

FCC's Consumer Advisory Committee Recommends Open Internet Consumer Disclosures

November 5, 2015

On November 3, 2015, the Federal Communications Commission's (FCC's or Commission's) Consumer Advisory Committee (CAC) issued **consumer disclosure recommendations** that--subject to bureau-level review and approval--will enable fixed and mobile broadband Internet access service (BIAS) providers to qualify for a limited safe harbor from the format requirements of the Commission's open Internet transparency rule.

Under the Commission's existing open Internet transparency rule, which has been in effect since the 2010 Open Internet Order, fixed and mobile BIAS providers must publicly disclose certain network management practices, commercial terms, and other information related to their BIAS offerings. In the **2015 Open Internet Order** (Order), the Commission enhanced the existing transparency rule, imposing significantly more detailed disclosure requirements on BIAS providers. At the same time, recognizing the burdens of preparing these enhanced disclosures, the Commission temporarily exempted smaller BIAS providers (i.e., those with 100,000 or fewer subscribers) from the enhanced rule and adopted a voluntary safe harbor scheme for the format and nature of the required disclosures. The Commission delegated the task of drawing up a "clear and easy to read" disclosure form (akin to a "nutrition label") to the CAC, a committee of industry and consumer interests.

The CAC's recommendations are intended to help guide consumers during the purchasing process and dictate how these disclosures should appear on company websites. Specifically, the CAC recommends that online disclosures use a simple type face, legible font size and have ample white space. The CAC also encourages BIAS providers to offer hard copies of their consumer disclosures in their retail and other consumer-facing locations.

The CAC recommends two distinct disclosure formats for fixed and mobile BIAS:

Fixed Broadband Consumer Disclosures

- **Price and Commercial Terms.** Fixed broadband consumer disclosures must include the non-promotional, month-to-month price for standalone broadband service. Disclosures must also include information regarding monthly data allowances, overage charges, equipment fees, other monthly fees, one-time fees, and early termination fees. Fixed broadband providers may also include monthly prices offered in conjunction with a contract or commitment. For broadband services only offered in conjunction with a separate required service, the provider must disclose the monthly price which includes all required costs. Disclosures may link to promotions and bundled service offerings.
- **Performance.** Fixed broadband consumer disclosures must include average speed (both

downstream and upstream), average latency and average packet loss. Performance information should represent actual average performance of the advertised service, during peak usage periods. Providers that participate in the Measuring Broadband America program may include information from their program results; however, non-participating providers must use methods consistent with the [2011 OGC/EB Advisory](#) (or other Commission guidance) and cannot simply provide a link to an online speed test. If applicable, fixed broadband providers should also include a statement explaining that the use of non-BIAS data services could impact broadband performance, linking to additional details.

- **Network Management.** Fixed broadband consumer disclosures should include a description of application-specific network management practices, subscriber-triggered network management practices as well as links to the provider’s privacy policy, customer service and the FCC complaint center.

Mobile Broadband Consumer Disclosures

- **Price and Commercial Terms.** Mobile broadband consumer disclosures must include the price of offerings based on the data allowance of a single line smartphone service plan, which can be a speed tier based allowance or a more traditional usage allowance. Mobile broadband providers must also include information regarding included services or features, other monthly fees, one time fees, early termination fees, service contract terms, bring your own device policies and the threshold for data allowances. Disclosures may link to promotions and bundled service offerings and providers are encouraged to include a link to the service’s customer agreement in their disclosures.
- **Performance.** Mobile broadband consumer disclosures must include the typical speed of service (both downstream and upstream) for the primary network technology (for example, LTE or 4G) as well as other technologies that the plan operates on. Providers should also identify typical peak period download and upload speeds. Mobile broadband consumer disclosures must also include the typical latency for all network technologies included within the disclosures. Just as with fixed broadband consumer disclosures, mobile disclosures should include a statement explaining that the use of non-BIAS data services could impact broadband performance, linking to additional details.
- **Network Management.** Similar to the fixed broadband consumer disclosures, mobile broadband consumer disclosures should include a description of application-specific network management practices, subscriber-triggered network management practices as well as links to the provider’s privacy policy, customer service and the FCC complaint center.

To qualify for the safe harbor provision, both fixed and mobile consumer disclosures must be accessible to people with disabilities. The CAC has outlined a number of recommendations to comply with this requirement. The CAC also provided samples of the [fixed broadband consumer disclosures](#) and [mobile broadband consumer disclosures](#) to further assist providers with compliance.

Now that the CAC has released its recommendations, the Wireline Competition Bureau, Wireless Telecommunications Bureau, and Consumer & Governmental Affairs Bureau (CGB) must review the proposal and “issue a Public Notice announcing whether the proposed format or formats meet its expectations for the safe harbor.” There is no established timeline for the Bureaus’ review; however, if the CAC’s recommendations do not meet their expectations, then they may ask the CAC to consider changes and release a revised proposal within 90 days of the Bureaus’ request.

It's unclear at this time whether the Bureaus will bless the CAC's recommendations, and if they do, how many BIAS providers will adopt the Commission's voluntary standard. Indeed, the enhanced transparency rules, which form the foundation of the CAC's guidelines, have not yet gone into effect, pending Paperwork Reduction Act (PRA) review at the Office of Management and Budget (OMB). Moreover, two upcoming dates may further impact the effect (or effective date) of these recommendations. First, on December 4, 2015, the D.C. Circuit will hear the industry's challenge to the 2015 Open Internet Order, which may affect the Commission's next steps with respect to its enhanced transparency rules. Second, on December 15, 2015, the CGB must decide whether to extend the small business exemption to the enhanced transparency rules. If the Commission ultimately decides not to extend the exemption (or allows the temporary exemption to expire), it may encourage the Bureau to more expeditiously adopt a safe-harbor-satisfying disclosure form to ease the burden on smaller providers.

Attorneys in Kelley Drye & Warren's Communications practice group are experienced in addressing Open Internet transparency and disclosure issues. For further information, please contact the authors of this blog post or your usual Kelley Drye attorney.