 500
2 questions, tentative conclusions, and proposed rules.

3 Has the FCC gone through the deliberative process in
4 your view that the FTC did in terms of determining how to
5 regulate?

6 Ms. Ohlhausen. Well, you have mentioned the process
7 that the FTC has undertaken, and it really has been a long-
8 time, iterative process. Actually, our first online privacy
9 workshop was held in 1996, so I think that our approach,
10 which has been incremental and technology neutral and, as
11 Chairwoman Ramirez said, looked at the type of information
12 and consumer expectations, has allowed us to develop our
13 approach in a way that gives us the benefit of flexibility
14 and the understanding, as consumer expectations and
15 technology has changed.

16 The FCC approach, obviously this is a follow-on to the
17 reclassification that was undertaken in the Open Internet
18 Order, so it has been a much more abbreviated process, in my
19 understanding.

20 Chairman Flake. All right. Senator Franken?

21 Senator Franken. Okay. So you brought it up again,
22 and I know that Commissioner Pai in his opening statement
23 talked about his own opposition to the Open Internet--the
24 reclassification. And Chairman Flake asked about, you know,
25 the innovation on the Internet and whether this will slow it

1 down or something.

2 It seems to me that the whole point of what
3 reclassification was was to preserve net neutrality, and
4 that is because every time the FCC had tried to preserve net
5 neutrality, the circuit court rejected them. And so that
6 this seemed to be something that--as I said in my opening
7 statement, the D.C. Circuit Court is going to be ruling on
8 this, you know, it could be--

9 [Laughter.] Senator Franken. It could be
10 now. Or now. Or now. Or maybe they do not do it on
11 Wednesdays.

12 Mr. Wheeler. Tuesdays and Fridays.

13 Senator Franken. Tuesday and Friday, okay. Well, not
14 now.

15 [Laughter.]

16 Senator Franken. Okay. Thank you for that. I should
17 have known that because I went to Harvard.

18 [Laughter.]

19 Senator Franken. Are you happy? Are you happy I did
20 not know it and I went to Harvard? Okay.

21 But the point is that--because we talked about 706, and
22 that is like pre-Open Internet, right? I mean this order.
23 So I just want to clarify what we are talking about here,
24 because it seems that now that this is reclassified as a
25 common carrier, this proposed rule--which is a proposed

1 rule. We are getting comments to the rule. The proposed
2 rules on lots of things have changed dramatically. This is
3 a proposed rule. But it seems to me that I do not think
4 that this endangers the growth of the innovation on the
5 Internet. What would have endangered innovation on the
6 Internet would have been to lose net neutrality. That is
7 what millions and millions of Americans wrote in to the FCC
8 about.

9 So if you are talking about what consumers want,
10 Commissioner Ohlhausen--which is the proper pronunciation--
11 then it just seems to me that we need to be talking about
12 what we are talking about here, which is we have--this is
13 reclassified as a common carrier like the phone company.
14 And that means the FCC has the authority to the privacy.

15 Now, I want to talk maybe about the FTC and the FCC
16 working together, because I believe they have worked
17 together in the past, and I believe the FTC, am I right,
18 Chairwoman Ramirez, you have worked with lots of different
19 agencies--FTC, and you have worked with the FDA, right?

20 Ms. Ramirez. Absolutely, Senator Franken. We have a
21 long history of working very well with a number of different
22 agencies, beginning with the fact that we share jurisdiction
23 over competition with the Antitrust Division of the
24 Department of Justice, we work together with the Consumer
25 Financial Protection Bureau, we have worked--I already

1 mentioned in my opening remarks that we also have an
2 extensive history of working together with the FCC in a
3 number of areas including telemarketing, mobile cramming.

4 And those are just a few examples of--

5 Senator Franken. So this is not new, because I am kind
6 of hearing suggestions that the FTC is the prime privacy
7 protection agency and that for this reason we must not take
8 away their authority to regulate broadband providers. And I
9 am not suggesting the FTC does not play a critical role, the
10 critical role in protecting consumer privacy. But I guess,
11 Chairman Wheeler, before my time is up, can you talk about
12 the FCC's history of protecting consumers' privacy and why
13 in your view the FCC is the appropriate agency to regulate
14 the privacy practices of broadband providers on top of, of
15 course, the obvious thing, which is now they are a common
16 carrier.

17 Mr. Wheeler. A couple of things, Senator.

18 Number one, as I said in my statement, we have been in
19 this business for decades, because the rule has existed on
20 networks for decades and decades.

21 Secondly, the FTC and the FCC as recently as 24 hours
22 ago worked together on a privacy issue that bifurcates
23 exactly the same way that we are discussing here, and that
24 is the issue of mobile security, because one of the problems
25 with mobile devices is that there have not been--there

1 appears to be--I do not want to judge this. We are
2 inquiring. There has been some difficulty in speedily
3 getting to mobile devices the kinds of patches necessary to
4 protect the privacy of consumers' information on those
5 devices.

6 We have jurisdiction over the networks that deliver to
7 the devices. The FTC has jurisdiction over the devices. So
8 we worked in tandem, and as recently as yesterday, we put
9 out a series of inquiries to those who we have
10 responsibility for. They put out a series of inquires to
11 those they have responsibility for. They asked the same
12 question. They were done on a coordinated basis with us
13 working together like this. And that is not an isolated
14 situation. And I think that that is the kind of reality
15 that we will see going forward, that we are responsible for
16 networks and they are responsible for edge providers.

17 Senator Franken. It sounds like a model way for
18 regulatory agencies to work together in tandem.

19 Chairman Flake. Just a couple more questions if it is
20 okay. Chairwoman Ramirez, in your view, has the FTC's
21 privacy protection regime over the years been sufficient to
22 effectively protect consumers' rights as it relates to ISPs?

23 Ms. Ramirez. Chairman, I think the Federal Trade
24 Commission has done a very effective job in addressing
25 consumer privacy and ensuring that consumer information is

1 appropriately safeguarded. And I have mentioned at length a
2 number of initiatives and enforcement work that we have done
3 in this area, as has Commissioner Ohlhausen.

4 At the same time, I do think that there are certain
5 areas where we could use additional authority. One example
6 is that the Commission has on a unanimous basis called for
7 Congress to enact data security legislation because we
8 believe that more needs to be done in that area and that we
9 could use additional tools to address the protection of
10 consumer information. So that is just one example. But I
11 do believe that we have been an effective agency when it
12 comes to privacy.

13 Chairman Flake. Okay. Commissioner Ohlhausen, do you
14 have anything to add there?

15 Ms. Ohlhausen. No. I agree completely with the
16 Chairwoman.

17 Chairman Flake. All right. Thank you.

18 Commissioner Pai, what kind of information do ISPs
19 actually see? And how does this continue to change? Does
20 it change?

21 Mr. Pai. That is a good question, Mr. Chairman. It
22 has changed over time. So, currently, for example, 70
23 percent, and going up, of all Internet traffic is encrypted.
24 So, for example, if you go on your laptop and you access
25 your Gmail account, you will see "https." Well, the "s"

1 part there is critical. That means that the ISP can only
2 see that you are accessing Google, accessing Gmail. If you
3 do a Google search, the ISP can only see if it is encrypted,
4 that you are accessing Google, and the domain of the site
5 you link on. They cannot see what search you put in. They
6 cannot see what site or what particular product you are
7 looking at and so forth. That is part of the reason why
8 Peter Swire, the President's former counsel and President
9 Clinton's former privacy counsel, has said that ISPs have a
10 very limited amount of information from consumers, and that
11 assumes, of course, we are talking about just one device.

12 Currently, the median number of Internet-connected
13 devices in the home is something like six. It is going to
14 go up to 11 by 2019. And so when we talk about multiple
15 devices across multiple networks in multiple locations, ISPs
16 have just a smidgen in comparison to some of the other
17 players in the online ecosystem, and that is part of the
18 reason why the online advertising market sees ISPs as a
19 relatively new and minor competitor compared with some of
20 the dominant players who have the lion's share of the
21 revenue.

22 Chairman Flake. Thank you.

23 Mr. Wheeler. It is quite a smidgen. If you go back to
24 what I said in my statement, let me just read what one
25 company says: "A combination of information from wireless

1 and WiFi"--we can tell where you are sitting in a room from
2 your WiFi connection--"WiFi locations, TV viewing, calling
3 and texting records, website browsing and mobile application
4 usage"--every mobile application you use, every website you
5 go to. And I respectfully disagree with Commissioner Pai on
6 the assertion that somehow encryption is going to solve
7 everything.

8 First of all, about 85 percent of the top 50 websites
9 that are not encrypted. But even if they were encrypted,
10 you go to the example that Senator Franken gave in his
11 opening statement, going to WebMD. And then you go to the
12 next level down in WebMD, which is information about this
13 cancer or that cancer. You may not be able to see what is
14 coming out about this cancer, but you know that you have
15 gone to WebMD/prostate cancer, or whatever, and then you
16 know that you have gone to all the other URLs--
17 www.prostatecancer.net, whatever the case may be--and you
18 are able from that to put together a collection of knowledge
19 about the individual which should not be sold by the
20 network. The network is just taking you to get that
21 information. They do not have the right to turn around and
22 say, "Hey, I have got information on who has got cancer."
23 That is wrong. They cannot do it today with a phone call.
24 They should not be able to do it on the Internet.

25 Mr. Pai. Senator, if I could just briefly respond.

1 Chairman Flake. Commissioner Pai.

2 Mr. Pai. I am pleased that the Chairman has not
3 disputed my assertion that there is upward of 70 percent of
4 all Internet traffic which is encrypted. Obviously, that
5 reflects the bulk of consumers' use of the Internet.

6 Secondly, it is important to remember that the multiple
7 contexts and multiple devices matter significantly. The
8 example I gave earlier about your smartphone, for example,
9 your ISP only has insight into your connection at home in
10 that example. Google has knowledge about all that
11 information across all of the different platforms.

12 Indeed, given the fact that Google encrypts the
13 majority of its traffic from Gmail to regular Google
14 searches, Google knows exactly what kind of cancer you are
15 looking at, what providers you might have looked at, how
16 worried you are based on your search queries. All your ISP
17 knows is that you accessed Google and the particular domain
18 name--not the entire URL, just the domain host--
19 Prostatecancer.net in this example; whereas, the edge
20 provider knows all of the various pages you looked at and
21 can tailor its advertising accordingly.

22 Significantly, as well, I am pleased the Chairman has
23 not disputed the fact that the edge providers are the ones
24 who are the dominant players in the relevant market here,
25 which is online advertising. That is a very significant

1 fact, and that is why former Chairman Leibowitz has said it
2 is odd to single out ISPs when they are the new competitors
3 in this space.

4 Mr. Wheeler. Here is the interesting thing: that when
5 I go to Google to find Prostatecancer.net, that is a
6 decision that I am making. It is my choice. I do not have
7 that kind of choice on the information that I give my
8 network. It is going to take that information regardless.
9 And the network has the right to look at every piece of
10 information.

11 I go to WebMD, and WebMD collected information on me.
12 I go to Weather.com, and Weather.com collects information on
13 me. I go to Facebook, and Facebook collects information on
14 me. But only one entity connects all of that information
15 that I am going to all those different sites and can turn
16 around and monetize it.

17 And like I say, we are in favor of them being able to
18 monetize it. They just need to be able to ask the
19 permission of the people whose information it is. The fact
20 that I hire the network to take me to Prostatecancer.net
21 does not give them the right to my information.

22 Chairman Flake. One last question, if you will indulge
23 me before I turn it back to you, Senator Franken. Various
24 stakeholders have requested that the FCC extend the comment
25 period here. Then on April 29th, the Chief of the FCC

1 Wireline Bureau denied these requests, in large part because
2 "granting an extension is not the norm." Given that it took
3 the FCC over a year to notice the proposed rules and the PRM
4 is close to 150 pages long and it asks more than 500
5 questions of the stakeholders, do you think that extending
6 the notice and comment period would be an appropriate and a
7 fair thing to do, Chairman Wheeler?

8 Mr. Wheeler. Oh, golly, you know, we have been
9 discussing this issue for half a dozen years. You know,
10 Commissioner Pai and his objection to the Open Internet
11 Order kept talking about let us talk about privacy, let us
12 talk about what the impact on privacy is. Everybody has
13 been talking about privacy. When the ISPs appealed our
14 decision and went to the court and asked for a stay, they
15 specifically said in their stay, "We need you to stay this
16 because we need there to be certainty on privacy." Well,
17 the court said, "No, you do not get the stay." We are now
18 providing certainty on privacy, like they have asked for.

19 So, I mean, I think this has been an ongoing process--
20 it is a filling-up record--and that there will be a
21 voluminous record on this.

22 Chairman Flake. Chairman Pai--or Commissioner Pai.

23 Mr. Pai. Thank you for the promotion.

24 Mr. Chairman, I think there are a couple different
25 responses. First here, as you pointed out in your question,

1 the FCC opened up this can of worms in February of 2015,
2 then took over a year to finally issue the NPRM. I do not
3 think it is too much to ask for a couple extra weeks to
4 allow the numerous stakeholders, some of which are trade
5 associations with hundreds of members who have to be
6 canvassed, to weigh in on these maximum questions. I think
7 Commissioner Rosenworcel, our colleague, got it exactly
8 right that there are some contradictions here that make
9 privacy complicated, and this rulemaking asks questions,
10 lots and lots of questions. It is extremely important for
11 the FCC to act, if indeed it is going to have a full and
12 impartial rulemaking, to act on the basis of a fully
13 developed record, and we cannot do that if we do not give
14 people enough time to comment.

15 The second point I would argue is, in addition, when
16 the Chairman is saying, well, the ISPs--everybody knew that
17 this was coming, well, yes, we knew that the door had been
18 opened, but we did not know exactly how the FCC was going to
19 walk through it. And I think a lot of people, ISPs in
20 particular, were probably misled, and they relied to their
21 detriment on the Chairman's commitment last November that we
22 will not be regulating ISPs any differently from edge
23 providers. Assuming they had gone ahead with that
24 assumption that it is going to be an FTC-like framework,
25 they would have been shocked when they saw the FCC's 500

1 questions proposing very prescriptive, very pervasive, and
2 very selective regulation.

3 Chairman Flake. Thank you.

4 Senator Franken?

5 Senator Franken. So that last comment begs my question
6 again that I asked either one round ago or two rounds ago, I
7 cannot remember, because I am--and this is to both of you
8 again, and anyone who wants to jump in. I am still not sure
9 if you want more privacy regulation on edge providers or
10 less on ISPs. Because that was kind of my question, and I
11 did not feel that I got an answer, so help me understand the
12 opt-out policy that you mentioned. If the opt-out option
13 that the FTC would apply to broadband providers would mean
14 consumers do not actually get access to the Internet, I
15 mean, is that fair? In other words, you know, either you
16 have got to opt out of--if you opt out, you do not get
17 Internet.

18 Mr. Wheeler. No, not quite.

19 Senator Franken. Not quite?

20 Mr. Wheeler. Not quite. This is your right to opt out
21 of the network using information that you contribute to it.

22 Senator Franken. Okay. I got you. Okay.

23 Mr. Wheeler. Can I try something on that, though,
24 Senator?

25 Senator Franken. Yes.

1 Mr. Wheeler. With your permission.

2 Senator Franken. Sorry about that.

3 Mr. Wheeler. You know, what we are dealing with here
4 is a reframing--an artful reframing of a historical
5 responsibility through a massive redefinition of what a
6 network does. The debate that is going on here is saying,
7 you know, throughout history a network has delivered to and
8 has not used the information of that delivery process. But
9 now, because suddenly we have gone to Internet protocol, the
10 Internet ought to be the same as the edge, that is a massive
11 redefinition of what a network does. A network delivers to
12 a third party. A network is not that third party.

13 Now, if a network wants to buy that third party, they
14 can operate that unit as a third party. But there has
15 always been this relationship between networks and their
16 consumers that we respect the information you put in because
17 it is your information and we are only getting it because we
18 have to have it to deliver to the endpoint.

19 So this whole thing about equity and, oh, my goodness,
20 somebody is going to be advantaged over another, it has
21 always been that way. When I made a phone call to call and
22 order something back in the days when you ordered from 800
23 numbers, and I then got on the mailing list of Hammacher
24 Schlemmer or whoever it was, that was between me and
25 Hammacher Schlemmer. My network delivered me there without

1 taking my information. That is the change that is trying to
2 be perpetrated at this point in time, and it is crucial that
3 we understand that this is a retreat from privacy. This is
4 a retreat from what Americans have always expected from
5 their networks. That is what we are trying to do.

6 Senator Franken. It would be a retreat.

7 Mr. Wheeler. Yes, sir, if we did not have this rule.

8 Senator Franken. What I am hearing from these two
9 Commissioners, because that is--you know, as Chairman, when
10 I was Chairman of this Committee, I looked a lot at things
11 like location privacy. And so I think edge providers, too,
12 should be regulated on privacy. And I think it is very,
13 very important, location privacy. And we had hearings here
14 on, you know, women who had their partners slip in tracking
15 of their partners, and it led to very tragic circumstances
16 where--and what I would like to see--what I do not
17 understand from you guys, whether you want to see--and it
18 sounds like you said yes, you would like less privacy
19 regulation from the edge providers and less for the ISPs.
20 Is that what I am hearing?

21 Mr. Pai. Senator, my position is very simple. I want
22 to return to the pre-2015 FTC framework, which applied to
23 everybody, a light-touch, case-by-case, flexible approach,
24 under both Democrat and Republican administrations.

25 Senator Franken. But when the ISPs were saying,

1 certain ISPs were saying, "We want to charge more to deliver
2 at a higher speed, that was a threat to what the Internet
3 had been from the very beginning. And that is why, after
4 the two court rulings from the circuit court, the FCC, after
5 trying to preserve net neutrality, went to what it seemed
6 like the courts were pointing to. And so I think you are
7 wrong. I just think you are wrong, because I want to
8 preserve net neutrality because that is how we got all this
9 innovation and growth.

10 Before YouTube, there was Google TV or Google Video,
11 and it was not good. So three guys over a pizza shop
12 created YouTube. And a few years later, Google bought
13 YouTube for a couple billion dollars. But no one would have
14 been able to sample YouTube if there was a slow lane and a
15 fast lane.

16 That is what all this innovation came from. We had net
17 neutrality from the very beginning of the Internet. We had
18 net neutrality from the very beginning of then. And you are
19 saying, no, we did not?

20 Mr. Pai. Senator, we had no net neutrality regulations
21 until 2015. YouTube was created in the absence of any net
22 neutrality regulations.

23 Senator Franken. There were not net neutrality
24 regulations, but there was net neutrality.

25 Mr. Pai. If by that you mean that ISPs respected the

1 principle of a free and open Internet, I think everybody
2 agrees that we should have one. And that is part of the
3 reason why, if you looked at the FCC's net neutrality order,
4 you would look in vain for examples of the comprehensive
5 market failure where ISPs were acting as gatekeepers
6 against--

7 Senator Franken. Because they were threatening to do
8 it, and--

9 Mr. Pai. But they never--I never heard of any threats,
10 and there is certainly no--you would think--

11 Senator Franken. You never heard of any threats?

12 Mr. Pai. Well, the FCC--

13 Senator Franken. You never heard of any--wait a
14 minute. Let me get the answer to this. You never heard any
15 ISP executive say they were considering doing fast lanes and
16 slow lanes?

17 Mr. Pai. No, Senator, your point was were they
18 threatening--

19 Senator Franken. Let me--why don't you answer my
20 question?

21 Mr. Pai. Sorry. Could you repeat the--I have never
22 personally heard any ISP executive--

23 Senator Franken. Personally. You never read of
24 anything like that?

25 Mr. Pai. There has been discussion about paid

1 prioritization and the like, and that is something that the
2 Chairman has himself said under Title II you cannot
3 prohibit. I mean, that is--and that is part of the reason
4 why we have seen all this innovation, is that in the absence
5 of net neutrality regulations--

6 Senator Franken. Wait a minute. Wait a minute. Wait
7 a minute. Wait a minute. The Chairman is saying that you
8 cannot prohibit paid prioritize under Title II?

9 Mr. Pai. In March of 2014, before the Senate Commerce
10 Committee--I can give you the transcript if you would like.

11 Senator Franken. Mr. Chairman?

12 Mr. Wheeler. Well, we did prohibit paid prioritize
13 under Title II.

14 Senator Franken. Okay. Well, there seems to be a
15 really basic difference of understanding here. But I find
16 it very, very, very hard to believe that you never heard
17 about any discussion--and I am not talking about an ISP
18 corporate officer talking directly to you. That is not what
19 I am saying. Try it one more time. Have you ever heard of
20 ISP corporate executives talking about paid prioritize?

21 Mr. Pai. Senator, I have heard about--in press
22 reports, I have read that there has been a concern about
23 ISPs acting in terms of fast lanes and slow lanes, of
24 course. That is part of what motivated the President to
25 make a pronouncement about Title II regulation at the FCC.

1 Senator Franken. Of course. You said "of course."
2 But 2 minutes ago you said you had never heard of such a
3 thing.

4 Mr. Pai. Your specific question, Senator, with
5 respect, was: Have you heard an ISP executive threaten--

6 Senator Franken. No, that was not my--

7 Mr. Pai. I am simply--

8 Senator Franken. Have you ever heard of an ISP
9 executive--so that is how you were parsing it? That is how
10 you were parsing it? You were answering that question so
11 literally. I do not know whether I said "of" or directly
12 had an ISP executive say to you, "You know, Commissioner
13 Pai, I am really thinking of doing this so we can really
14 stuff our pockets." That is not my question. That was not
15 my question. There was a reason that we went to an Open
16 Internet Order, and that is, to preserve net neutrality.
17 And that is why there are 4 million comments. And to
18 pretend that was not the case before this Committee seems to
19 me to be very disingenuous.

20 Mr. Chairman, would you like to ask some more
21 questions?

22 Chairman Flake. No. I think they have been through
23 enough. I appreciate the testimony. I appreciate what we
24 have heard today. This has been very helpful to us.

25 Senator Franken. Can I put a couple things into the

1 record, Mr. Chairman?

2 Chairman Flake. You bet.

3 Senator Franken. Sorry. I have a letter from a number
4 of consumer advocacy organizations in support of the FCC's
5 rulemaking. I would ask consent for them to be entered into
6 the record.

7 Chairman Flake. Without objection.

8 [The letter follows:]

9 / SUBCOMMITTEE INSERT

1 Senator Franken. There is also a statement for the
2 record from Senator Leahy.

3 Chairman Flake. Without objection.

4 Senator Franken. Thank you very much.

5 [The prepared statement of Senator Leahy follows:]

6 / SUBCOMMITTEE INSERT

1 Chairman Flake. I also want to put in the record a
2 couple letters regarding the proposed FCC rules from various
3 groups that represent a large cross-section of technology
4 companies, including two letters addressed to the FCC asking
5 that it follow the FTC approach to privacy.

6 Senator Franken. I object.

7 [Laughter.]

8 Senator Franken. Will the record note that
9 Commissioner Pai laughed at that?

10 [Laughter.]

11 Mr. Pai. I will say affirmatively yes for the record.

12 Senator Franken. See? See?

13 [The letters follow:]

14 / SUBCOMMITTEE INSERT

1 Chairman Flake. I never knew you had to get a record
2 of people applauding--laughing.

3 Senator Franken. Laugh. Laugh. There is a difference
4 between laughter and applauding.

5 [Laughter.]

6 Senator Franken. Believe me, I know.

7 Chairman Flake. Let the record show--also, Senator
8 Grassley has a statement as well.

9 [The prepared statement of Chairman Grassley follows:]

10 / SUBCOMMITTEE INSERT

1 Chairman Flake. And let the record show I have both
2 laughed and applauded at Senator Franken's jokes over the
3 years.

4 The hearing record will remain open for 1 week, and
5 with the thanks of the Committee, this hearing is adjourned.

6 [Whereupon, at 4:04 p.m., the Subcommittee was
7 adjourned.]

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