

# What to Expect from the FCC's Restoring Internet Freedom Order

December 13, 2017

This Thursday, December 14<sup>th</sup>, the FCC will vote on the Restoring Internet Freedom Order, after releasing a draft on November 22<sup>nd</sup>. The [Draft Order](#) would overturn the FCC's earlier [2015 Open Internet Order](#). We don't expect any bombshell revisions when the FCC acts, and as such we expect that the Order will:

- **Reclassify fixed and mobile BIAS as an information service.** The most significant change in the draft Order to the regulatory classification of BIAS. We expect that the Commission will follow through with its plan to reverse the 2015 Open Internet Order's classification of fixed and mobile BIAS as a common carrier telecommunications service under Title II of the Communications Act, reclassifying BIAS as an "information service" and reinstating the regulatory framework that was in place prior to March 2015.
- **Vacate the bright-line rules and the general conduct standard.** Having reclassified BIAS as an information service, we further expect the Commission will eliminate the conduct rules adopted in the 2015 Title II Order, including the "bright-line" prohibitions on paid prioritization, blocking and throttling and the 2015 Order's general conduct rule. The general conduct rule, which raised particular concern from Republican commissioners when it was adopted, prohibited BIAS providers from unreasonably interfering with or disadvantaging the ability of consumers to select, access, and use lawful Internet content, applications, and services, and for edge providers to make such content, applications, and services available to end users.
- **Retain, but refactor, the open Internet transparency rule.** Contrary to early suggestions, the Restoring Internet Freedom Order likely will not scrap the open Internet transparency rule, which was first imposed in 2010 and later enhanced in 2015. Instead, we expect that the Order will rescind the 2015 Order's enhancements to the 2010 rule and provide additional flexibility to providers, allowing them to either post the statement on their websites or to submit them to the FCC for posting on a publicly accessible website.
- **Return consumer protection authority to the FTC (with caveats).** By reclassifying BIAS as an information service, the Order cedes the FCC's consumer protection authority over BIAS to its sister agency the Federal Trade Commission (FTC). Specifically, while the 2015 Open Internet Order applied core consumer protection provisions of the Communications Act to BIAS providers, including sections 201, 202, 222, and 255, BIAS will now be subject to Section 5 of the FTC Act, which prohibits unfair and deceptive trade practices. Importantly, although the FCC and FTC are actively working on a [memorandum](#) of understanding to promote coordination of enforcement efforts, it's an open question whether the FTC is able to enforce Section 5 against BIAS providers who also provide regulated common carrier services. Specifically, in 2016 the Ninth Circuit [ruled](#) that Section 5's exemption for "common carriers" applied not just to a

company's common carrier activities, but to all activities of a common carrier. As a result of this decision, any BIAS provider that also provides telecommunications services may be shielded from both FCC and FTC jurisdiction. The FTC has [appealed](#) the panel decision *en banc* and the court heard argument in September. How the Ninth Circuit resolves this question – or whether it reaches a result without addressing the jurisdictional question – may impact whether the FTC will be able to be the “cop on the beat” that the FCC Order expects.

- **Addresses several procedural issues.** The draft Restoring Internet Freedom Order also resolves several procedural issues, denying a request from trade group INCOMPAS to modify protective orders related to four recent major transactions involving BIAS providers, and denying a request from the National Hispanic Media Coalition to incorporate several informal complaint in a subsequent proceeding open for public comment.

So, what's next? The Commissioners will vote on the finalized version of this item at the Commission's December 14<sup>th</sup> meeting. Chairman Pai's Republican colleagues are expected to support the item, while Democratic Commissioners Clyburn and Rosenworcel are expected to dissent, giving the Order a 3-2 majority for adoption. After the Order is published in the *Federal Register*, we expect pro-Title II parties to appeal the Order.

Ultimately, we will be back in a familiar location – in appeals over the FCC's classification of broadband. Three of the FCC's previous attempts have been before the D.C. Circuit, with two reversals (at least in part) of the FCC's action and (ironically) one decision sustaining the 2015 decision that this Order will reverse. Appellate courts give substantial deference to agency decisions, so long as the ultimate decision addresses the relevant facts and arguments and the outcome is within the zone of reasonable interpretations of the statute. It is possible, therefore, that both the FCC's classification of BIAS as a Title II service and its expected reclassification of BIAS could be upheld, so long as the court determines that the decision falls within this traditional zone of deference. If that happens, then it will ultimately be up to Congress to prevent constant flip-flopping of the regulatory regime applicable to these services.

We are tracking and will provide a more complete client advisory when the final Order is released.