Written Question Submitted by Hon. John Thune to Hon. Michael O'Rielly

Question 1. Following the reclassification of broadband Internet access service as a Title II public utility, Chairman Wheeler indicated that the FCC will propose new privacy regulations. The Federal Trade Commission (FTC) already has extensive experience in protecting consumer privacy, and consumers and business already have experience in applying the FTC's privacy rules and precedents; the Commission has virtually no such experience beyond the very narrow confines of rules implementing Sec. 222. Why would the Commission create a new, likely inconsistent set of rules rather than adopting the FTC's privacy protections? Given that the Commission's rules will only apply to BIAS providers, isn't there a significant likelihood that functionally identical activities on a smartphone will be governed by completely different rules based upon who is providing the service?

As an initial matter, I do not believe the Commission has authority to regulate broadband privacy practices under section 222 or any other provision. Since Congress has not assigned this role to the FCC, the agency should not presume to act, especially in an area where it has very little experience or expertise. Moreover, there is a significant risk that any rules adopted by the FCC will supplant or conflict with well-established FTC privacy precedents that are currently serving fairly well as a predictable road map for businesses and consumers alike. As I have said before, the Internet is much too important to our economy to be saddled with experimental regulations from any and all interested agencies.

Question 2. I understand that you are close to finalizing action on an order that would address the standalone broadband issue that many in Congress have written to you about over the past several years and also adopt some new limits and other measures related to universal service support for rate of return providers. Do you commit to work quickly and collaboratively with this committee and with affected stakeholders to the extent any adverse or unintended consequences arise out of the reforms?

Yes, I commit to do so. I have also made the same commitment to providers and their associations. While the reforms are intended to provide much needed stability and certainty to enable companies to invest in broadband and deliver service to consumers, we also want to continue to work collaboratively to ensure that any legitimate issues that arise are quickly and appropriately addressed.

Question 3. Ensuring that rural and urban consumers have access to reasonably comparable services at reasonably comparable rates is a fundamental statutory principle of universal service. Are you confident that the standalone broadband solution you are poised to adopt will do that – specifically, will it allow rural consumers to get standalone broadband at rates reasonably comparable to their urban counterparts? If not, what more do you think the FCC will need do to ensure such comparability?

Yes, our intent is to ensure that rates in rural America are reasonably comparable to those in urban areas, as required by the statute. Here again, if the reforms do not operate as envisioned, we would want to work with the providers and their associations to make any necessary adjustments.

Question 4. I have heard concerns that the methodology used in the 2014 order to determine the local rate floor for voice service has led to rates in some rural areas, including parts of South Dakota, that are not reasonably comparable to those services provided in urban areas. Given this concern, when do you plan to act on the petition for reconsideration filed by several rural associations regarding the rate floor methodology? Do any other Commissioners have thoughts regarding this matter?

I do not have any information on the timing of this particular petition. As I have said in other contexts, however, the Commission should act as promptly as possible on outstanding petitions. Too many times, petitions remain pending for multiple years and parties receive no indication as to when they might receive an answer, positive or negative.

Question 5. Last July, the FCC released an omnibus declaratory ruling on the Telephone Consumer Protection Act (TCPA). TCPA litigation has increased dramatically in the last decade. What considerations did the Commission give to the impact its ruling would have on businesses, both large and small, that need to reach their customers for legitimate business purposes?

Unfortunately, the FCC gave very little consideration to legitimate companies acting in good faith to reach customers who expressed interest in being contacted. As I said at the time, the order painted nearly all businesses as bad actors and abused the statute in multiple ways, making it nearly impossible for companies to use modern technology to reach consumers without incurring substantial legal risk.

In my statement on the ruling, I provided many examples of the wide range of businesses and communications that would be negatively impacted by the order. In some cases, companies are left to choose between adhering to the ruling and compliance with regulations from other federal and state agencies that require businesses to call consumers, sometimes multiple times. The FCC ignored all of these examples and arguments in reaching its decision and, therefore, it is not surprising that a number of companies have challenged the decision in court.

Question 6. Many small businesses seek to improve their efficiency and customer relationships by providing information to their customers through the use of modern dialing technologies. The FCC's recent interpretation of the term "autodialer" in the TCPA declaratory ruling, however, could sweep in any number of modern dialing technologies. Other than using a rotary phone, what other technologies can small businesses feel comfortable using without exposing themselves to TCPA litigation risk?

There is no good answer for businesses. The FCC's appallingly incorrect reading of the statutory definition of an automatic telephone dialing system (ATDS or autodialer) sweeps in any equipment that could be used or modified to function as an autodialer at some point in the future. According to the FCC, it does not matter how the equipment was configured or used at the time a call was actually made. As a result, companies cannot even rely on manual dialing as a last resort to reach consumers because even the equipment used to manually dial the calls could potentially be changed to function as an autodialer in the future.

Question 7. By establishing liability after a mere one-call exception, the Commission's ruling creates a perverse incentive for incorrectly-called parties to allow or even encourage incorrect calls to continue, rather than notify the calling party of the error. These continuing incorrect calls thus become potential violations and the basis for monetary penalties sought through litigation. What will you do to repair this perverse incentive?

I highlighted this concern when the FCC adopted the exception. The ruling sets a trap for legitimate businesses and places absolutely no responsibility on the consumer to notify a company that they reached the wrong person. This was already happening before the ruling, as I noted in my statement on the ruling, and the FCC's decision will only make a bad situation worse.

The FCC is currently defending this decision in court, so it is unlikely that the FCC will change the exception before the court rules on it.

Question 8. Has the Commission considered providing a safe harbor for a calling party that reasonably relies on available customer phone number records to verify the accuracy of a customer's phone number?

The FCC considered and rejected reasonable proposals by outside parties to establish a safe harbor for legitimate companies that follow a long list of best practices to avoid stray calls to the wrong people. I, too, argued that a safe harbor was warranted because there is no comprehensive way to confirm whether a number has been reassigned. These concerns were ignored.

Question 9. The pay TV set-top box NPRM proposes to expand the scope of the term "navigation device" to include "software or hardware performing the functions traditionally performed in hardware navigation devices." On what theory does the Commission base this interpretation and expansion of the statutory term's scope to include software? Does software that is not integral to the operation of a navigation device fall within the scope of Section 629?

I voted against the Commission's recent "Commercial Availability of Navigation Devices Notice of Proposed Rulemaking and Memorandum Opinion and Order" (commonly referred to as the set-top box item) because, in part, I strongly disagreed with the majority's interpretation of section 629 to apply to such software, including applications or apps. I hope that if the Commission attempts to conclude this item, this proposal never sees the light of day as it violates the specific wording of the law and the spirit of this provision.

Question 10. How does the NPRM propose or contemplate preventing third party devices or applications from adding unapproved or additional advertising alongside MVPD service content? How does the NPRM propose to protect and secure interactive MVPD programming and services when accessed through third party devices or applications? How does the NPRM propose to enforce such protection and security measures?

As you can see from the text of the item, the majority does not see any particular problem needing Commission attention regarding the possible replacement of such advertising. Instead,

the item states that market forces will address any issue but fails to explain how this would work in practice. Being one that generally supports market forces, I do not know how this would be applied in this instance. In terms of protection and security of content, this question may be better suited to those Commissioners that support the item as I disagreed with the logic and the specific proposals designed to rely on third party contracts as a mechanism to enforce and maintain important policies.

Written Question Submitted by Hon. Deb Fischer to Hon. Michael O'Rielly

Question 1. Commissioner O'Rielly, as the FCC moves forward with reforms of the Lifeline program, I continue to have concerns about the potential for waste, fraud, and abuse. In Nebraska, there is little to no waste, fraud, or abuse mainly due to the diligence of the state's Public Service Commission in overseeing the program. The PSC thoroughly vets all companies before designating them as Eligible Telecommunications Carriers, and they have leverage through this process to police the quality of the services provided. We also have a system of verifying the eligibility of consumers applying to the program. I understand that some of the changes that you are considering would eliminate the important role that states like Nebraska play in overseeing and policing the Lifeline program. How would the FCC be able to replicate the work that states do to prevent waste, fraud, and abuse in the Lifeline program?

A draft item just circulated on March 8, so I am limited by FCC rules in what I can say about the contents of the item. However, I have made clear on multiple occasions that I am concerned about waste, fraud, and abuse in the program. I will carefully consider the points you raise in reviewing whether any of the reforms would magnify this ongoing problem.

Question 2. Commissioner O'Rielly, in discussing the FCC's recent proposal on set-top boxes, nearly everyone has said, yourself included, that they would like to see the marketplace continue to move away from set-top boxes and towards more innovative methods of allowing customers to access video content. New technologies have increased competition in the video market, and companies like Netflix, Hulu, Roku, as well as a wide variety of video applications are providing new options to consumers. Further, many cable and satellite companies are moving away from set top boxes and towards application-based platforms. How do we continue to encourage innovation in the video marketplace while avoiding technology mandates and burdensome regulations?

Thankfully, the marketplace – driven by consumer demand – is heading in that direction without assistance or mandates by the Commisison, as many video distributors are already moving to an app-centric world and away from the hardware limitations of a set-top box environment. Consumers are able to experience wide choices of digital video content that will only increase over time, absent unnecessary interference from the Commission. While I leave it to Congress' purview, I will suggest that there may be great benefits from removing unnecessary burdens contained in Title VI of the Communications Act. Additionally, it is important that new video offerings, such as over-the-top video, not be vacuumed into the existing video regulatory regime.

Written Question Submitted by Hon. Ron Johnson to Hon. Michael O'Rielly

Question 1. Commissioner O'Rielly, am I correct that you were not offered an opportunity to cast a vote on the latest Wireless Competition Report? When did you learn of the Report's release? Do you believe the process used to adopt the Report is consistent with Congress' statutory direction, and if not, what are your thoughts regarding congressional action to repeal or modify this annual requirement?

You are correct that I was not provided an opportunity to vote on the Wireless Competition Report, despite requests from Commissioner Pai and me to have it formally circulated to and voted by the entire Commission. The timeline of notification and release is as follows:

Dec. 21, 2015, 6:12 pm:	Provided 48 hours notice that the report was to be released on delegated authority.
Dec. 22, 2015, 10:42 am:	My office requested that the report be circulated to and voted on by the Commission.
Dec. 23, 2015, 2:23 pm:	Informed that the Chairman would move forward with the release of the report on delegated authority.
Dec. 23, 2015, approx. 6:00pm:	Report released.

Generally, the data contained in this report is used by the Commission as a foundation for regulatory decisions and, therefore, should contain input from and be approved by the Commissioners. More specifically, releasing the report on delegated authority fails to comply with the statute, which states that the Commission, not the Bureau, must report annually about the state of the mobile industry. Further, the report must contain an analysis of "whether or not there is effective competition." Even though more than 90 percent of Americans have a choice of four or more wireless providers, the report does not conclude, as directed by Congress, whether this industry is competitive. I leave it to Congress to decide the best course of action to rectify this situation and whether the annual report remains useful. But it may be helpful for Congress to reiterate, at a minimum, that any such report must be released by the Commission, as opposed to on delegated authority, and must conclude whether or not the wireless industry is competitive.

Question 2. Commissioner O'Rielly, in your testimony, you provided an example of an FCC enforcement action against First National Bank. Specifically, you said, "Before First National was ever notified about the citation, the Commission had already tried the case through the press, harming the company's reputation. Interestingly, the citation was dismissed two month later without similar fanfare." What, if anything, can Congress do to help address this issue?

I have suggested that the Commission change its procedures so that citations are not publicized until after the target has had the opportunity to respond to the claimed violations, which occurs within 30 days of the issuance of the citation. I made clear that this change would not detract from the Enforcement Bureau's ability to pursue an investigation, or a fine if warranted. The company would still receive the citation and could face further enforcement action. Nor would it

detract from the Commission's ability to use a citation as a deterrent for other companies because the citation (unless rescinded after discussions with the target) would still become public.

I can report that the Commission has not changed its procedures to date. I would welcome any action by Congress to address this issue.

Written Question Submitted by Hon. Ted Cruz to Hon. Michael O'Rielly

Question 1. In the Open Internet Order, the Federal Communications Commission (FCC) revised the definition of "public switched network" to mean "the network that . . . use[s] the North American Numbering Plan, *or public IP addresses*, in connection with the provision of switched services" (See para. 391 (emphasis added)). Although the FCC disclaimed any intent to "assert" jurisdiction over the assignment or management of IP addresses by the Internet Numbers Registry System (see *id.* at note 1116), the FCC's decision to equate telephone numbers with IP addresses nonetheless gives the FCC statutory jurisdiction over IP addresses as a matter of law. Over 20 years ago the FCC concluded that Section 201 of the Communications Act gave it plenary jurisdiction over telephone numbers, because "telephone numbers are an indispensable part" of the duties that section 201 imposes on common carriers (See Administration of the North American Numbering Plan, Notice of Proposed Rulemaking, FCC 94-79, ¶ 8 (1994)). IP addresses are likewise an indispensable part of the duties the FCC imposed on ISPs under section 201, including the duty to connect to "all or substantially all Internet endpoints".

How can the FCC uphold the public interest requirements in section 201 of the Act if it refuses to assert its statutory authority over an indispensable part of the public switched network?

If the FCC believes regulation of IP numbers used to connect end points on the public switched telephone network is unnecessary, why hasn't it forborne from the regulation of telephone numbers?

In the Open Internet Order, the majority used an ends-justifies-the-means approach to change a long-standing definition so that mobile broadband could miraculously be redefined as a Title II service. Inconsistencies, such as those raised above, are one of the many unintended consequences of regulatory overreach and using outdated rules on modern technology. Hopefully, this change of definition, which was implemented without opportunity for public comment and is inconsistent with prior Commission precedent, will be struck down by the D.C. Circuit. As for why the Commission has not taken action to forbear from the regulation of telephone numbers, I leave it to the Chairman to respond.

Written Question Submitted by Hon. Dean Heller to Hon. Michael O'Rielly

Question 1. For years, I have believed that the way in which rules are processed at the Commission lacks transparency and is detrimental to the American public. My FCC Process Reform Act would address these transparency and accountability issues for the sake of consumers and the industries supporting innovation and our economy.

For example, the public has no idea the specific language of the rules the Commission is voting on until after they are passed. We saw that with the net neutrality rules that were pushed through this time last year, and we saw it a few weeks ago when the FCC voted on the proposal related to set-top boxes.

In fact, Chairman Wheeler said during that meeting on set-top boxes: "There have been lots of wild assertions about this proposal before anybody saw it." The problem is that the public doesn't know what to expect from the rule—there is no certainty for those on the outside.

Do you believe the public has a right to see the specific language of a rule before it is voted on by the Commission?

This simple but powerful fix would benefit the American people, the functionality of the Commission and the transparency of our government. I appreciate all of your hard work to push this effort forward and am hopeful that it will become reality, either through changes made by the Commission itself or Congressional action.

Question 2. As someone committed to protecting Americans' and Nevadans' privacy, especially related to personally identifiable information (PII), I have a question regarding the recent set-top box Notice of Proposed Rulemaking.

Currently, pay-TV companies must follow strong privacy protections to ensure consumers' personal information is not collected, utilized, or shared for non-service related purposes. How does this NPRM contemplate applying and enforcing these same privacy to any new suppliers entering the set-top box market? Does the FCC have the legal authority to enforce Title 6 privacy standards on third parties?

You raise an important issue regarding the Commission's recent set top box item, from which I dissented. The item proposes to rely on the imposition of mandates on video distrubutors to include privacy requirements in any contract with a third party when sharing the so-called data streams. I do not see how Title VI can be read to provide the Commission with authority to govern the privacy of third party providers' use of this valuable information via the private contractual requirements of video distributors.