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Congressional Review Act Resolution Repealing FCC's Privacy Rules Signed into Law

On March 28, on highly partisan votes, the U.S. House of Representatives, following action by the U.S. Senate a week earlier, passed a joint resolution of congressional disapproval that wipes the FCC's new broadband privacy regulations out of the rulebook. The President signed the legislation on April 3, putting it into effect.

The mechanism used by Congress and the President is the Congressional Review Act. This law empowers Congress to review, by means of an expedited legislative process, new federal regulations issued by government agencies and, by passage of a joint resolution, to overrule a regulation. Once a rule is thus repealed, the CRA also prohibits the reissuing of the rule in substantially the same form or the issuing of a new rule that is substantially the same, "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule" (5 U.S. Code § 801(b)(2)). Congress has a window of time lasting 60 *legislative* days (i.e., days that the U.S. Congress is actually in session, rather than calendar days) to disapprove of any given rule; otherwise the rule will go into effect at the end of this period. The definition of new rules that are "substantially the same" has not been tested in court.

What were the objections to the FCC's new privacy rules?

ISPs objected to being subject to more stringent privacy rules than other participants in the Internet ecosystem such as edge providers. The FCC contended that ISPs had greater access to sensitive information than others. The FCC rule also had a more expansive definition of sensitive information than the Federal Trade Commission (FTC) uses for regulating privacy practices of non-ISPs. The privacy and data breach rules were particularly burdensome for small providers.

The FTC cannot regulate the privacy practices of ISPs since, under the Open Internet Order, broadband is a common carrier (Communications Act Title II) service, and the FTC is specifically prohibited from regulating common carriers.

How does this affect GVNW clients?

The FCC's privacy and data security regulations had not yet gone into effect for small providers. Now such providers will not have to be concerned with compliance with the regulations since they are effectively removed from the FCC rules.

However, the FCC's broadband privacy order also eliminated some compliance and recordkeeping obligations, and now those obligations are reinstated. The specific compliance recordkeeping and annual certification requirements in Section 64.2009 of the Commission's rules are now reinstated for voice providers. The 2017 filing deadline for the annual CPNI certification, which was March 1, obviously has passed. It is unknown as to whether the Commission will issue a Public Notice addressing filing a certification in 2017, or will just skip this year's filing and wait for the March 1, 2018 certification. The state privacy laws, including data security and data breach laws that were preempted if they were inconsistent with the FCC's privacy rules, are now reinstated.

Although the broadband privacy and data breach rules are no longer in effect, companies must still comply with the current CPNI rules, be cognizant of customers' concerns about privacy, and implement secure data handling procedures and processes.

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