

# On the Eve of the FCC's Reclassification of Broadband Services, the FCC and FTC Release Memorandum of Understanding for Oversight of Broadband

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On December 11, 2017, the Federal Communications Commission (FCC) and Federal Trade Commission (FTC) released a [draft Memorandum of Understanding](#) (MOU) which will allocate oversight and enforcement authority related to broadband Internet access service (BIAS) between the two agencies. The new MOU was announced three days before the FCC's [scheduled vote](#) to reclassify BIAS as an "information service," and is expected to be finalized simultaneously with that vote. The MOU is part of an ongoing effort to address concerns that reversing the current "net neutrality" rules will adversely affect consumers, and provides a guide for Internet service providers (ISPs) and other stakeholders to understand which agency will be taking the lead on oversight and enforcement going forward. However, the extent to which the MOU takes effect will depend upon, among other things, the pending case interpreting section 5 of the FTC Act that is before the Ninth Circuit Court of Appeals.

The MOU generally divides FCC and FTC jurisdiction over BIAS providers as follows:

## FCC

- Monitor the broadband market and identify market entry barriers by, among other activities, reviewing informal complaints filed by consumers.
- Take enforcement actions against ISPs that fail to comply with the Transparency Rule's posting requirement. FCC enforcement would not address the adequacy of the disclosure, however.

## FTC

- Investigate and take enforcement action against ISPs for unfair, deceptive, or otherwise unlawful acts or practices, including but not limited to, actions pertaining to the accuracy of the disclosures required under the Transparency Rule, as well as their marketing, advertising, and promotional activities.

The agencies have made clear that they will coordinate their activities "to promote consistency in law enforcement and to prevent duplicative or conflicting actions." They will also continue to share consumer complaints with each other and will collaborate on consumer and industry outreach and

education efforts. FCC Chairman Ajit Pai said in a statement that the MOU “outlines the robust process by which the FCC and FTC will safeguard the public interest,” but Commissioner Mignon Clyburn (a Democrat) called the MOU “a smoke and mirrors PR stunt, distracting from the FCC’s planned destruction of net neutrality protections later this week.”

Despite the MOU and upcoming Restoring Internet Freedom Order, significant questions will remain about the appropriate jurisdiction of the FCC and FTC with respect to BIAS and ISPs. For example, less than three months ago, the Ninth Circuit [received arguments](#) in a rehearing *en banc* of the court’s earlier decision to dismiss an FTC case against AT&T Mobility over allegedly “unfair and deceptive” throttling practices in connection with wireless data services provided to AT&T’s customers with unlimited data plans. Implementation of the MOU may be impacted by how the Ninth Circuit resolves this jurisdictional dispute. If the Ninth Circuit finds the common carrier exemption to be activity-based, then the FCC’s expected decision to walk back from “common carrier” designation for BIAS will open the door for FTC oversight. On the other hand, if the Ninth Circuit finds that exemption to be status-based – or resolves the case without resolving the question – then the FTC’s ability to proceed under the MOU may be in question. Thus, even after the MOU is finalized, we may have to wait to see the final impact of the agreement.