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Small Entity Compliance Guide

Preserving the Open Internet; Broadband Industry Practices

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This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above-referenced FCC rulemaking docket(s). This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide may, perhaps, not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

1-888-CALL-FCC (1-888-225-5322)
TTY: 1-888-TELL-FCC (1-888-835-5322)
Fax: 202-418-0232
fccinfo@fcc.gov

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I. BACKGROUND

In 2009, the Commission launched a public process to determine whether and what actions might be necessary to preserve the characteristics that have allowed the Internet to grow into an indispensable platform supporting our nation's economy and civic life, and to foster continued investment in the physical networks that enable the Internet. These rules were developed following a public rulemaking process that included input from more than 100,000 individuals and organizations and several public workshops.

This process made clear that the Internet has thrived because of its freedom and openness—the absence of any gatekeeper blocking lawful uses of the network or picking winners and losers online. Consumers and innovators do not have to seek permission before they use the Internet to launch new technologies, start businesses, connect with friends, or share their views.

The Internet is a level playing field. Consumers can make their own choices about what applications and services to use and are free to decide what content they want to access, create, or share with others. This openness promotes competition. It also enables a self-reinforcing cycle of investment and innovation in which new uses of the network lead to increased adoption of broadband, which drives investment and improvements in the network itself, which in turn lead to further innovative uses of the network and further investment in content, applications, services, and devices. A core goal of the *Open Internet Order* is to foster and accelerate this cycle of investment and innovation.

The record and the Commission's economic analysis demonstrated, however, that the openness of the Internet cannot be taken for granted, and that it faces real threats. Broadband providers have endangered the Internet's openness by blocking or degrading content and applications without disclosing their practices to end users and edge providers (i.e., providers of content, applications, services, and devices), notwithstanding the Commission's adoption of open Internet principles in 2005. The record also established the widespread benefits of providing greater clarity in this area: clarity that the Internet's openness will continue; that there is a forum and procedure for resolving alleged open Internet violations; and that broadband providers may reasonably manage their networks. In light of these considerations, the Commission has long recognized that certain basic standards for broadband provider conduct are necessary to ensure the Internet's continued openness.

II. DEFINITIONS

- **Broadband Internet access service.** 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. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part. [47 C.F.R. § 8.11(a)]
- **Fixed broadband Internet access service.** A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services. [47 C.F.R. § 8.11(b)]
- **Mobile broadband Internet access service.** A broadband Internet access service that serves end users primarily using mobile stations. [47 C.F.R. § 8.11(c)]
- **Reasonable network management.** A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service. [47 C.F.R. § 8.11(d)]

III. OBJECTIVES OF THE PROCEEDING

The purpose of the *Open Internet Order* is to create a framework that aims to ensure the Internet will remain an open platform, characterized by free markets and free speech. The rules facilitate consumer choice, end-user control, competition through low barriers to entry, and the freedom to innovate without permission. [47 C.F.R. § 8.1]

The rules aim to ensure that Internet openness will continue, providing greater certainty to consumers, innovators, investors, and broadband providers, including the flexibility providers need to effectively manage their networks.

IV. RULES

➤ **Scope of the Rules**

The Open Internet rules apply to broadband Internet access services, including fixed services and mobile services. Because mobile broadband is at an earlier-stage platform than fixed broadband and is rapidly evolving, the Commission found it appropriate to apply only the transparency rule and part of the no blocking rule to providers of mobile broadband, as described in the next part below. [See also 47 C.F.R. §§ 8.3, 8.5, 8.7]

The term “broadband Internet access service” encompasses any service that the Commission finds to be providing a functional equivalent of the service as defined in our rules or that is used to evade the protections set forth in these rules. (See section II above; 47 C.F.R. § 8.11(a).) The rules do not apply to edge provider activities such as the provision of content or applications over the Internet. The rules also do not apply to coffee shops, bookstores, airlines, and other entities

when they acquire Internet service from a broadband provider to enable their patrons to access the Internet from their establishments. (*Open Internet Order* para. 52)

➤ **Transparency, No Blocking, and No Unreasonable Discrimination**

The three basic rules adopted by the Commission—which are grounded in broadly accepted Internet norms and prior Commission decisions—provide greater clarity and certainty regarding the continued freedom and openness of the Internet. Applied with the principle of reasonable network management, the rules empower and protect consumers and innovators while helping ensure that the Internet continues to flourish:

1. Transparency [47 C.F.R. § 8.3]

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

This rule applies to both fixed and mobile broadband Internet access providers.

2. No Blocking [47 C.F.R. § 8.5]

Fixed services: A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

Mobile services: A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

3. No Unreasonable Discrimination [47 C.F.R. § 8.7]

Fixed services: A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.

Mobile services: This rule does not apply to mobile services.

➤ **Reasonable Network Management**

In order to preserve an open, robust, and well-functioning Internet, broadband providers must have the flexibility to reasonably manage their networks. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

The rules against blocking and unreasonable discrimination are subject to reasonable network management, meaning that discrimination by a broadband provider that constitutes “reasonable network management” is “reasonable” discrimination.

Small entities are thus subject to the following reasonable management practice standards:

1. Broadband providers may employ network management practices that are appropriate and tailored to the network management purpose they seek to achieve, but they need not necessarily employ the most narrowly tailored practice theoretically available to them.
2. Legitimate network management purposes include:
 - Ensuring network security and integrity, including by addressing traffic that is harmful to the network;
 - Addressing traffic that is unwanted by end users (including by premise operators), such as by providing services or capabilities consistent with an end user’s choices regarding parental controls or security capabilities; and
 - Reducing or mitigating the effects of congestion on its network.
3. The rules do not impose affirmative obligations dealing with unlawful content or the unlawful transfer of content. A broadband provider is not prevented or restricted from refusing to transmit material such as child pornography.
4. The rules protect only devices that do not harm the network and only require fixed broadband service providers to allow devices that conform to publicly available industry standards applicable to the providers’ services.
5. The disclosure requirement does not require broadband providers to disclose competitively sensitive information or information that would undermine the efficacy of reasonable network management practices.

➤ **Specialized Services**

The rules do not prevent broadband providers from offering specialized services, such as facilities-based VoIP, which share capacity with broadband Internet access service over providers’ last-mile facilities. In the *Open Internet Order*, the Commission indicated that it would be concerned about any marketing, advertising, or other messaging by broadband providers suggesting that one or more specialized services, taken alone or together, and not provided in accordance with the open Internet rules, is “Internet” service or a substitute for broadband Internet access service. The Commission also promised to monitor the potential for anticompetitive or otherwise harmful effects from specialized services, including from any arrangements a broadband provider may seek to enter into with third parties to offer such services.

➤ **Other Laws and Considerations**

1. Emergency Communications and Law Enforcement, Public Safety, and National Security Authorities

The Open Internet rules do not supersede any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

2. Unlawful Transfers of Content

The Open Internet rules do not prohibit reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

Open Internet rules protect only *lawful* content, and are not intended to inhibit efforts by broadband providers to address unlawful transfers of content.

V. COMPLIANCE REQUIREMENTS

➤ **Reporting, Recordkeeping, and Other Transparency Requirements for Small Entities**

The transparency rule gives broadband providers some flexibility to determine what information to disclose and how to disclose it. The rule does not require public disclosure of competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices. The rule also does not require that providers bear the cost of printing and distributing bill inserts or other paper documents to all existing customers.

The *Open Internet Order* simply requires that broadband providers, 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 as well as to the Commission, and that they disclose relevant information at the point of sale. Effective disclosures include some or all of the following types of information:

1. Network Practices

Congestion Management. If applicable, descriptions of congestion management practices; types of traffic subject to practices; purposes served by practices; practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.

Application-Specific Behavior. If applicable, whether and why the provider blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not

prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications.

Device Attachment Rules. If applicable, any restrictions on the types of devices and any approval procedures for devices to connect to the network.

Security. If applicable, practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked (but excluding information that could reasonably be used to circumvent network security).

2. Performance Characteristics

Service Description. A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.

Impact of Specialized Services. If applicable, what specialized services, if any, are offered to end users, and whether and how any specialized services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.

3. Commercial Terms

Pricing. For example, monthly prices, usage-based fees, and fees for early termination or additional network services.

Privacy Policies. For example, whether 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.

Redress Options. Practices for resolving end-user and edge provider complaints and questions.

This list is not necessarily exhaustive, nor is it a safe harbor. There may be additional disclosures necessary for a particular broadband provider to comply with the rule in light of the relevant circumstances. The Commission anticipated that broadband providers may be able to satisfy the transparency rule through a single disclosure, and therefore did not require multiple disclosures targeted at different audiences. But the Commission expects that broadband providers will make disclosures in a manner accessible by people with disabilities.

➤ No Blocking

The no-blocking rule bars broadband providers from impairing or degrading particular content, applications, services, or non-harmful devices so as to render them effectively unusable (subject to reasonable network management). The Commission has recognized that in some circumstances the distinction between blocking and degrading (such as by delaying) traffic is merely “semantic.” Moreover, to the extent that a content, application, or service provider could avoid being blocked only by paying a fee, charging such a fee would not be permissible under these rules.

➤ **Unreasonable Discrimination**

Differential treatment of traffic is more likely to be reasonable the more transparent to the end user that treatment is.

Enabling end users to choose among different broadband offerings based on such factors as assured data rates and reliability, or to select quality-of-service enhancements on their own connections for traffic of their choosing, would be unlikely to violate the no unreasonable discrimination rule, provided the broadband provider's offerings were fully disclosed and were not harmful to competition or end users.

Differential treatment of traffic that does not discriminate among specific uses of the network or classes of uses is likely reasonable. For example, during periods of congestion a broadband provider could provide more bandwidth to subscribers that have used the network less over some preceding period of time than to heavier users. Use-agnostic discrimination (sometimes referred to as application-agnostic discrimination) is consistent with Internet openness because it does not interfere with end users' choices about which content, applications, services, or devices to use. Nor does it distort competition among edge providers.

The conformity or lack of conformity of a practice with best practices and technical standards adopted by open, broadly representative, and independent internet engineering, governance initiatives, or standards-setting organizations is another factor to be considered in evaluating reasonableness.

It is unlikely that pay for priority—a commercial arrangement between a broadband provider and a third party to directly or indirectly favor some traffic over other traffic in the broadband Internet access service connection to a subscriber of the broadband provider—would satisfy the “no unreasonable discrimination” standard.

VI. EFFECTIVE DATE

November 20, 2011.

VII. WEBLINKS

Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.