

# FCC Privacy Rules, Part 2: Opt-ins and Opt-outs – The New Regime

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# Introduction & Recap

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- FCC adopted its privacy rules on 10/27
  - New privacy and data security obligations for carriers
  - Different in key respects from the Federal Trade Commission's (FTC) regime
  - 3-2 party-line vote: Republicans said they would have supported rules if they mirrored the FTC Framework
- Fate of the rules in the next Administration unclear

# Agenda

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1. Timeline of implementation
2. Legal challenges to the rules
3. Notice and Choice, explained
4. Prohibitions on conditional offers of service and enhanced notice for financial incentive offers
5. DWT recommendations

# Deadlines

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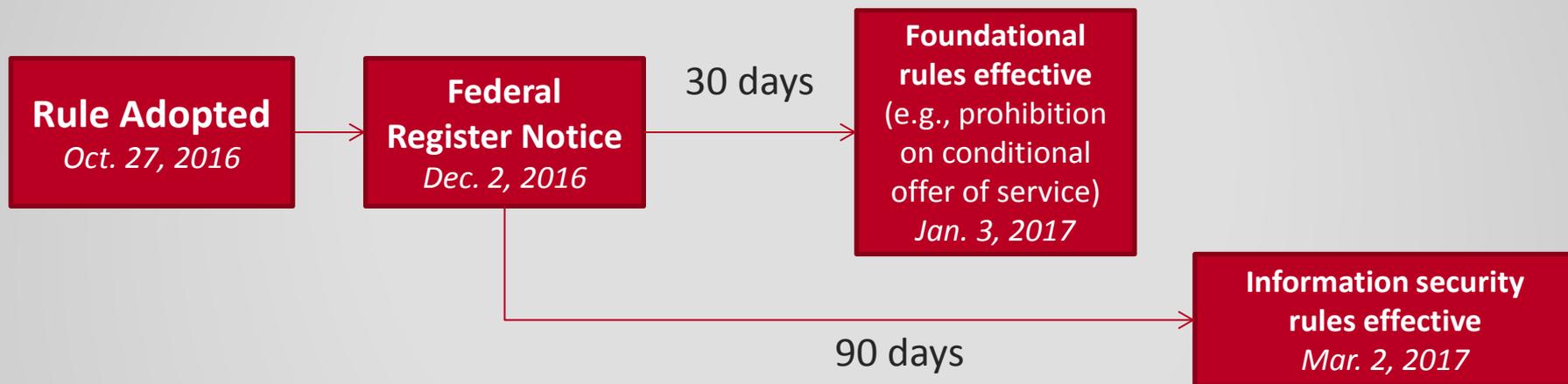
- **Federal Register Publication Date:** Dec. 2, 2016
- 30 days after publication in Federal Register (Jan. 3, 2017)
  - Background
  - Take-it-or-leave-it offers prohibited
  - Business customer exemption
- 90 days after publication in Federal Register (Mar. 2, 2017)
  - Data security requirements
- The later of notice of OMB approval and effective dates in Federal Register or six months after publication of the Order in the Federal Register (*no earlier than June 2, 2017*)
  - Breach Notification
- The later of notice of OMB approval and effective dates in Federal Register or one year after publication of the Order in the Federal Register (*no earlier than Dec. 2, 2017*), with 1 year extension for small carriers
  - **Notice**
  - **Choice**



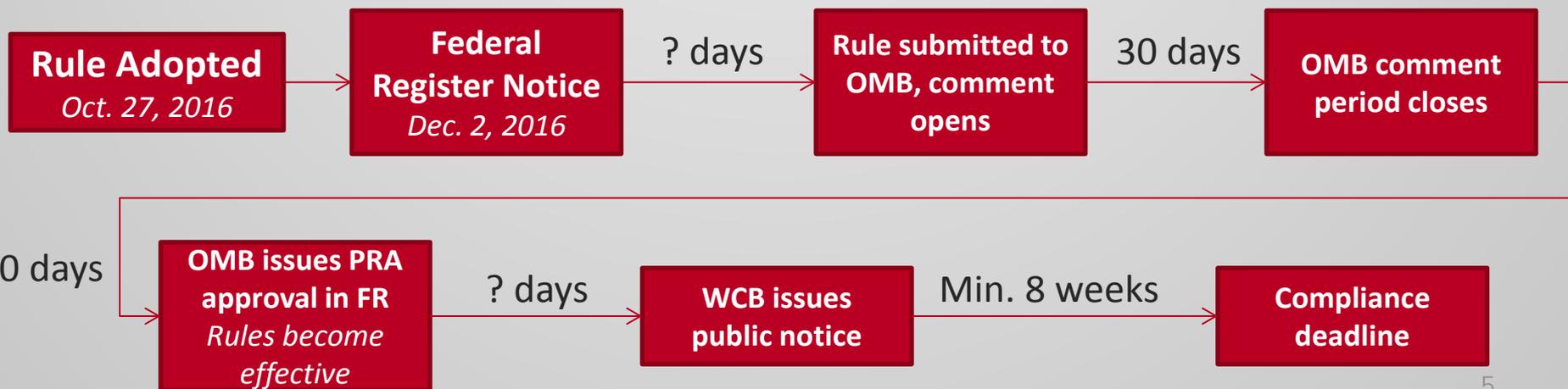
# Timeline



## Timeline 1: Foundational and Data Security Rules



## Timeline 2: Notice, Choice, and Breach Rules



# Risks to Rules

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- **Petitions for Reconsideration, Court Challenges**

- FCC or interested party could bring petition for recon. Deadline is Jan. 3, 2017
- Must chose between petition for recon or court challenge; if court challenge, deadline is Jan. 31, 2017.
- BUT deadline is December 12, 2016 to file appeal and participate in circuit court lottery

- **Roll Back by Trump Administration**

- Halting OMB approval for those rules that require approval

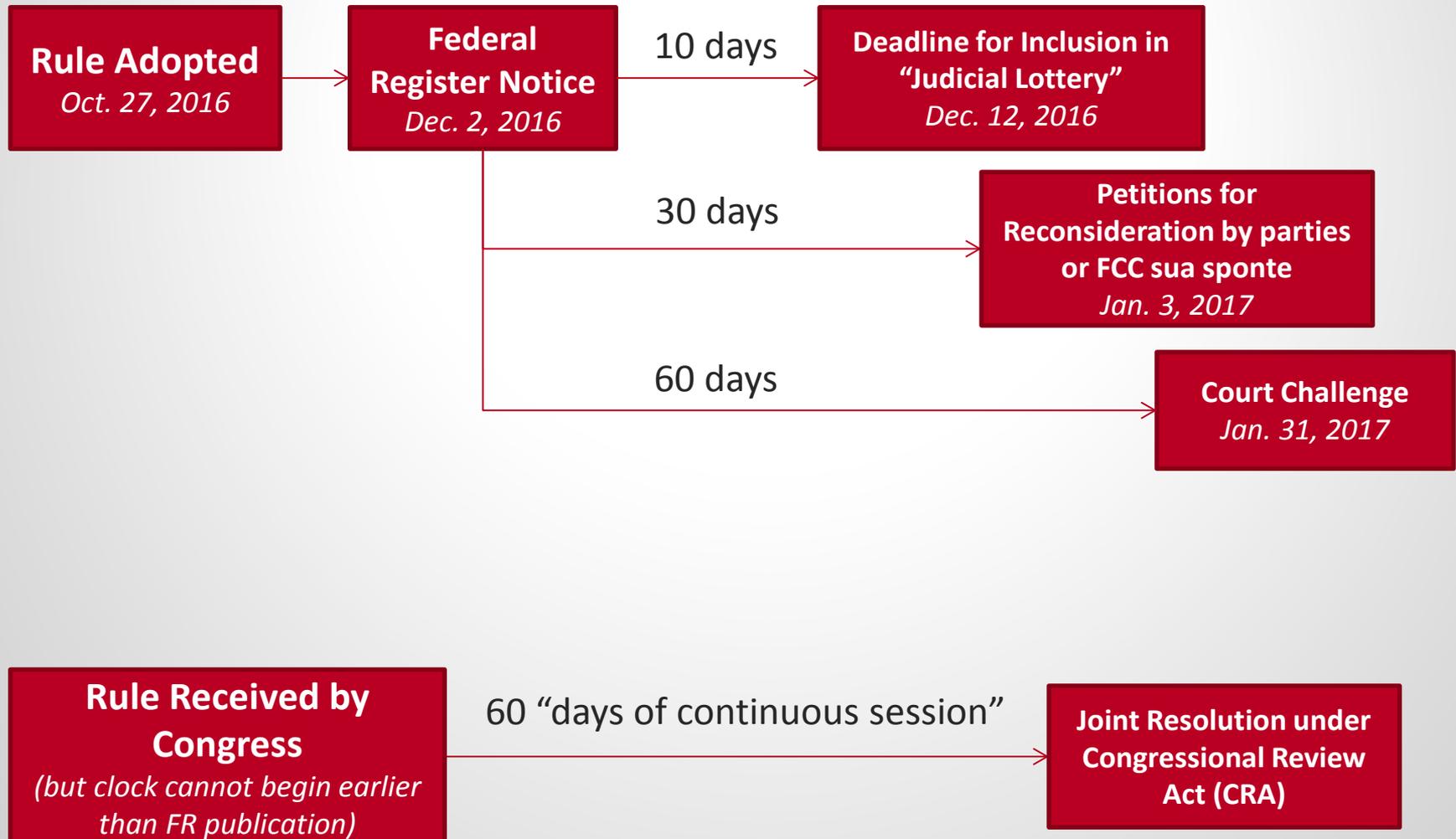
- **Congressional Action**

- Legislation
- Congressional Review Act - Within 60 "days-of-continuous-session" Congress can introduce joint resolution of disapproval

- **FCC**

- Republican-led FCC could move to (1) nullify privacy rules or (2) reverse broadband reclassification
- Could choose not to enforce

# Timeline of Potential Challenges



# Structure of the Rules; Logistics

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- Section 222 continues to apply
  - Assuming the Open Internet Order's reclassification remains in effect
  
- New rules completely replace CPNI rules, 47 C.F.R. Part 64, Subpart U *as they are phased in*
  - For some period of time, the old and new rules will co-exist (see next slide)
  
- State law preemption on case-by-case basis

# New Rule Crosswalk and Overlap for Voice Services



¶ 310: “Until these rules become effective, Section 222 applies to all telecommunications services, including BIAS, **and our current implementing rules continue to apply to telecommunications services other than BIAS and to interconnected VoIP.**”

Old Rules	New Rules
64.2001 - Basis and Purpose ( <i>replaced on Jan. 3</i> )	64.2001 - Basis and Purpose ( <i>effective Jan. 3</i> )
	64.2002 - Definitions ( <i>effective Jan. 3</i> )
64.2003 – Definitions	64.2003 - Notice ( <i>effective on OMB approval</i> )
	64.2004 - Choice ( <i>effective on OMB approval</i> )
64.2005 - Use without approval ( <i>replaced on Mar. 2</i> )	64.2005 - Data Security ( <i>effective Mar. 2</i> )
	64.2006 - Breach ( <i>effective on OMB approval</i> )
64.2007 - Use with approval	
64.2008 – Notice	
64.2009 - Safeguards (including annual certification rule)	
64.2010 - Safeguards on disclosure	64.2010 - Business customer exemption ( <i>effective Jan. 3</i> )
64.2011 – Breach	64.2011 - Conditional offers and financial incentives ( <i>subsection (a) effective Jan. 3, subsection (b) on OMB approval</i> )
	64.2012 - Preemption ( <i>effective Jan. 3</i> )

# Notice



- **Basic requirement:**
  - **Old:** must notify customers of privacy policies and customer choices for CPNI
  - **New:** must notify customers of its privacy policies and customer choices for CPI
- **Format:**
  - **Old:** sufficient information to enable customer to make choice; “customer has a right, and the carrier has a duty, under federal law, to protect the confidentiality of CPNI”; types of information that constitute CPNI; the specific entities that will receive CPNI; purposes for which CPNI will be used; right to disapprove those uses and deny or withdraw access at any time; the precise steps the customer must take in order to grant or deny approval.....
  - **New:** clear, conspicuous, comprehensible, not misleading
- **Timing:**
  - **Old:** prior to soliciting customer consent; 30 day waiting period for opt-out; follow-up notices to customers every 2 years
  - **New:** at point of sale, and through website, app, or functional equivalent; advance notice of material changes via direct communication to customer
- **Record Keeping:**
  - **Old:** maintain records of notification (and consent) for at least one year
  - **New:** N/A

## Content

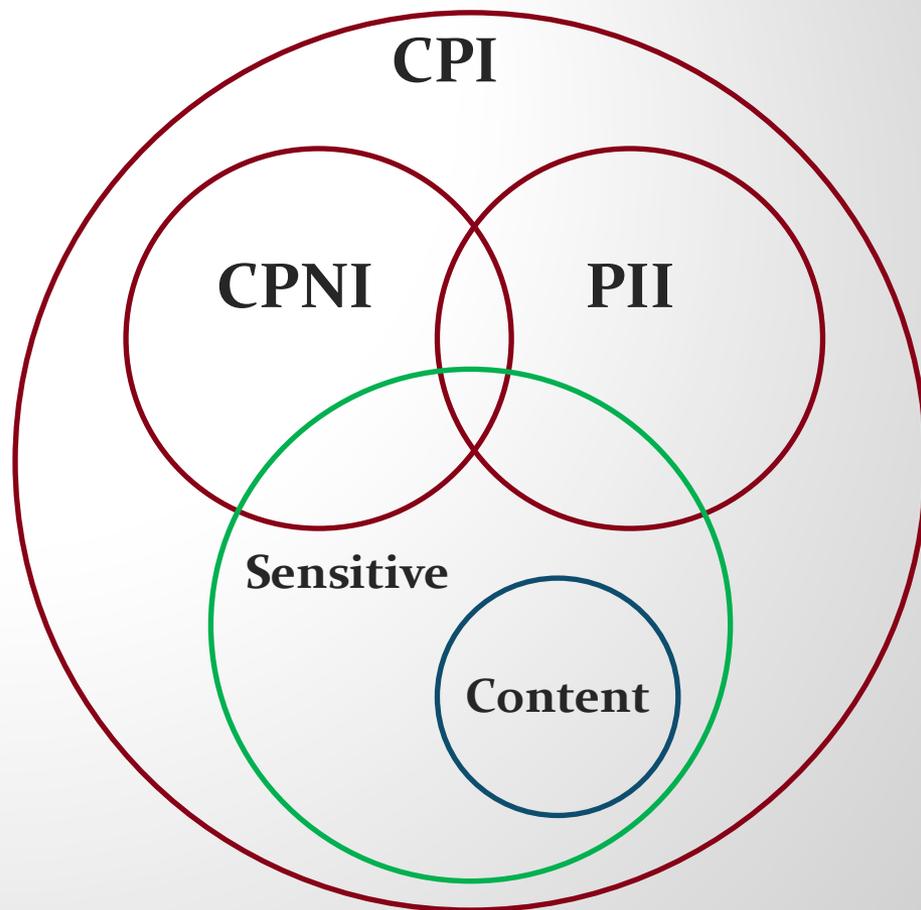
1. Type of CPI carrier collects, and how used
2. Under what circumstances CPI is disclosed
3. Categories of entities to which CPI disclosed
4. Customer choice rights
5. Mechanism to withdraw approval
6. Translation, if applicable

# Choice



- $CPI = CPNI + PII + \text{Content of Communications}$

- CPI may be sensitive
  - Financial, health, children's info
  - SSN
  - Precise geolocation
  - *Content of communications*
  - Call detail info
  - Web browsing, app usage, or functional equivalent



# Choice

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- **No consent** required to:
  - Initiate, render, bill and collect
  - Protect rights or property of carrier or protect users from fraud, abuse, unlawful use
  - Respond to inbound inquiries
  - Emergency situations
  - Limited 1<sup>st</sup> Party Marketing
- **Opt-out consent** is required for other uses of non-sensitive CPI
- **Opt-in consent** required for use of sensitive CPI and material retroactive changes

**Reminder:** rules apply only to CPI collected via carrier's provision of the broadband service, not through other channels like provision of video service

# Choice Examples



CPI Data Type	Source of Data Type	CPI Sub-Classification	Sensitive?	Type of Consent Required*
<b>Name, address</b>	Provider's retail store	PII, Broadband CPNI	No	Opt-out
<b>IP Address</b>	Captured by provider's servers while routing	PII, Broadband CPNI	No (but yes if part of a data set that, for example, reveals "content of communications" or other sensitive information obtained from the ISP's network, such as web browsing history or app usage)	Opt-out
<b>Precise geolocation</b>	Captured through provider's network	Broadband CPNI	Yes	Opt-in
<b>Website Visited</b>	Captured through provider's Domain Name Server (DNS)	Broadband CPNI, Content	Yes	Opt-in

\* Consent is not required for information obtained by virtue of providing non-telecommunications services like email, websites, cloud storage services, social media sites, or video or music streaming services.

\* Consent is not required for de-identified data.

# Conditional Offer of Service, and Incentives

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- **Conditional.** ISPs may not make broadband service contingent on a customer giving up privacy rights
- **Incentives.** But financial incentives (with heightened disclosure requirements) are ok

# DWT Recommends...

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- **Create an information security program now**
  - Broad application beyond FCC compliance
- **Conduct an Assessment**
  - How do you use CPI?
  - What consent do you obtain today?
  - What consent will you need under the new rules?
  - How long might it take to implement all the changes necessary to comply?
- **Create a transition plan**
  - If some or all of the rules go into effect, when do you need to start implementing changes?

# Questions?

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