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Summary of Net Neutrality Rules

On March 12, 2015, the FCC released its so-called Net Neutrality Rules, which govern the provision of fixed and mobile broadband Internet access service ("BIAS"). The FCC's highly contested March 12th Order and new rules implementing a "light-touch regulatory framework" are over 300 pages, and subject BIAS providers to Title II regulation. Although the FCC declined to apply 30 statutory provisions and over 700 codified rules (so called forbearance), violations of the new rules "will be subject to any and all penalties authorized under the Communications Act and rules." The FCC claims that the new rules are necessary to preserve an open Internet, citing past instances of abuse exemplifying broadband providers' "incentives and ability to engage in practices that pose a threat to Internet Openness". Many critics argue that the new rules are a bad solution in search of a problem, and that they will stifle competition, growth and investment.

Specifically, the FCC defined BIAS as a "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but

excluding dial-up Internet access service." BIAS does not include enterprise services, virtual private network services, hosting, data storage services, or Internet backbone services.

The FCC found that BIAS is a "telecommunications service" and subject to Sections 201, 202, and 208 of the Communications Act. Commercial arrangements for the exchange of traffic with a BIAS provider "are within the scope of Title II" and the FCC will hear disputes on a case-by-case basis.

The new rules ban blocking, throttling and paid prioritization, and will be administered on a case-by-case basis. Under the new rules, BIAS providers can't:

- Block lawful content, applications, services or non-harmful devices, subject to "reasonable network management";
- Impair or degrade lawful Internet traffic based on Internet content, application or service or use of a non-harmful device, subject to "reasonable network management" (*i.e.*, no throttling);
- Engage in paid prioritization (*i.e.*, no fast lanes); or
- Unreasonably interfere with or disadvantage (i) end users' access and use of BIAS or the lawful Internet content, applications, services or devices, or (ii) edge providers' ability to make lawful content, applications, services or devices available to end users, subject to "reasonable network management."

The FCC's 2010 transparency rule, which requires broadband Internet access service provider to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of broadband Internet access services, remains in effect.

The new rules define a "network management practice" as "a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."

By subjecting BIAS to Sections 201, 202 and 208 of the Communications Act, such service must be provided "upon reasonable request," BIAS charges, practices and classifications must be just and reasonable, and common carriers may not make any unjust and unreasonable discrimination in such

charges, practices and classifications. Violations are enforceable pursuant to the FCC's Section 208 complaint proceedings. Statutes that protect customer privacy, regulate pole attachments, advance access for persons with disabilities and foster network deployment also apply to BIAS.

Time will tell what these rules actually mean for BIAS providers and consumers, as the Commission addresses complaints on a case-by-case basis. Such broad and subjective terms as "legitimate network management purpose", "unreasonably interfere" and "unreasonably disadvantage" almost guarantee further questions, litigation and disputes. Perhaps that's why the FCC will entertain requests for advisory opinions relating to *prospective* or proposed conduct, make such advisory opinions available to the public, and periodically publish "enforcement advisories" to promote "legal certainty" regarding the new rules.

The more pressing and fundamental question is whether the new rules will survive further legal challenges. Last year the U.S. Court of Appeals for the D.C. Circuit in *Verizon v. Federal Communications Commission, et. al.*, No. 11-1355 (D.C. Cir. Jan. 14, 2014) vacated the FCC's anti-discrimination and the anti-blocking provisions of the FCC's net neutrality rules, finding that the FCC did not have authority to enact such regulations. The Court held that Section 706 of the Communications Act of 1996 vests the FCC with authority to "enact measures encouraging the deployment of broadband infrastructure" and that the FCC interpreted this statute "to promulgate rules governing broadband providers' treatment of Internet traffic." But the Court found that the Communications Act prohibits the FCC from regulating broadband providers as common carriers having "classified them as in a manner that exempts them from treatment as common carriers." That is, having previously exempted certain broadband providers as information service providers that are exempt from Title II common carrier obligations, the Court found that the FCC could not regulate them by imposing anti-discrimination and anti-blocking obligations on them. As the FCC explains in its March 12th Order, "absent a finding that broadband providers were providing a 'telecommunications service,' the D.C. Circuit's *Verizon* decision defined the bounds of the Commission's authority to adopt open Internet protections to those that do not amount to common carriage."

The FCC attempts to address the *Verizon* court's concerns by crafting rules that classify BIAS as a telecommunications service within the scope of Title II, while forbearing from applying many regulations to it. The FCC noted in its March 12th Order that "[c]hanged factual circumstances cause us to revise our earlier classification" of BIAS, including evolving business relationships among cable operators and their

service offerings, as well as a "rapidly changing market" for broadband Internet access services. The FCC also noted that mobile broadband networks are faster, more broadly deployed, more widely used and more technologically advanced than they were in 2010, and that network connection speed and data consumption have exploded. But do these and other changes justify such a broad change in classification, or are these rules merely a thinly-veiled response to the *Verizon* court remand and President Obama's Internet goals?

Are the new Net Neutrality Rules a good solution to a problem that needs to be fixed, or *are they* the problem? We welcome your thoughts.

If you have questions about this Net Neutrality update, or if we may otherwise be of assistance to you, please feel free to contact us.

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