



Federal Communications Commission
Washington, D.C. 20554

March 11, 2016

DA 16-271

Small Entity Compliance Guide

Protecting and Promoting the Open Internet

FCC 15-24
GN Docket No. 14-28

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:

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I. BACKGROUND

On May 15, 2014, the Federal Communications Commission (Commission) issued the *Protecting and Promoting the Open Internet Notice of Proposed Rulemaking* to address the *Verizon* remand where the D.C. Circuit struck down the Commission’s 2010 Open Internet conduct rules prohibiting blocking and unreasonable discrimination. The Commission sought and received comment on the proper scope of the rules; the best ways to define, prevent, and treat violations of practices that may threaten an open Internet (including paid prioritization); enhancements to the transparency rule; and the appropriate source of legal authority to support new open Internet rules.

In February 2015, informed by the views of nearly 4 million commenters, staff-led roundtables, numerous *ex parte* presentations, meetings with individual Commissioners and staff, and more, the *2015 Open Internet Order (2015 Order)* put into place strong, sustainable rules to ensure that Americans reap the economic, social, and civic benefits of an open Internet. The overwhelming consensus in the record was that carefully-tailored rules to protect Internet openness will allow investment and innovation to continue to flourish. The Commission adopted rules to prevent specific practices it knows are harmful to Internet openness— blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness. The Commission also enhanced the transparency rule to ensure that consumers are fully informed as to whether the services they purchase are delivering what they expect.

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. § 8.2(a)]
- **Edge provider.** Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet. [47 C.F.R. § 8.2(b)]
- **End user.** Any individual or entity that uses a broadband Internet access service. [47 C.F.R. § 8.2(c)]
- **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. § 8.2(d)]

- **Mobile broadband Internet access service.** A broadband Internet access service that serves end users primarily using mobile stations. [47 C.F.R. § 8.2(e)]
- **Reasonable network management.** A network management practice is 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. [47 C.F.R. § 8.2(f)]

III. OBJECTIVES OF THE PROCEEDING

The purpose of the *2015 Order* is to protect and promote the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission, and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment. [47 C.F.R. § 8.1]

IV. RULES

- **No Blocking, No Throttling, No Paid Prioritization, and the No Unreasonable Interference/Disadvantage Standard**

In light of the *Verizon* remand and the absence of open Internet safeguards, the Commission in February 2015 reinstated strong, enforceable open Internet rules. As in 2010, the Commission believed that conduct-based rules targeting specific practices were necessary.

1. **No Blocking** [47 C.F.R. § 8.5]

A person engaged in the provision of 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.

2. **No Throttling** [47 C.F.R. § 8.7]

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

3. **No Paid Prioritization** [47 C.F.R. § 8.9]

(a) A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.

(b) “Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of

preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.

(c) The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.

4. No Unreasonable Interference or Unreasonable Disadvantage Standard for Internet Conduct [47 C.F.R. § 8.11]

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

➤ Transparency Requirements

1. The Transparency Rule

The Commission enhanced the *2010 Open Internet Order* transparency rule, which had been upheld by the court in its decision in 2014. The original rule, which the Commission reaffirmed, requires broadband Internet access service providers to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of their offerings sufficient for consumers to make informed choices. In the *2015 Order*, the Commission clarified that providers were required to disclose promotional rates, fees and surcharges, and data caps, as well as more detailed information about network performance.

While the *2015 Order's* bright line rules and general conduct standard went into effect earlier this year, the enhancements to the transparency rule are still pending approval from the Office of Management and Budget (OMB) because they were enhancements to an already existing rule.

2. Small Provider Exemption to the Transparency Rule

Broadband providers with 100,000 or fewer subscribers are exempt from the enhanced transparency requirements until December 15, 2016.

➤ Scope of the Rules

1. Broadband Internet Access Service

The open Internet rules adopted by the Commission apply to fixed and mobile broadband Internet access service. While the definition of broadband Internet access service encompasses arrangements for the exchange of Internet traffic, the open Internet rules do not apply to that portion of broadband Internet access service. [See also 47 C.F.R. §§ 8.5, 8.7, 8.9]

Broadband Internet access service continues to include services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite.

Broadband Internet access service encompasses all providers of broadband Internet access service, as we delineate them here, regardless of whether they lease or own the facilities used to provide the service.

2. Internet Traffic Exchange

The definition of broadband Internet access service includes the exchange of Internet traffic by an edge provider or an intermediary with the broadband provider's network. The Commission noted that anticompetitive and discriminatory practices in this portion of broadband Internet access service can have a deleterious effect on the open Internet, and will review practices on a case-by-case basis under sections 201 and 202 of the Communications Act of 1934, as amended (Act).

3. Non-BIAS Data Services

Non-BIAS data services, which are not subject to the conduct-based rules, may generally share the following characteristics. First, these services are not used to reach large parts of the Internet. Second, these services are not a generic platform—but rather a specific “application level” service. Third, these services use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services.

The Commission provided the following examples of services and characteristics of those services that, at this time, likely fit within the category of services, and thus are not subject to the conduct-based rules:

- Some broadband providers' existing facilities-based VoIP and Internet Protocol-video offerings.
- Connectivity bundled with e-readers, heart monitors, or energy consumption sensors would also be considered non-BIAS data services to the extent these services are provided by broadband providers over last-mile capacity shared with broadband Internet access service.
- Additional examples may include limited-purpose devices such as automobile telematics, and services that provide schools with curriculum-approved applications and content.

4. Reasonable Network Management

The *2015 Order* retains a reasonable network management exception to the no-blocking rule, the no-throttling rule, and the no-unreasonable interference/disadvantage standard to ensure that broadband providers can optimize overall network performance and maintain a consistent quality experience for consumers, while carrying a variety of traffic over their networks. To ensure that the reasonable network management exception will not be used to circumvent the open Internet rules, while still allowing broadband providers flexibility to experiment and innovate as they reasonably manage their networks, the Commission maintains a case-by-

case approach. Broadband providers may implement network management practices that are primarily used for, and tailored to, ensuring network security and integrity, including by addressing traffic that is harmful to the network, such as traffic that constitutes a denial-of-service attack on specific network infrastructure elements. Likewise, broadband providers may also implement network management practices that are primarily used for, and tailored to, addressing traffic that is unwanted by end users. Further, network management practices that alleviate congestion without regard to the source, destination, content, application, or service are also more likely to be considered reasonable network management practices in the context of this exception. In evaluating congestion management practices, a subset of network management practices, the Commission will also consider whether the practice is triggered only during times of congestion and whether it is based on a user's demand during the period of congestion.

➤ **Other Laws and Considerations**

1. Emergency Communications and Safety and Security Authorities

In the *2010 Open Internet Order* the Commission adopted a rule that acknowledges the ability of broadband providers to serve the needs of law enforcement and the needs of emergency communications and public safety, national, and homeland security authorities. This rule remains in effect today. To make clear that open Internet protections coexist with other legal frameworks governing the needs of safety and security authorities, the *2015 Order* retains this rule, which reads as follows:

Nothing in this part supersedes 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. Transfers of Unlawful Content and Unlawful Transfers of Content

The *2015 Order* again concludes that open Internet rules do not prohibit broadband providers from making reasonable efforts to address the transfer of unlawful content or unlawful transfers of content to ensure that open Internet rules are not used as a shield to enable unlawful activity or to deter prompt action against such activity. The *2015 Order* accordingly retains the Commission's rule from the *2010 Open Internet Order*:

Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

V. COMPLIANCE REQUIREMENTS

➤ **No Blocking, No Throttling, No Paid Prioritization, and the No Unreasonable Interference/Disadvantage Standard**

Below we briefly explain what the Commission's conduct-based rules require:

1. No Blocking

The no blocking rule prohibits broadband providers from blocking access to lawful Internet content, applications, services, and non-harmful devices. The rule does not prevent or restrict a broadband provider from refusing to transmit unlawful material, such as child pornography or copyright-infringing materials.

2. No Throttling

The no-throttling rule bans conduct that is not outright blocking, but inhibits the delivery of particular content, applications, or services, or particular classes of content, applications, or services. This prohibition includes, for example, any conduct by a broadband Internet access service provider that impairs, degrades, slows down, or renders effectively unusable particular content, services, applications, or devices, that is not reasonable network management. The no-throttling rule also addresses conduct that impairs or degrades content, applications, or services that might compete with a broadband provider's affiliated content. The rule does not address a practice of slowing down an end user's connection to the Internet based on a choice made by the end user, such as service tiers or data caps.

3. No Paid Prioritization

The no paid prioritization rule bans arrangements in which the broadband provider accepts consideration (monetary or otherwise) from a third party to manage the network in a manner that benefits particular content, applications, services, or devices. Paid prioritization refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management.

4. No Unreasonable Interference or Unreasonable Disadvantage Standard for Internet Conduct

This general conduct rule establishes that broadband providers shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. The Commission will follow a case-by-case approach, considering the totality of the circumstances, when analyzing whether conduct satisfies the no-unreasonable interference/disadvantage standard to protect the open Internet. The Commission discussed a non-exhaustive list of considerations used to make this determination: end-user control; competitive effects;

consumer protection; effect on innovation, investment, or broadband deployment; free expression; application agnostic; and, standard practices.

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

In the *2015 Order*, the Commission adopted enhancements to the existing transparency rule, which covers both content and format of disclosures by providers of broadband Internet access service. The enhanced transparency requirements serve the important function of providing critical information to serve end-user consumers, edge providers of broadband products and services, and the Internet community. The transparency rule requires that broadband providers, at a minimum, prominently display disclosures on a publicly available, easily accessible website 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. Whenever there is a material change in a provider's disclosure of commercial terms, network practices, or performance characteristics, the provider has a duty to update the disclosure.

Small providers are exempt from the *2015 Order's* enhanced transparency requirements until December 15, 2016.¹ This temporary exemption from the enhancements to the transparency rule applies to those providers of broadband Internet access service (whether fixed or mobile) with 100,000 or fewer broadband subscribers as per their most recent Form 477, aggregated over all the providers' affiliates. The enhancements to the transparency rule are still pending OMB approval, since they were enhancements to an already existing rule. Thus, at the time of release of this compliance guide, providers should continue to remain in compliance with our transparency rule from the *2010 Open Internet Order*.

VI. EFFECTIVE DATE

The Order became effective on June 12, 2015, except for the modified information collection requirements in paragraphs 164, 166, 167, 169, 173, 174, 179, 180, and 181 of document FCC 15-24, that are not effective until approved by the Office of Management and Budget (OMB).

VII. WEBLINKS

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

Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

¹ We note however, that the transparency rule has always required broadband providers to disclose information "sufficient for consumers to make informed choices," and that test could, in particular circumstances, include the enhancements that the Commission adopted. We also reiterate that under both the existing transparency rule and the enhancements adopted in the *2015 Order*, all disclosures that broadband providers make about their network practices, performance, and commercial terms of broadband services must be accurate and not misleading.