

Questions for the Record from Senator Orrin G. Hatch

Questions for Chairwoman Ramirez

- 1. Does the FTC believe that there is a need for a new and separate data security and breach notification regime enforced by the FCC?**

The FTC has long supported federal legislation that will address data security and breach notification that would apply to all companies, including telecommunications carriers. For many years, the FTC has protected consumers' data security under the FTC Act. But the FTC Act excepts common carrier activity from FTC enforcement, an exception that we have recommended Congress repeal. Doing so would allow the FTC to protect consumers against unfair and deceptive practices committed in the provision of common carrier service, which involves access to large amounts of consumer data and which competes with other services that are subject to the FTC's enforcement authority. However, because legislation has not been enacted in these areas, the FTC currently lacks jurisdiction over common carriers when they are engaged in common carrier activity, and cannot take action when such entities fail to maintain reasonable security during those activities. As a result, I believe that consumers would benefit from data security and data breach rules in this area. Common carriers collect a wide variety of personal information from consumers, including contact and billing information, and web browsing habits. They should reasonably secure this information so that it does not fall into the hands of identity thieves or other wrongdoers. And if a breach occurs, they should notify consumers so that consumers can take steps to mitigate harm.

- 2. Under the Memorandum of Understanding between the FTC and the FCC regarding consumer privacy and data security, how do you anticipate exercising the FTC's longstanding authority over a party in conjunction with the FCC's new enforcement authority under the proposed privacy rules against the same party?**

The FCC's proposed rules would apply in general to data collection and use by common carriers when they are providing broadband internet access. Under FCC regulations, broadband internet access is a common carrier activity. The FTC does not have jurisdiction over common carrier activities, and there accordingly will not be duplicative enforcement efforts in most instances. Even where the agencies share jurisdiction, however, the Memorandum of Understanding formalizes our ongoing collaboration on consumer protection matters. As stated in the MOU, the agencies are committed to "working together to protect consumers and the public interest, and, in so doing, avoid duplicative, redundant, or inconsistent oversight." This means that we share expertise, provide investigative assistance, develop joint initiatives, and convene regular meetings to discuss matters of common interest. It also means that we coordinate work to avoid duplication and undue burdens on companies potentially subject to the jurisdiction of both agencies.

One example of FTC-FCC coordination involves our parallel studies of mobile security, which we announced just last month. The FTC is seeking information from mobile

device manufacturers and operating systems about how they provide security updates to address vulnerabilities. At the same time, the FCC is conducting a separate, parallel inquiry into common carrier services' policies regarding mobile security updates. Over the course of the studies, the two agencies have been in close contact to avoid duplication and promote consistency.

Questions for the Record from Senator Flake

Questions for Chairwoman Ramirez

1. How long has the FTC been enforcing consumer privacy against ISPs?

The FTC has examined broadband privacy issues for many years, from both an enforcement and policy perspective. We initiated non-public investigations into privacy practices of ISPs. In addition, in our 2012 privacy report, we discussed ISP privacy practices and concerns with the practice of Deep Packet Inspection and similar technologies. Also in 2012, we hosted a workshop examining privacy issues associated with large platform providers, including ISPs. We continue to look at privacy practices of ISPs, to the extent they are not engaged in the provision of common carrier services.

2. During this time, has the FTC brought any privacy enforcement actions against ISPs?

Although we have brought a number of actions against ISPs, none has focused exclusively on privacy. However, in an action against an ISP, we alleged that the ISP caused substantial consumer injury when it distributed spam, child pornography, malware, and other harmful electronic content. *See FTC v. Pricewert LLC*, No. 09-CV-2407-RMW (N.D. Cal. 2009).

a. If so, please provide me with a list of these actions.

3. During this time has the FTC brought any enforcement actions against ISPs?

Yes.

a. If so, please provide me with a list of these actions.

FTC v. Tracfone Wireless, Inc., No. 15-cv-00392-EMC (N.D. Cal. 2015) (deceptive advertising of unlimited data plan)

FTC v. AT&T Mobility, No. C-14-4785-EMC (N.D. Cal. 2014) (deceptive advertising of unlimited data plan)

FTC v. Pricewert LLC, No. 09-CV-2407-RMW (N.D. Cal. 2009) (distributing malware, pornography, and other harmful electronic content)

Sprint Nextel Corp., Docket No. 062-3067 (FTC Aug. 8, 2007) (claims on website that BlackBerry plan included unlimited web usage for a flat monthly fee) (closing letter)

FTC v. Cyberspace.com, 2002 WL 32060289 (W.D. Wash. 2002), *aff'd*, 453 F.3d 1196 (9th Cir. 2006) (deceptive rebate checks sent to consumers who subscribed to internet service)

America Online, Inc. & CompuServe Interactive Servs., Inc., Docket No. C-4105 (FTC Jan. 28, 2004) (continuing to bill AOL Internet service subscribers after customers asked to cancel; delaying payment of \$400 rebates)

Juno Online Servs., Inc., Docket No. C-4016 (FTC June 25, 2001) (deceptive advertising of “free” and fee-based dial-up internet access services)

Gateway, Inc., Docket No. C-4015 (FTC May 15, 2001) (false advertising for Gateway.net Internet access service)

WebTV Networks, Inc., Docket No. C-3988 (FTC Dec. 8, 2000) (deceptive advertising of a TV set-top box that allows users to connect to the Internet through a TV)

America Online, Inc., 125 F.T.C. 403 (1998) (deceptive advertising of trial periods for online services)

Prodigy Services Corp., Inc., 125 F.T.C. 430 (1998) (deceptive advertising of trial periods for online services)

CompuServe, Inc., 125 F.T.C. 451 (1998) (deceptive advertising of trial periods for online services)

4. Do you believe that these privacy rules could have an impact on the negotiation of the US-EU Privacy Shield?

The Privacy Shield Framework is currently only available to companies whose activities fall within the jurisdiction of the FTC or the Department of Transportation. To the extent a company’s activities fall outside of the FTC’s or DOT’s jurisdiction, the company would not be eligible to participate in the Privacy Shield Framework. However, the legal privacy regime in the United States is robust, as evidenced by many laws applicable to privacy and data security, and the over 500 privacy enforcement actions the FTC has brought over the last few decades. The FCC’s privacy rules would add to this robust privacy regime, and the FTC staff has made recommendations to align these rules with the privacy framework followed by the FTC.