A Practical Look at the Federal Communications Commission’s Open Internet (Network Neutrality) Regulations

Introduction

On December 23, 2010, the Federal Communications Commission ("Commission" or "FCC") adopted new Open Internet ("network neutrality") rules1 that place a variety of disclosure and other obligations on certain providers of broadband Internet access. Effectiveness of the net neutrality rules first required review by the Office of Management and Budget (OMB). On June 30, 2011, while OMB review continued, the Chief of the FCC’s Enforcement Bureau and the Office of General Counsel issued a Public Notice to assist with compliance with the new transparency rule. ("Enforcement Advisory" released June 30, 2011)2 OMB review was completed early in August, the rules were published in the Federal Register on September 23, 2011, and they are effective as of November 20, 2011.3

The proceeding was controversial, illustrated by the 3–2 vote by the Commissioners and the intense statements by each. The rules, the justification for the rules, and the Commission’s authority to adopt the rules will be the subject of ongoing policy, legal, and legislative battles in the months and years ahead. Petitions for review were filed in numerous federal circuits, and, after a lottery, the D.C. Circuit Court of Appeals was selected to hear the appeals brought by Verizon and Verizon Wireless and MetroPCS and numerous consumer and public interest groups. We expect the court to hear the case in 2012.

In this memo, we do not discuss the policy basis for the rules or the questions of the FCC’s jurisdiction to adopt open Internet rules. Rather, this memo has the more targeted objectives of (1) giving a practical overview in ques-

3 See Federal Register, Vol. 76, No. 185 at 59192 (Sept. 23, 2011).
tion and answer format of the substance of the new rules and the obligations they impose on affected providers of broadband Internet access services and (2) serving as a general guide for compliance, taking into account the Enforcement Advisory.

1. When the Rule Becomes Effective and to Whom It Applies

When Do the New Rules Become Effective?
November 20, 2011.

To Whom Do the New Rules Apply?
Fixed and mobile providers engaged in the provision of broadband Internet access (“BIA”) services, although the rules applicable to each group differ slightly. The Commission explained in the Order that an entity that might otherwise be a BIA provider is not subject to the rules “when [it] acquire[s] Internet service from a broadband provider to enable [its] patrons to access the Internet from [its] establishments.” The Commission gave the following examples of entities that may qualify for this exemption, which the agency termed “premises operators”: coffee shops, bookstores, and airlines. The Commission noted that providers that make BIA available to qualifying premises operators are subject to the rules and Order, and their premises operator customers are to be treated as the end users.

The new rules and Order will not apply to dial-up Internet access providers.

Do the New Rules Also Apply to Entities That Resell Finished BIA products?
The Commission’s new rules and Order do not expressly address this issue. However, there are good reasons to believe that the rules apply to any BIA provider that the retail customer considers as its BIA provider. Thus, it is likely that the Commission would find that the rules and Order apply to an Internet access provider that serves end users only through resale of a BIA service even when the underlying provider is subject to the rules because, in addition to a providing the wholesale broadband Internet access product to the reseller, it offers a retail product directly to end users.

Did the Commission Impose Any Open Internet Obligations on Application or Content Providers?
No. The Commission did not impose any regulatory obligations on content and applications providers. The FCC noted that it would continue to monitor the marketplace and left open the prospect of adopting such rules in the future.

Do the New Rules and Order Apply to Content-Delivery Networks?
No. Among other things, they do not provide retail services to residential subscribers and small businesses. The Commission expressly rejected extending open Internet rules to content-delivery networks.

How Does the Commission Define BIA?
The new rules define BIA as a “mass-market retail service” that provides transmission capacity from and to “substantially all Internet endpoints.” BIA includes any capabilities that are incidental to BIA service. A service
that is the functional equivalent of BIA is also considered BIA as well as any service that is used by a BIA provider “to evade the protections set forth in the [open Internet rules].”

How Does the Commission Treat Specialized Services?
The Order observed that so-called “specialized services” share the same network facilities as BIA, such as “some [BIA] providers’ existing facilities-based VoIP and Internet Protocol-video offerings.” The Commission explicitly declined to adopt rules or policies at this time regarding specialized services. The Order found that specialized services generally are not themselves BIA, although in some cases a specialized service may be deemed BIA if it is the functional equivalent of BIA or is used to evade the open Internet rules. The Commission intends to monitor “market developments to verify that specialized services promote investment, innovation, competition, and end-user benefits without undermining or threatening the open Internet.” The Commission stated its expectation that BIA providers will expand their capacity supporting BIA if they increase the capacity devoted to specialized services.

Is BIA Limited to Certain Technology Platforms?
No. The Order makes clear that services provided over any technology platform may be BIA. As a non-exhaustive list, the FCC mentions wireline, terrestrial wireless (both fixed and mobile), and satellite services.

How Do the Rules Define “Mass-Market Retail Service”?  
A “mass-market retail service” is one sold on a standardized basis to residential and small business customers and other end user customers on such as schools and libraries. However, the Order recognized that BIA providers, as non-common carriers, may “tailor[] its terms of service to meet the requirements of an individual end user,” and suggests that in such cases, even though the service is not standardized, still falls within the requirements imposed by the rules.

Because BIA service is defined as a “mass-market” service, the term does not encompass any broadband service provided to enterprise customers, and thus such services are not subject to the open Internet rules.

Does the Commission Clearly Explain the Line Between Small Business and Enterprise Broadband Internet Access End Users?
No, it does not define either term nor explain the transition between the two categories, and the Order gives no indication of where the Commission will draw the line.

Did the Commission Give Any Guidance Regarding What Types of Services It Would Consider As the Functional Equivalent of BIA?
Yes. The Commission stated that a service which is designed to reach a substantial subset of Internet endpoints based on user endpoints might be considered the functional equivalent of BIA. As additional examples, services that allow access to the World Wide Web but not to e-mail or that allow access only to the top 100 websites would also be considered BIA and subject to the open Internet rules.
BIA services do not include services that allow access to only one or a small number of Internet endpoints for a particular device, e.g., connectivity bundled with e-readers or heart monitors. Also excluded from BIA would be virtual private network services, content delivery network services, multichannel video programming services, hosting and data storage services, and Internet backbone services provided those services are separate from broadband Internet access.

2. The New Requirements Imposed on BIA Providers

What Do the New Rules Require?
Generally, both fixed and mobile BIA providers must publicly disclose information regarding the network management practices of their BIA services as well as information regarding network performance and the commercial terms of its BIA services as it applies to all Internet traffic, not just voice or video traffic. The two categories of BIA providers are subject to the same rule regarding disclosure -- the “transparency rule.” Both groups of providers are subject to prohibitions against blocking -- the “no blocking rule” -- although slightly different rules in this regard apply to fixed providers in comparison with mobile providers. Finally, fixed providers will become subject to a proscription against unreasonable discrimination.

How Do the New Rules Define Fixed and Mobile BIA?
Fixed BIA is a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed BIA includes wireless and satellite services that meet the conditions of service primarily at fixed endpoints using stationary equipment. Mobile BIA is a broadband Internet access service that serves end users primarily using mobile equipment, such as smartphones.

A. The Transparency Rule

Did the Commission Specify in Its Transparency Rule What Must Be Disclosed?
Not exactly. The rules require that the public disclosures of network management practices, network performance characteristics, and terms and conditions be “sufficient for consumers to make informed choices regarding use” of the BIA service as well as sufficient for content, application, service, and device providers to “develop, market, and maintain Internet offerings.” Although the Commission gave examples of what sort of information it expected would be disclosed by a BIA provider in compliance with the transparency rule, it underscored that, depending upon the network of the BIA provider and the technology used, disclosure of additional information may be necessary for compliance “in light of relevant circumstances,” which might include the features offered by the provider, its network architecture or limitations, and other matters. In short, the Commission did not provide a safe harbor to BIA providers regarding disclosures in its rules and Order. The Commission anticipates that disclosures “sufficient” to enable “consumers to make informed choices regarding use of services” generally will satisfy the portion of the transparency rule regarding disclosures to content, application, service, and device providers.
Does the Enforcement Advisory Make the Transparency Requirements Clearer?

The Enforcement Advisory provided examples of approaches that would satisfy the transparency rule, but the Enforcement Advisory also emphasized that affected broadband providers could comply through alternative approaches. The methods of compliance described in the Enforcement Advisory are “not required or exclusive,” the Chief of the FCC’s Enforcement Bureau and the Office of General Counsel have explained. The Enforcement Advisory indicated that the FCC, or the Enforcement Bureau, may provide further guidance in the future.

The Enforcement Advisory clarified that disclosure of information regarding the network management practices of their BIA services as well as information regarding network performance and the commercial terms of its BIA services as it applies to all Internet traffic “will suffice for compliance with the transparency rule at this time” (but see following question and answer regarding disclosures by mobile providers of third-party device and application certification procedures, which also must be made).

Has the FCC Provided Guidance on What Security Measures Must be Disclosed?

Yes, in the Enforcement Advisory. As in other areas, the FCC’s guidance is to disclose what is “sufficient for consumers to make informed choices regarding use” of the service and sufficient for content, application, service, and device providers to “develop, market, and maintain Internet offerings.” Security measures that incidentally prevent end users from accessing the content, applications, services, and devices of the consumer’s choice should be disclosed while those that do not bear directly on a consumer’s choice, such as internal network security measures, need not be disclosed.

Do the New Rules and Order Require BIA Providers to Disclose Competitively Sensitive Information?

No. In the Order, the Commission explained that the transparency rules do not require entities to disclose...
competitively sensitive information, information that would compromise network security, or information that would undermine the efficacy of reasonable network management practices.

**Explain in More Detail the Requirement for BIA Providers to Publicly Disclose Their Network Performance.**

The examples of disclosures of network performance characteristics discussed by the Commission in its *Order* are (i) a service description including technology used, actual and expected speed and latency, and the suitability of the service for real-time applications and (ii) what specialized services are offered to end users by the BIA provider (such as voice IP telephony or IP video service) and how such services may affect the last-mile capacity and performance of the BIA product. As explained in the Enforcement Advisory, results from the Commission’s broadband performance measurement project — the “Measuring Broadband America” report issued August 2, 2011 (http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0802/DOC-308828A1.pdf) — may serve as a guide for broadband providers’ measurement and disclosure of network performance. The Enforcement Advisory explained that participants in the project may disclose their results as a “sufficient representation of the actual performance their customers can expect to experience,” whereas non-participants could look to the methodology employed by the project as a possible solution among possible methods of disclosing network performance, such as internal testing and consumer speed test data. While the Commission is in the process of obtaining performance data regarding mobile broadband providers, the Enforcement Advisory noted that mobile providers could disclose results of self- or third-party testing of their networks’ performance or, where reliable information from testing is not available, disclose representative speeds and latency that customers can expect, accompanies by a statement that such information is the best available to the provider.

**Explain in More Detail the Requirement for BIA Providers to Publicly Disclose Their Terms and Conditions.**

The examples of terms and conditions expected to be disclosed by the Commission in its *Order* are pricing, including fees for early termination, privacy policies, and practices for resolving end user complaints and questions. The Commission was careful to note that the examples were chosen on the assumption that the BIA provider has chosen to offer its BIA services on standardized terms but that BIA providers are not required to do so. The Commission explained that, if a provider “tailors its terms of service to meet the requirements of an individual end user,” those terms and conditions must be disclosed “to the end user” in accordance with the transparency principle. The Commission specifically stated that the BIA provider who deals on a customer specific basis becomes subject to the new rules only *after* the provider has entered into the arrangement with the end user.

**Did the Commission Elaborate on the Privacy Policy Terms and Conditions to Be Disclosed?**

Yes. In the *Order*, the Commission gave the following illustrations of what it expected to be disclosed: whether the provider’s network management practices entail inspection of network traffic, and whether traffic information is stored, provided to third parties, or used by the
carrier for non-network management purposes. These disclosures could just as easily be a component of disclosure of network management practices as well.

**How and Where Must the Disclosures Required by the Transparency Rule Be Provided?**

At a minimum, BIA providers must prominently display or provide links to its disclosures under the transparency rule on a website that is “publicly available” and “easily accessible.” Such disclosure will be treated as disclosure to the Commission as well as end users, although the Commission may require additional disclosures be made directly to it. End users must be able to identify which disclosures apply to their particular BIA service, and the Commission expects that BIA providers will make the disclosures available in a manner accessible to persons with disabilities.

The disclosures required by the transparency rule also must be disclosed at the point of sale. The Order explained that “broadband providers must, at a minimum, prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users and edge providers.” The Enforcement Advisory clarified that disclosures do not have to be “in hard copy” nor is “extensive training” required to allow employees to provide the disclosures themselves. The Enforcement Advisory stated that one acceptable method would be “orally and/or prominently in writing” to direct prospective customers at the point of sale to a web address where the up-to-date disclosures can be easily found – as opposed to the provider’s general purpose home page “from which the disclosures are not clearly and readily accessible.” At brick-and-mortar retail outlets, according to the Enforcement Advisory, providers relying on web-based disclosures should make available connected equipment through which customers can access the disclosures.

The Commission expects a single disclosure by a broadband provider may be sufficient without multiple disclosures to multiple audiences.

**Must the Disclosures Follow a Certain Format?**

No. The Commission declined to adopt a required format. It only stated that their disclosure must be “sufficiently clear and accessible” to meet the requirements of the rule. The FCC left open the possibility that it might require adherence to a set of best practices in the future.

**How Often Must the Information Disclosed Pursuant to the Transparency Requirement Be Updated?**

The Commission did not specify any specific timeliness requirement, but did state that disclosure must be “timely” and “accurate.” There is no requirement for periodic disclosures regardless of whether there have been changes to the disclosed information. The initial disclosure should be made by the effective date of the rules to be timely and, absent further guidance from the Commission, updated promptly as often as modifications to network management practices, network performance characteristics, and terms and conditions render the information that has previously been disclosed inaccurate or incomplete. The Enforcement Advisory stated the Commission’s expectation that performance disclosures are to be reevaluated whenever the provider knows or has reason to believe that the actual performance “differs materially” from the then current performance disclosure.
B. The No Blocking Rule

What Does the No Blocking Rule Require of Fixed BIA Providers?

A fixed BIA provider, but only to the extent that it is engaged as a BIA provider, is prohibited from blocking “lawful content, applications, services, or non-harmful devices, subject to reasonable network management practices.” Thus, for example, the rule does not apply to the extent a BIA provider makes available Internet access service to enterprise customers. The Commission explained in the Order this rule applies to “all traffic transmitted to or from end users” of a BIA, “including traffic that may not fit cleanly into any of these categories [of content, applications, services].” The Commission noted that only lawful content and applications are protected.

What Does the No Blocking Rule Require of Mobile BIA Providers?

A mobile BIA provider, but only to the extent that it is engaged as a BIA provider, is prohibited from blocking end users from “accessing lawful websites” and blocking “applications that compete with the provider’s voice or video telephony services,” meaning those services in which the BIA provider has an attributable interest, subject to reasonable network management practices. An attributable interest includes equity ownership in or de facto control of or by the video or voice telephony service provider, or an exclusive arrangement for such video or voice telephony services. The no-blocking rule does not apply to the mobile BIA provider’s application stores or their functional equivalent.

What Constitutes Blocking under the No Blocking Rule?

In addition to outright blocking, the Order explains that blocking includes impairment or degradation so as to “render [particular content, applications, services or non-harmful devices] effectively unusable subject to reasonable network management.” The Commission makes clear that charging a fee to a content, application, or service provider to avoid being blocked (impaired or degraded) is impermissible under the rule. The Commission noted that the new rules do not “affect existing arrangements for network interconnection, including existing paid peering relationships.”

Does All Degradation or Impairment, for Example, That Caused by Network Congestion, Violate the No Blocking Rule?

No. The Commission declined to adopt a blanket prohibition on degradation. BIA providers are not obligated to expand or upgrade their networks to avoid congestion (although the FCC expected that BIA providers have the incentives to, and would, do so). The Order recognizes that “some network congestion” may be unavoidable.

Does the No Blocking Rule Require BIA Providers to Block Unlawful Content?

No. The Commission stated in the Order that BIA providers are not required to be the arbiters of what is lawful content.

Are Any Restrictions on the Use of Non-Harmful Devices Permissible?

The Order explains that a BIA provider may require devices to conform to “widely accepted and publicly available standards.”
C. The Non-Discrimination Rule

What Does the Non-Discrimination Rule Require?
Not all discrimination is prohibited. Rather, the non-discrimination rule prohibits unreasonable discrimination by BIA providers, but only to the extent they are providing BIA service. Thus, for example, the rule does not apply to the extent a BIA provider makes available Internet access service to enterprise customers. The non-discrimination rule applies to the “transmission of lawful network content” over an end user’s BIA service. The non-discrimination rule is not violated by reasonable network management which has a discriminatory result.

What Constitutes Reasonable versus Unreasonable Discrimination?
It depends on the content and circumstances of the discrimination. The Commission would review any potential violation based on the facts of the individual case. The Commission provided limited guidance but stated that the following factors would be considered:

**Transparency**: the more transparent to end users a BIA provider’s differential treatment of traffic is, the more likely the Commission would find it to be reasonable.

**End user control**: the Commission indicated in the Order that if a BIA provider enabling end user customers to choose among different BIA offerings based on factors such as data rates and reliability that would be unlikely to constitute unreasonable discrimination, “provided the . . . offerings [are] fully disclosed and [are] not harmful to competition or end users.” Similarly, with the same proviso, if end users are able to select quality-of-service enhancements on connections for traffic of their own choosing, the BIA provider is unlikely to be unreasonably discriminating. The Order states specifically that, in principle, tiered or usage-based pricing would be acceptable such that BIA providers may ask end users that use the network more to pay more and vice versa.

**Discrimination among specific uses of the network**: The Order indicated that “differential treatment that does not discriminate among specific uses of the network or classes of uses is likely reasonable.” Discrimination that addresses congestion by temporarily limiting the bandwidth available to the heaviest users would, in general, be acceptable as discussed in the Order.

**Conformity with standard practices**: the more a practice confirms with standards adopted by open, broadly representative, and independent organizations, the less likely is the practice to be found unreasonable discrimination. Nonetheless, the Commission may find a practice to be unreasonable discrimination even if it fully conforms with such a standard.

**Harm and impairment**: The Order explains that the Commission will have concerns if a practice harms an actual or potential competitor to the BIA provider, harms end users, or that impairs free expression. The FCC made clear this was a non-exhaustive list.

**Commercial arrangements to discriminate**: The Order explains that commercial agreements – such as pay-for-priority agreements with content or application providers – between the BIA provider and a third party to favor some traffic over other traffic (directly or indirectly) over the connection to a end user would be a cause for significant concern.
Communications from emergency responders: The Order explained that BIA providers may prioritize communications by first responders over other communications.

Are Discriminatory Practices That Are Controlled Entirely by the BIA Provider by Definition Unreasonable?

No. The Commission emphasized that this is not the case. As noted above, for example, reasonable network management with discriminatory impact does not constitute unreasonable discrimination.

Do the New Rules and Order Apply a Non-Discrimination Rule to Mobile BIA Providers?

No, not at this time. The Commission stated that it would continue to monitor the need for such a rule as it gains more experience.

D. Reasonable Network Management

What Do the New Rules Mean by “Reasonable Network Management?”

The rules state that “a network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose.” The rule adds that the particular network architecture as well as the technology of the BIA provider will be taken into account to determine if a network management practice is reasonable.

Did the Commission provide examples of “legitimate network management purpose?”

Yes. The FCC stated in the Order that such purposes include:

- ensuring network security, such as against viruses, worms, malware, botnets, and spam
- ensuring network integrity
- addressing traffic harmful to the provider’s network, such as combating denial-of-service attacks
- addressing traffic unwanted by end users
- reducing or mitigating the effects of congestion on the network.

Generally, however, the Commission intends to give further definition of the term on a case-by-case basis as a result of handling complaints or prosecuting investigations against BIA providers.

Apart from the Examples Given in Response to the Previous Question, Did the Commission Provide Further Guidance about What Would Qualify as a Reasonable Network Management Practice?

Yes. It stated that the evaluations of a practice would consider similar factors as those that would guide it in ascertaining whether, for fixed network providers, a practice constituted unreasonable discrimination. The Commission also suggested that even reasonable practices must be appropriate and tailored to the threat, should be evaluated periodically to ascertain whether they remain necessary and reasonable, and should allow end-users opt-in or opt-out (for example when the practice is designed to combat malware or viruses which could compromise end user networks).

Did the Commission Adopt a Rule to Treat As Reasonable Network Management “Reasonable
Practices to Prevent the Transfer of Unlawful Content and the Unlawful Transfer of Content?

No. However, as explained further below, the Commission adopted a rule giving BIA providers flexibility to address efforts by BIA providers to address copyright infringement and other unlawful activity. While the Commission provided no guidance as to whether such efforts need to be disclosed under the transparency rule, we believe BIA providers should do so.

Must BIA Providers Seek Prior Approval for Their Network Management Practices?

No. However, the Commission invited BIA providers and others to do so, should they choose.

Will a Network Management Practice That Is Reasonable for One Type of BIA Provider Platform Be Reasonable for Others?

While the Commission might reach that outcome in some cases, it emphasized that whether a management practice is reasonable depends on the specifics of a network and how it handles and delivers Internet traffic.

3. Cooperation with Law Enforcement

Do the New Rules and Order Make Accommodations for Obligations of BIA Providers to Address the Needs for Emergency Communications or to Assist Law Enforcement?

Yes. The new rules make explicit that the rules are not to be construed to supersede any obligation or authorization that BIA providers have “to address the needs of emergency communications or law enforcement, public safety, or national security authorities” or to limit a BIA provider’s ability to do so (referred to as the “safety and security provision”). In short, the new rules and Order are not to be read to impede the ability of BIA providers to fully meet their obligations under the Communications Assistance for Law Enforcement Act, the Foreign Intelligence Surveillance Act, and the Electronic Communications Privacy Act. The Order also recognizes that a BIA provider, in connection with emergencies, may be required to make available guaranteed or prioritized access to the Internet for federal, state, local, and tribal public safety agencies and homeland security personnel, among other authorities.

Did the FCC Express Concerns about Guaranteed or Prioritized Access to the Internet for Law Enforcement Authorities and Emergency Personnel?

Yes. The Commission cautioned that broadband providers should not “use the safety and security provision [of the rules] without the imprimatur of a law enforcement authority” or to “mask improper practices.” Thus, the Order stated that the application of the safety and security provision must be connected to an invocation by the governmental authority rather than a BIA’s provider’s independent decision that law enforcement requires guaranteed or prioritized access. However, the Commission also explained that “it would be a mistake to limit the [safety and security] rule to situations in which broadband providers have an obligation to assist safety and security personnel.” As an example of an invocation of the safety and security provision where there is not a legal obligation on the part of the BIA provider, the Commission referred to voluntary implementation of the Cellular Priority Access Service (Wireless Priority
Service) to prioritize public safety communications on wireless networks.

**Must a BIA Provider Obtain Commission Approval before Implementing Changes under the Safety and Security Provision?**

No. The Commission did note that the National Emergency Number Association encourages or even requires network managers to provide public safety users with advance notice of changes in network management which could affect emergency communications. More generally, the Commission encouraged (but did not require) BIA providers to be mindful of potential impacts to emergency communications when implementing network management policies and to coordinate, as appropriate, major changes with providers of emergency services.

**4. Addressing Unlawful Internet Activity**

**Did the Commission provide for Exceptions to Its Open Internet Rules When a BIA Provider Attempts to Address Unlawful Activity on Its Network?**

Yes, the Commission adopted a rule making clear that its open Internet rules do not prohibit “reasonable efforts by a provider of [BIA] to address copyright infringement and other unlawful activity.” The Commission explained in the Order that its open Internet rules should not be seen as a shield for unlawful activity or to deter expeditious measures against unlawful activity.

**Do the rules or Order impose an obligation on BIA providers to address copyright infringement or unlawful activity?**

No. The rules merely make clear that a BIA provider is not impeded by the new rules form taking voluntary or mandatory (from a source outside the new FCC rules) actions to address unlawful activity. As with invocation of the safety and security provision, however, we would suggest that this provision regarding efforts to address unlawful activity should not be used by BIA providers to “mask improper practices” under the open Internet rules.

**5. Enforcement of the Open Internet Rules**

**How Will the Open Internet Rules Be Enforced?**

The Commission’s rules and Order describe three principal avenues of case-by-case enforcement: informal complaints, formal complaints, and Commission-initiated proceedings. The Order adopted a special set of rules for formal complaints regarding the BIA rules.

**A. Informal Complaints**

**How Does the Informal Complaint Process Work?**

An informal complaint is sometimes a precursor to the filing of a formal complaint, but it is not a requirement. Any party with an interest in the enforcement of the Commission’s rules may file an informal complaint against a party it alleges has violated the rules. The requests must set forth the facts relied upon, the relief sought, the statutory and regulatory provisions pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the informal complaint. Upon receipt of the informal com-
plaint, the Commission staff will give the party against whom the informal complaint is made the opportunity to respond. The Commission will typically encourage the parties during the informal complaint process to reach a negotiated resolution.

**Does the Informal Complaint Process Involve Briefing or a Hearing?**

No. Typically, the informal complaint and the response are the only documents filed with the Commission. There is not a hearing and, in the vast majority of cases, the Commission will not issue an order. In some cases, an informal complaint may lead to Commission investigation or enforcement action. But in the majority of cases, historically, the informal complaint process ends with Commission staff issuing a statement to the parties that after reviewing the informal complaint and response, the staff did not find reason to initiate an investigation or enforcement action. The staff will invite the complainant to file a formal complaint if it wishes to pursue the matter further.

**B. Formal Complaints**

**Who may file a formal complaint against a BIA provider?**

Any person. While end users may file a complaint, so too may content and application and other edge-providers, watch-dog groups, and any other person and entity.

**How is the Formal Complaint Process Initiated?**

Before a party can file an informal complaint against a BIA provider under the new formal complaint rules, it must first notify the BIA provider in writing of its intention to file a complaint for violation of the open Internet rules. The notice must be detailed and explain the specific nature of the potential complaint. The notice must allow the BIA provider at least ten (10) calendar days to respond before the formal complaint can be filed. The principal purpose of the notice is to encourage the parties to reach a negotiated solution before the formal complaint is filed.

**If the Pre-Complaint Notice Does Not Result in a Resolution, What Is the Next Step?**

Once the time period for response in the written notice has passed, the person intending to file the complaint may do so. The Commission’s rules place strict guidelines on the content and service of a formal complaint. Briefly, everything concerning the claim must be included and explained fully and with specificity, supported by affidavits and all relevant documentation. Legal arguments must be set forth completely within the complaint itself as there may not be separate briefing of legal matters unless the Commission specifically requests it. The complainant bears the burden of proof in that the complaint must set forth facts and legal arguments sufficient to establish the case for an open Internet violation.

**Once the Formal Complaint Is Filed, What Is the BIA Provider’s Opportunity to Answer?**

Once the BIA provider is served with the complaint, it has twenty (20) calendar days to answer. As with the formal complaint, the Commission’s rules place strict guidelines on the content of the BIA provider’s answer. Briefly, the BIA provider must fully and completely give all defenses to the formal complaint and respond specifically – by admitting or denying – to each material allegation of fact and law in the complaint. The facts
alleged in the answer must be supported by affidavit or documentation. The burden of the BIA provider is to furnish supported facts and make legal argument demonstrating that the practice is not a violation of the rules, for example by showing that the practice is reasonable network management.

Failure to answer within twenty days of receiving the complaint may result in a default judgment against the BIA provider.

**Does the Complainant Have the Opportunity to Reply to the Answer?**

Yes. The reply must be limited to matters contained in the answer, absent Commission permission. The reply must be filed within ten (10) days after the answer is submitted. Failure to file a reply will have no adverse impact on the complainant, with the exception of affirmative defenses set forth in the answer, which will be treated as admitted if there is not a reply.

**What Further Procedures Are There in the Formal Complaint Process?**

The Commission retains the discretion to move to a decision after consideration of the complaint, answer, and reply (if any). The rules provide for the Commission, in its discretion, to allow for other motions or pleadings by the parties, but notes that such motions and pleadings will require a showing of "extraordinary circumstances." Other procedures the Commission may specify, as it deems appropriate, are limited discovery, oral argument, an evidentiary hearing, and briefs. The Commission may also consider whether temporary relief is appropriate while the formal complaint is pending based on the complaint, answer, and reply (if any). Finally, the Commission, on its own motion or at the request of a party after the complaint is filed, may direct attorneys and/or the parties to appear for a conference to consider simplifying or narrowing issues, obtaining admissions or stipulations of fact, settlement, the use of the discretionary procedures described above, and other matters that may aid in the resolution of the complaint.

Since the rules have not yet taken effect, it is too early to tell with what frequency the Commission will use these additional procedures to help resolve complaints brought under the open Internet rules.

**Do the Rules Provide a Means for Protecting Confidential Information?**

Yes. In the course of a formal complaint proceeding, a party may designate materials it files as proprietary that it believes falls within an exemption to disclosure under the Freedom of Information Act. The Commission’s rules provide specific direction regarding submissions of material parties wish to be treated as proprietary and not subject to public disclosure, use of such material by the Commission and the non-producing party(ies) during the formal complaint proceedings, and disposition of such material at the end of the proceeding.

**C. Commission-Initiated Proceedings**

**Will the Commission Rely Solely on Informal and Formal Complaints to Enforce the Rules?**

No. The Commission has made clear that it will use its authority to initiate on its own motion investigations and enforcement actions. In some cases, the Commission may act on the basis of informal complaints that have been received, especially if it observes trends or patterns
in informal complaints that identify potential targets for enforcement, which is similar to its enforcement activity in other contexts.

**How Might Such FCC-Initiated Activity Commence?**

The Commission staff might serve a letter of inquiry on a BIA provider to gather more information regarding suspected violations engaged in by the BIA provider. Following the responses to the letter of inquiry, the FCC may conclude there is a sufficient basis to proceed to a formal enforcement action and issue a Notice of Apparent Liability (“NAL”), giving the BIA provider notice of the violations the Commission believes have occurred and tentatively concluding that specific monetary forfeiture amounts should be paid by the BIA provider. Alternatively, if the Commission has reason to believe it has sufficient evidence to proceed without having first serving a letter of inquiry on the BIA provider, the FCC may move directly to an NAL.

Following the party’s response to the NAL, the Commission will consider the record and proceed to a decision. We would expect that, in the case of the open Internet rules, the Commission will impose compliance program obligations on BIA providers found to have violated the rules in addition to imposing monetary forfeitures.

**Can a Party Negotiate with the Commission if it Receives a Letter of Inquiry or an NAL?**

Yes. Historically, the Commission staff has welcomed the opportunity to negotiate a consent decree with those parties that have allegedly violated the Commission’s rules. Such negotiations in many cases have the prospect of leading to reduced fines than those which often result from fighting the NAL without trying to reach a negotiated resolution. A negotiated consent decree may also contain more favorable compliance provisions than an order following an NAL.

Of course, depending on the alleged violation and the facts, it may be more advisable to fight an NAL rather than to enter into a consent decree. We recommend that any BIA provider that receives a letter of inquiry or an NAL consult with counsel regarding an appropriate strategy.

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We at Kelley Drye hope that you find this practical look at the new open Internet rules useful. If you have additional questions, or wish to discuss any of the material herein further, we invite you to contact one of your usual attorney contacts at Kelley Drye.