

Open Internet Rules Become Effective Today, June 12

June 12, 2015

On June 12, 2015, the [Open Internet Order's](#) (Order) three bright line rules and the new "general conduct" standard will become effective. The reclassification of broadband Internet access service (BIAS) as a telecommunications service and the complementary action forbearing from the application and enforcement of sections of Title II of the Communications Act will also become effective on June 12.

A number of parties have challenged the Order with appeals consolidated in the D.C. Circuit. On June 11, 2015, the D.C. Circuit rejected U.S. Telecom's request for stay which would have put the rules on hold until the court issued a decision on their legality. As a result, the rules will go into effect. The court agreed to expedite its proceedings, and is expected to issue a final decision in the case (no. 15-1063) by early next year.

The Order includes new and modified open Internet rules; reclassifies broadband Internet access service (BIAS) as a "telecommunications service" under Title II of the Communications Act of 1934, as amended; and imposes several provisions of Title II on BIAS providers (e.g., consumer protection, privacy, and disabilities access requirements), while forbearing from others.

Impact for BIAS Providers

The Commission's three "bright-line rules" prohibiting certain network practices of BIAS providers take effect today. Those provisions are:

- **No blocking.** Fixed and mobile BIAS providers may not block access to legal content, applications, services or non-harmful devices, subject to reasonable network management.
- **No throttling.** Fixed and mobile BIAS providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices, subject to reasonable network management.
- **No paid prioritization.** Fixed and mobile BIAS providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind. The "no paid prioritization" rule bans what are commonly referred to as "Internet fast lanes," and also prevents ISPs from giving preferential treatment to the content or services of their affiliates. This rule does not have an exception for reasonable network management.

In addition, other BIAS provider actions will be subject to a broad "general conduct" standard. This standard has two related components:

- **With respect to consumers,** service providers cannot "unreasonably interfere with or unreasonably disadvantage" a consumer's ability to select, access, or use lawful content,

applications, services, or devices of their choosing.

- **With respect to edge providers**, service providers cannot “unreasonably interfere with or unreasonably disadvantage” the ability of edge providers to make lawful content, applications, services, or devices available to consumers.

The Commission will investigate the practices of BIAS providers on a case-by-case basis using the “no unreasonable interference/disadvantage” conduct standard, subject to a multi-factor test.

For a more detailed explanation of the Open Internet Order’s rules, read our recent [client advisory](#).

Further Proceedings

Other aspects of the Order will take effect over a period of months. First, a number of new requirements are subject to the approval of the Office of Management and Budget (OMB). These are:

The “Enhanced” Transparency Rule

The Order reinforced the 2010 transparency rule, which was the only rule that the D.C. Circuit upheld in *Verizon v. FCC*. While BIAS providers are subject to the 2010 transparency rule now, the enhanced elements will not take effect until approved by OMB. The Enhanced Transparency disclosure requirements are:

- **Commercial terms.** Fixed and mobile BIAS providers must disclose a service’s full monthly cost, and any promotional rates must be clearly noted, with details about the duration of the promotional period and the cost of service once the promotional period ends. Providers must also list any additional one time and/or recurring fees, including the name, definition, and cost of each additional fee. Further, providers must state whether any data caps or allowances are part of an offered plan and the consequences for exceeding that cap or allowance.
- **Performance characteristics.** Fixed and mobile BIAS providers must disclose packet loss in their network performance disclosures as well as the network’s average performance over a reasonable period of time. Mobile broadband providers will also be required to disclose network performance for services within each technology (e.g., 3G and 4G).
- **Network practices.** Fixed and mobile BIAS providers must disclose network practices that affect traffic associated with a particular user or user group, including any application-agnostic degradation of service to a particular end user.

The Order temporarily exempts fixed and mobile providers with 100,000 or fewer subscribers from the requirements of the Enhanced Transparency Rule. The Commission’s Consumer and Governmental Affairs Bureau (CGB) will determine whether to retain this exemption and must make their decision by December 15, 2015. If the Bureau fails to act by that date, the temporary exemption will expire.

While OMB approval is pending, the transparency rule pre-dating the recent Order remains in full effect for all fixed and mobile BIAS providers. In the interim, we recommend that fixed and mobile BIAS providers review their marketing materials and online disclosures in preparation for the effectiveness of the Enhanced Transparency Rule.

Protection of Customer Information

The Order applies Section 222 of the Communications Act to BIAS providers. Accordingly, BIAS providers will be required to protect the confidentiality of “proprietary information” and a subset of proprietary information, Customer Proprietary Network Information (CPNI), that providers hold about their customers. However, the Commission refrained from applying the associated CPNI rules.

On April 28, the Commission hosted a privacy workshop that explored the Commission’s roles in protecting the privacy of consumers that use broadband Internet access service. As explained in our earlier [blog post](#), the discussion centered around the FCC’s recent Open Internet Order and its implications for the obligations that broadband providers will have going forward with respect to consumer privacy and data security. In addition, on May 20, the FCC’s Enforcement Bureau issued a Public Notice stating that it expected BIAS providers to take “reasonable, good faith efforts” to protect customer privacy in the absence of specific rules for broadband providers. You can read more about the Bureau’s advisory in this [blog post](#).

Later this year, the Commission will likely initiate a separate rulemaking proceeding to decide how to apply privacy provisions, including specific CPNI regulations to BIAS providers.

Should you have any questions about the Order and its implications for your organization or the broadband industry in general, feel free to contact any one of the attorneys in the Kelley Drye [Communications](#) practice.