

**FCC FACT SHEET\***  
**Preventing Digital Discrimination**  
Notice of Proposed Rulemaking – GN Docket No. 22-69

**Background:** This *Notice of Proposed Rulemaking* would take the next step in the Commission’s efforts to promote equal access to broadband by seeking comment on potential rules to address digital discrimination of access to broadband internet access service. Equal access to high-quality, affordable broadband internet service is critical for everyone living in the Nation today; it serves as the backbone to many aspects of civic and commercial life. In March 2022, the Commission launched a broad inquiry on the direction in the Infrastructure Investment and Jobs Act that it facilitate equal access to broadband internet access service by preventing digital discrimination of access and identifying necessary steps for eliminating such discrimination. This *Notice of Proposed Rulemaking* would build on the robust comment offered by a broad array of stakeholders in response to that inquiry and seek further, focused comment on the statutory language and the proposals suggested in the record, toward a framework for facilitating equal access and combatting digital discrimination.

**What the Notice of Proposed Rulemaking Would Do:**

- The *Notice of Proposed Rulemaking* would propose to do following:
  - Adopt a definition of “digital discrimination of access” as that term is used in section 60506 of the Infrastructure Investment and Jobs Act;
  - Revise the Commission’s informal consumer complaint process to accept complaints of digital discrimination of access; and
  - Adopt model policies and best practices for states and localities combating digital discrimination.
- The *Notice of Proposed Rulemaking* would seek comment on the following:
  - Further details of the definition of “digital discrimination of access,” including its scope and the appropriate legal standard;
  - Rules the Commission should adopt to facilitate equal access and combat digital discrimination, including a broad prohibition on digital discrimination, affirmative obligations on providers of broadband internet access service, and action on targeted issues; and
  - The legal authority for adopted rules.

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\* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in GN Docket No. 22-69, which may be accessed via the Electronic Comment Filing System (<http://www.fcc.gov/ecfs>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s Meeting. See 47 CFR § 1.1200 *et seq.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementing the Infrastructure Investment and
Jobs Act: Prevention and Elimination of Digital
Discrimination
GN Docket No. 22-69

NOTICE OF PROPOSED RULEMAKING\*

Adopted: []

Released: []

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission:

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\* This document has been circulated for tentative consideration by the Commission at its December open meeting. The issues referenced in this document and the Commission’s ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairwoman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

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## I. INTRODUCTION

1. Today we take the next step in our efforts to promote equal access to broadband for all people of the United States by seeking comment on potential rules to address digital discrimination of access to broadband internet access service. Equal access to high-quality, affordable broadband internet service is critical for everyone living in the Nation, as we increasingly rely on broadband for work and education, healthcare and entertainment, and to stay connected with friends and family. As the broadband networks we depend on have become the backbone to many aspects of civic and commercial life, everyone needs access to robust, high-speed internet.

2. In this proceeding, we seek to identify and address the harms experienced by historically excluded and marginalized communities; provide a grounding for meaningful policy reforms and systems improvements; and establish a framework for collaborative action to promote and facilitate digital opportunity for everyone. These goals follow express Congressional direction in section 60506 of the Infrastructure Investment and Jobs Act (Infrastructure Act) to “ensure that all people of the United States benefit from equal access to broadband,” including by preventing and identifying steps to eliminate “digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.”<sup>1</sup> In March of this year, we launched a broad inquiry on how to construe the language in section 60506. In response, we received input from a broad array of stakeholders. We now seek further, focused comment on the statutory language and the proposals suggested in the record, as we create a framework for addressing digital discrimination.

## II. BACKGROUND

3. On November 15, 2021, President Biden signed the Infrastructure Act into law. Among other provisions regarding broadband infrastructure, section 60506 of that Act set forth various requirements for the prevention and elimination of digital discrimination.<sup>2</sup> Defining “equal access” as “the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions,”<sup>3</sup> section 60506 requires the Commission to adopt rules not later than two years after enactment “to facilitate equal access to broadband internet access service.”<sup>4</sup> In satisfying that obligation, section 60506 requires us to consider “the issues of technical and economic feasibility presented by that objective”<sup>5</sup> and directs our rules be aimed at “(1) preventing digital discrimination of access based on income level, race,

<sup>1</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, § 60506 (2021) (codified at 47 U.S.C. § 1754) (Infrastructure Act).

<sup>2</sup> 47 U.S.C. § 1754.

<sup>3</sup> 47 U.S.C. § 1754(a)(2).

<sup>4</sup> 47 U.S.C. § 1754(b). The Infrastructure Act defines “broadband internet access service” for section 60506 and the remainder of Title V as having “the meaning given the term in section 8.1(b) of [the Commission’s rules], or any successor regulation.” *See* Infrastructure Act § 60501(1); *see also* 47 CFR § 8.1(b) (defining broadband internet access service 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. 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.”). In this Notice, we use the terms “broadband” and “broadband internet access service” interchangeably.

<sup>5</sup> 47 U.S.C. § 1754(b).

ethnicity, color, religion or national origin; and (2) identifying necessary steps for the Commission[] to take to eliminate discrimination described in paragraph (1).”<sup>6</sup> Section 60506 further directs the Commission to collaborate with the Attorney General to ensure that “[f]ederal policies promote equal access to robust broadband internet access service by prohibiting deployment discrimination”;<sup>7</sup> to develop “model policies and best practices that can be adopted by States and localities to ensure that broadband internet access service providers do not engage in digital discrimination”;<sup>8</sup> and to revise our “public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination.”<sup>9</sup>

4. *Pre-Existing Commission Authority to Address Discrimination and Promote Access.* Section 60506 follows other authority granted to the Commission to address discrimination. Section 1 of the Communications Act of 1934, as amended (the Communications Act), codifies as one of the core purposes of the Commission “to make available, so far as possible,” a “rapid, efficient, Nation-wide” wire and radio communication service with adequate facilities “to all of the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.”<sup>10</sup> The Communications Act also includes authority in section 202(a) to prohibit unjust or unreasonable discrimination by common carriers in charges, practices, classifications, or regulations in connection with like communications services.<sup>11</sup> The Universal Service provisions of section 254 promote access to telecommunications and information services for “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas.”<sup>12</sup> And section 706 of the Communications Act requires the Commission to conduct regular inquiries as to whether “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”<sup>13</sup>

5. *Commission Efforts to Bridge the Digital Divide.* Our work to implement section 60506 complements and builds upon a robust history of Commission efforts to bridge the digital divide. The Commission has long used its Universal Service programs to promote access to telecommunications services and advanced information services at just and reasonable rates for all.<sup>14</sup> These programs help deliver broadband services to low-income consumers and to unserved and underserved communities in rural and insular areas, and provide support in various ways: one offers low-income consumers discounts on voice service or broadband internet access service; others provide funding to eligible schools and libraries for affordable broadband services to help connect students and members of local communities or provide funding for health care providers to ensure that patients have access to broadband enabled healthcare services; and, because some areas may lack network infrastructure, one program offers subsidies to providers to build out and deploy broadband networks.<sup>15</sup> Since 2020, the Commission also has received Congressional appropriations to establish the Emergency Broadband Benefit (EEB) Program

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<sup>6</sup> 47 U.S.C. § 1754(b)(1)-(2).

<sup>7</sup> 47 U.S.C. § 1754(c).

<sup>8</sup> 47 U.S.C. § 1754(d).

<sup>9</sup> 47 U.S.C. § 1754(e).

<sup>10</sup> 47 U.S.C. § 151.

<sup>11</sup> 47 U.S.C. § 202(a).

<sup>12</sup> 47 U.S.C. § 254(b)(3).

<sup>13</sup> 47 U.S.C. § 1302(a).

<sup>14</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*). The Universal Service programs include the Lifeline Program, the High Cost Program, the Rural Health Care Program, and the E-Rate Program.

<sup>15</sup> See *Report on the Future of the Universal Service Fund*, WC Docket No. 21-476, Notice of Inquiry, FCC 21-127, at 13-18, paras. 30-43 (Dec. 15, 2021) (describing the various Universal Service programs).

and its successor, the Affordable Connectivity Program (ACP), which provides monthly discounts for broadband services and connected devices for qualifying households;<sup>16</sup> and the Emergency Connectivity Fund (ECF)<sup>17</sup> and COVID-19 Telehealth Programs,<sup>18</sup> which have, respectively, provided funding to eligible schools and libraries for broadband services and connected devices for use by students, school staff, or library patrons and health care providers for telecommunications services, information services and connected devices.<sup>19</sup> The Emergency Broadband Benefit and Affordable Connectivity Programs alone have helped provide affordable broadband to more than 15 million qualifying households.<sup>20</sup>

6. We have also explored and taken action on issues that may uniquely impact broadband service in underserved communities. In March 2021, the Public Safety and Homeland Security Bureau refreshed the record in a proceeding regarding network resiliency during disasters, including in communities with vulnerable populations.<sup>21</sup> In February of this year, we adopted rules addressing certain practices in apartments, public housing, office buildings, and other multi-tenant buildings that limit competition for broadband service in those buildings.<sup>22</sup> And in March of this year, the FCC released its Strategic Plan which reflects goals to help bring affordable, reliable, high-speed broadband to 100 percent of the country<sup>23</sup> and to gain a deeper understanding of how our rules, policies, and programs may promote or inhibit advances in diversity, equity, inclusion, and accessibility.<sup>24</sup>

7. *Communications Equity and Diversity Council.* On June 29, 2021, the Commission chartered the Communications Equity and Diversity Council (CEDC).<sup>25</sup> The mission of the CEDC is to present recommendations to the Commission on “advancing equity in the provision of and access to digital communication services and products for all people of the United States, without discrimination on the basis of race, color, religion, national origin, sex, or disability.”<sup>26</sup> The Commission has appointed

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<sup>16</sup> See *Affordable Connectivity Program Emergency Broadband Benefit Program*, WC Docket Nos. 21-450 and 20-445, Report and Order and Further Notice of Proposed Rulemaking, FCC 22-2, at 2-3, paras. 1-3 (Jan. 14, 2022) (establishing the Affordable Connectivity Program, which is the successor program to the Emergency Broadband Benefit Program).

<sup>17</sup> See *Establishing Emergency Connectivity Fund to Close the Homework Gap*, WC Docket No. 21-93, Report and Order, 36 FCC Rcd 8696, 8697-98, paras. 3-4 (2021) (*Emergency Connectivity Fund Order*).

<sup>18</sup> See *Promoting Telehealth for Low-Income Consumers; COVID-19 Telehealth Program*, WC Docket Nos. 18-213 and 20-89, Report and Order, 35 FCC Rcd 3366 (2020).

<sup>19</sup> See *COVID-19 Telehealth Program*, WC Docket Nos. 18-213 and 20-89, Report and Order and Order on Reconsideration, 36 FCC Rcd 7141 (2021); see also *Emergency Connectivity Fund Order*, 36 FCC Rcd at 8697-98, paras. 3-4 (establishing ECF program).

<sup>20</sup> USAC, *ACP Enrollment and Claims Tracker*, <https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker/> (last visited Nov. 29, 2022).

<sup>21</sup> *Public Safety and Homeland Security Bureau Seeks Comment on Wireless Service Providers' Safety Measures for Their Customers During Disasters in Connection with the Consolidated Appropriations Act of 2021*, PS Docket No. 11-60, Public Notice, 36 FCC Rcd 5944, 5945 (PSHSB 2021) (seeking comment on efforts by wireless mobile providers to communicate disaster-related information with “individuals who are low-income, members of the disabilities community, or non-English speaking”).

<sup>22</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Report and Order and Declaratory Ruling, FCC 22-12 (WCB Feb. 11, 2022).

<sup>23</sup> See FCC, *Strategic Plan 2022-2026 at 1* (2022), <https://www.fcc.gov/document/strategic-plan-2022-2026>.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> In chartering the CEDC, the Commission renewed the charter of the Advisory Committee on Diversity and Digital Empowerment under a new name. *FCC Seeks Nominations for Membership on Communications Equity and Diversity Council*, Public Notice, 36 FCC Rcd 10391 (MB 2021).

<sup>26</sup> *Id.*

distinguished leaders from community, industry and governmental organizations as members of the CEDC and its three working groups: the Digital Empowerment and Inclusion Working Group, tasked with “making recommendations for addressing digital redlining and other barriers that impact equitable access to emerging technology in under-served and under-connected communities”;<sup>27</sup> the Innovation and Access Working Group, tasked with “recommending solutions to reduce entry barriers and encourage ownership and management of media, digital, communications services and next-generation technology properties, and start-ups to encourage viewpoint diversity by a broad range of voices”;<sup>28</sup> and the Diversity and Equity Working Group, tasked with “examining how the FCC can affirmatively advance equity, civil rights, racial justice, and equal opportunity in the telecommunications industry to address inequalities in workplace employment policies and programs.”<sup>29</sup>

8. The CEDC and its working groups have taken significant steps toward executing their charges over the past 17 months. The CEDC has held five public meetings, including one on September 22, 2022, when the Innovation and Access Working Group hosted a Digital Skills Gap Symposium & Town Hall to examine the issues and challenges that states and localities face in addressing the need for greater digital skills training.<sup>30</sup> And on November 7, 2022, the CEDC adopted a report titled “Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity,” including a portion developed by the Digital Empowerment and Inclusion Working Group recommending both (1) model policies and best practices to prevent digital discrimination by broadband providers, and (2) best practices to advance digital equity for states and localities.<sup>31</sup>

9. *Task Force to Prevent Digital Discrimination.* On February 8, 2022, Chairwoman Rosenworcel announced the formation of the cross-agency Task Force to Prevent Digital Discrimination.<sup>32</sup> The Task Force is focused “on creating rules and policies to combat digital discrimination and to promote equal access to broadband across the country, regardless of zip code, income level, ethnicity, race, religion, or national origin.”<sup>33</sup> Since its inception, the Task Force has facilitated coordination among the Bureaus and Offices regarding this proceeding, advised the Commission on matters regarding combating digital discrimination, and met with interested stakeholders. In November of this year, Task Force leadership held listening sessions with a broad array of advocates to hear diverse perspectives on this proceeding.<sup>34</sup>

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<sup>27</sup> *FCC Announces Working Group Members of the Communications Equity and Diversity Council*, Public Notice, DA 22-41 (MB Jan. 13, 2022).

<sup>28</sup> *FCC Announces Revised Agenda for July 22, 2022 Communications Equity and Diversity Council Meeting*, Public Notice, DA 22-790 (MB July 22, 2022).

<sup>29</sup> *Id.*

<sup>30</sup> *Media Bureau Releases Agenda for September 22, 2022, Symposium and Town Hall on Digital Skills Gap*, GN Docket No. 17-208, Public Notice, DA 22-980 (MB Sept. 20, 2022).

<sup>31</sup> Communications Equity and Diversity Council, *Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity at 12* (2022), <https://www.fcc.gov/sites/default/files/cedc-digital-discrimination-report-110722.pdf>. The report also includes a portion developed the Innovation and Access Working Group, providing recommendations on contracting and grants for small and diverse businesses, and a portion developed by the Diversity and Equity Working Group, providing recommendations on digital discrimination and inclusive populations. The report is attached as Appendix B.

<sup>32</sup> Press Release, FCC, Chairwoman Rosenworcel Announces Cross-Agency Task Force to Prevent Digital Discrimination (Feb. 8, 2022), <https://docs.fcc.gov/public/attachments/DOC-380060A1.pdf>.

<sup>33</sup> *Id.*

<sup>34</sup> *See, e.g.*, FCC Consumer and Governmental Affairs Bureau, Transcript, GN Docket No. 22-69 (rec. Nov. 9, 2022) (Task Force to Prevent Digital Discrimination Listening Session Transcript); *see also* Letter from Jonathan Walter, Media & Democracy Program Fellow, Common Cause, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69, at 2 (filed Nov. 7, 2022) (Common Cause et al. Nov. 7 *Ex Parte*); Letter from Ryan Johnston, Senior Policy

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10. *Notice of Inquiry*. In March 2022, we released a *Notice of Inquiry* commencing this proceeding and seeking broad comment on the statutory language and rules we should adopt consistent with Congressional direction.<sup>35</sup> In response, we received substantial comment on these issues from a range of stakeholders representing interests from the civil rights community, state and local governments, and broadband service providers of various sizes, technologies, and business models. The record reflects diverse perspectives on the nature and causes of digital discrimination of access, how to construe section 60506 and the authority it offers us, and the steps we should take to fulfill the Infrastructure Act’s direction.

### III. DISCUSSION

11. In light of this record, we now seek further, focused comment on the rules we should adopt to fulfill the Congressional direction in section 60506 to facilitate equal access to broadband internet access service and prevent digital discrimination of access. We first propose and seek comment on possible definitions of “digital discrimination of access” as used in the Infrastructure Act.<sup>36</sup> We next propose to revise our informal consumer complaint process to accept complaints of digital discrimination. We seek comment on the rule or rules we should adopt to prevent digital discrimination of access, as required by Congress. And we propose to adopt model policies and best practices for states and localities combating digital discrimination based on the CEDC recommendations.<sup>37</sup>

#### A. Defining “Digital Discrimination of Access”

12. We propose to adopt a definition of “digital discrimination of access” that encompasses actions or omissions by a provider that differentially impact consumers’ access to broadband internet access service, and where the actions or omissions are not justified on grounds of technical and/or economic infeasibility.<sup>38</sup> We seek comment on whether this definitional approach should depend on whether, and for what reason(s), the provider intended to discriminate on the basis of a protected characteristic. We therefore propose to define “digital discrimination of access,” for purposes of this proceeding, as one or a combination of the following: (1) “policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers’ access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin”; and/or (2) “policies or practices, not justified by genuine issues of technical or economic feasibility, that are intended to differentially impact consumers’ access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin.”<sup>39</sup> We believe that this approach represents a plausible interpretation of “digital discrimination of access” as the term is used in the Infrastructure Act. We seek comment on this proposal, and we seek further comment on the details of this definition.

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Counsel, Next Century Cities, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69, at 1 (filed Nov. 7, 2022); Letter from Alisa Valentin, Senior Director of the Washington Bureau, National Urban League, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69, at 2 (filed Nov. 6, 2022).

<sup>35</sup> *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Inquiry, FCC 22-21, at 1-2, para. 2 (2022) (*Notice of Inquiry*).

<sup>36</sup> See 47 U.S.C. § 1754(b)(1) (establishing that one aspect of “facilitat[ing] equal access” is “preventing digital discrimination of access based on income level, race, ethnicity, color, religion or national origin.”).

<sup>37</sup> For purposes of this Notice, the term “localities” includes Tribal governments.

<sup>38</sup> 47 U.S.C. § 1754(b) (requiring the Commission to “adopt final rules to facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility presented by that objective . . .”).

<sup>39</sup> We further explore the nuances and possible meaning of the components our proposed definitions in Part III.A.2 of this Notice. See *infra* Part III.A.2.

13. We seek comment on whether this definitional approach represents the best way to interpret digital discrimination of access under the statute. Should the definition focus on the provider's actions or omissions as represented by its policies and practices, or should we adopt another approach? Should the definition exclude those actions or omissions that are justified by issues of technical and economic feasibility? Is there another definitional approach that would be more practical or implementable? Does our proposed approach align with the concept of digital discrimination in section 60506 and allow us to fulfill the goals of that section? Would a different definition for "digital discrimination of access," including suggestions in the record, better interpret digital discrimination under the statute?<sup>40</sup> Does the statutory use of the statutorily-defined term "equal access" separate from the statutorily-undefined term "digital discrimination of access" counsel any particular approach?<sup>41</sup> We propose to define the term "digital discrimination of access" to give meaning to the full term used in subsection 60506(b)(1), and we seek comment on this proposal.<sup>42</sup> Is that the appropriate term in section 60506 to define, or should we instead define a different term, such as "digital discrimination"? What significance, if any, do the words "of access" hold? Should we consider any of the definitions of "digital discrimination" that the CEDC's Digital Empowerment and Inclusion Working Group compiled in its report on model policies and best practices for states and localities from interviews they conducted?<sup>43</sup> If so, how should we include that content in the definition?

### 1. Disparate Impact and Disparate Treatment

14. We seek comment on whether to adopt the definition of digital discrimination based on disparate impact (i.e., discriminatory effect), disparate treatment (i.e., discriminatory intent), or both. In response to the *Notice of Inquiry*, we received comments in support of each approach, including arguments that the language of section 60506 encourages or requires us to adopt one approach or the other. We now seek further comment on which approach (or combination of approaches) we should take and the legal support for each approach. Commenters in support of a disparate impact standard put forth a number of arguments to explain their view. For example, some commenters including the American Foundation for the Blind, Black Women's Roundtable, the Multicultural Media, Telecom and Internet Council, and Public Knowledge, urge the Commission to define digital discrimination as being based on disparate impact and argue that this is the only way to create an effective prohibition that captures discrimination as it happens in the real world.<sup>44</sup> In addition, commenters such as the National Digital

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<sup>40</sup> See, e.g., Electronic Frontier Foundation et al. Comments at 2, 4 (rec. May 16, 2022) (suggesting we define digital discrimination as "discriminatory infrastructure deployment choices made based on socio-economic status"); Lawyers' Committee for Civil Rights Under Law Comments at 25 (rec. May 16, 2022) (suggesting the Commission adopt a "comprehensive concept that refers to all practices by all entities that disrupt an individual's capacity to enjoy equal access—defined as comprehensively as possible—to broadband"); National Digital Inclusion Alliance Comments at 10 (rec. May 16, 2022) (suggesting we adopt a three-prong test to define digital discrimination).

<sup>41</sup> 47 U.S.C. § 1754(a)(2), (b)(2).

<sup>42</sup> 47 U.S.C. § 1754(b)(1).

<sup>43</sup> See Appx. C at 47.

<sup>44</sup> American Foundation for the Blind Comments at 2 (rec. May 16, 2022) (writing that "disability discrimination often occurs without intention of exclusion or through ignorance of best practices in accessibility," therefore the Foundation "support[s] an approach to digital discrimination that examines the impact of practices and policies on people's access to broadband . . . rather than an approach requiring proof of intentional exclusion."); Black Women's Roundtable Comments at 2-3 (rec. May 16, 2022) (asserting that inclusion of disparate impact is needed to capture "intended and unintended consequences that historical societal norms and industry decisions have had and continue to have on marginalized communities."); Multicultural Media, Telecom and Internet Council Comments at 14-15 (rec. May 16, 2022) (arguing that rules solely requiring discriminatory intent "would inherently fail to capture most of the discrimination that occurs in the modern age."); Public Knowledge Comments at 21-22 (rec. May 16, 2022) (arguing that a disparate impact framework would produce more effective and predictable results because a disparate impact analysis will make discrimination easier to identify and claims would not be reliant on hard-to-find

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Inclusion Alliance, the National Urban League, and representatives of several cities and counties across the country emphasize that facially neutral or even unintentional practices could still produce discriminatory effects and “the devastating consequences are much the same” as intentional discrimination.<sup>45</sup> Several commenters further argue that the language of section 60506 supports a disparate impact approach.<sup>46</sup>

15. Commenters favoring a definition requiring disparate treatment also offer a variety of arguments to support their view. Some commenters, such as ACA Connects, International Center for Law & Economics, AT&T, and the Wireless Internet Service Providers Association (WISPA), argue that even broadband deployment driven by legitimate business reasons might lead to uneven deployment, and that digital discrimination of access should not be understood to include such conduct.<sup>47</sup> AT&T and the U.S. Chamber of Commerce further assert that a rule defining digital discrimination based on disparate impact alone would chill broadband investment and harm competition.<sup>48</sup> CTIA maintains that an intent standard is most consistent with Congress’s and the Commission’s overall efforts to improve broadband access and affordability and the many challenges involved in broadband deployment.<sup>49</sup> Some commenters also argue that the language of section 60506 does not support a definition of digital discrimination that includes disparate impact.<sup>50</sup>

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or inconsistent evidence); Telecommunications for the Deaf and Hard of Hearing, Inc. et al. Reply at 12-13 (rec. June 30, 2022) (Accessibility Advocacy Organizations and Research Groups Reply).

<sup>45</sup> See National Digital Inclusion Alliance Comments at 10-11 (asserting that it is “irrelevant” whether broadband providers, “make intentional decisions to avoid low-income communities *because* they are low-income communities,” if the result is still that a low-income neighborhood pays the same price for worse broadband service); National Urban League Comments at 3 (rec. May 16, 2022) (writing that similar to the areas of housing, employment, and credit, digital discrimination, “[t]he outcomes of companies’ profit driven decision-making may negatively impact communities of color and low-income communities.”); Public Advocates Office at the California Public Utilities Commission Reply at 2-4 (rec. June 30, 2022) (writing that “outcomes matter more than intent,” and only a disparate impact standard will prevent and eliminate digital discrimination); see also New York City’s Office of Technology and Innovation Comments at 1-2 (rec. May 16, 2022) (City of New York Comments); The Utility Reform Network Comments at 19 (rec. May 16, 2022) (TURN Comments); Chicago et al. Reply at 12 (rec. June 30, 2022) (representing Chicago, Illinois; Boston, Massachusetts; Howard County, Maryland; Montgomery County, Maryland; and the Texas Coalition of Cities for Utility Issues) (Local Governments Reply).

<sup>46</sup> See Lawyers’ Committee for Civil Rights Under Law Comments at 25-28; Multicultural Media, Telecom and Internet Council Comments at 17-18.

<sup>47</sup> See ACA Connects Comments at 21-31, 33 (rec. May 16, 2022) (allowing claims of digital discrimination based on disparate impact would be “imprudent and unjustified” in light of the history broadband deployment in this country and the economic and legal incentives that already drive deployment decisions); AT&T Comments at 17 (rec. May 16, 2022) (claiming due to the rapid rate of technological innovation, providers cannot deploy and upgrade their networks all at the same time); International Center for Law & Economics Comments at 11 (rec. May 16, 2022) (writing that “there are very good reasons—not motivated by animus toward protected groups—for broadband to be deployed unevenly.”); Wireless Internet Service Providers Association Comments at 24 (rec. May 16, 2022) (asserting that “there are numerous perfectly legitimate business reasons for a service provider to deploy service in one area and not another, to have different rates, terms and conditions, or to delay network repairs or enhancements.”) (WISPA Comments).

<sup>48</sup> See AT&T Comments at 17; U.S. Chamber of Commerce Reply at 4 (rec. June 30, 2022).

<sup>49</sup> CTIA Reply 11-12 (rec. June 30, 2022) (writing that broadband, “deployment and affordability subsidies . . . are necessary precisely because the marketplace alone cannot reasonably be expected to yield fully equal treatment for all.”).

<sup>50</sup> See USTelecom Comments at 11-13 (rec. May 16, 2022) (also arguing that courts are “reluctant to expand disparate-impact liability beyond the context in which it arose: traditional civil rights statutes.”); see also AT&T

(continued....)

16. We seek further comment on this record and whether and how to incorporate disparate impact or disparate treatment in our definition, either independently or in some combined formulation, to best achieve the goal established by Congress in section 60506 to “facilitate equal access.”<sup>51</sup> Are some commenters’ assertions correct that the problem of digital discrimination is primarily one of disparate impact such that our efforts to “facilitate equal access” would fall far short if we focus solely on disparate treatment? Alternatively, would a definition centered on disparate impact chill investment and deployment? If so, why, and what is the likely scope of any disinvestment effect that considering disparate impact might cause, and would the harms of disinvestment (if any) outweigh the benefits of adopting such an approach, including but not limited to potentially greater access to broadband services? Would our consideration of disparate impact present practical challenges for entities subject to any rules we adopt or to victims of digital discrimination? Additionally, would considering disparate impact present practical administrative challenges for the Commission,<sup>52</sup> or would it be simpler to administer because the Commission would only need to analyze the effect of the particular action and its business justification, rather than trying to discern intent? If there are administrative or compliance burdens associated with a disparate impact approach, how might the Commission minimize those burdens to best achieve the statutory goal of facilitating equal access? Under a disparate treatment approach, by contrast, how difficult would it be to discern a broadband provider’s intent for particular service and deployment decisions? Are there circumstances in which an intentionally discriminatory policy or practice does not produce discriminatory effects? Should the Commission address such a practice in order to satisfy its mandate to “prevent[]” digital discrimination, regardless of its effects?<sup>53</sup>

17. Certain commenters also offer arguments in favor of each approach based on the statutory text of section 60506 and U.S. Supreme Court precedent. Some commenters argue that Supreme Court precedent in the *Inclusive Communities* decision, which concluded that the Fair Housing Act encompasses claims based on disparate impact, requires us to adopt a disparate treatment approach to implement section 60506,<sup>54</sup> while others argue that the same precedent requires us to adopt a disparate impact approach.<sup>55</sup> Some commenters further point to statutory language and context, separate from this precedent, as reasons for us to adopt each approach.

18. We first seek comment on whether the *Inclusive Communities* decision applies to our actions in this proceeding. As an initial matter, is this decision the controlling precedent under which we should consider this issue? Is there other judicial precedent we should consider, instead of or in addition to this decision, to guide our interpretation of section 60506? Are section 60506’s design and operative language sufficiently similar to the Fair Housing Act and the other civil rights statutes discussed in *Inclusive Communities* to make the Supreme Court’s textual analysis in that decision applicable to section 60506? Assuming that *Inclusive Communities* is binding or even helpful precedent for our task, we seek comment on the standard we should derive from the decision and apply to our analysis of section 60506. In the course of concluding that disparate impact claims are cognizable under the Fair Housing Act,<sup>56</sup> the

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Comments at 15-17; TechFreedom Comments at 14-15 (rec. May 16, 2022); Verizon Reply at 6 (rec. June 30, 2022).

<sup>51</sup> See 47 U.S.C. § 1754(b).

<sup>52</sup> See U.S. Chamber of Commerce Reply at 4 (arguing that applying a disparate impact standard would be “highly impractical for the Commission to administer”).

<sup>53</sup> 47 U.S.C. § 1754(b)(1).

<sup>54</sup> *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015); see Verizon Reply at 6; AT&T Comments at 15-17; TechFreedom Comments at 14-15; USTelecom Comments at 11-13.

<sup>55</sup> See Lawyers’ Committee for Civil Rights Under Law Comments at 25-28; Multicultural Media, Telecom and Internet Council Comments at 17-18.

<sup>56</sup> *Inclusive Communities*, 576 U.S. at 545-46.

Supreme Court stated that antidiscrimination laws should be interpreted to encompass disparate impact claims when (1) the statutory text refers “to the consequences of actions and not just to the mindset of actors,” and (2) “that interpretation is consistent with statutory purpose.”<sup>57</sup> Should we follow this two-pronged analysis? In its comments, Verizon frames its argument according to three “textual through-lines” it divines from the *Inclusive Communities* decision: (i) Congress’s use of the language “otherwise adversely affect” or “otherwise make unavailable”; (ii) the placement of these types of “catchall phrases looking to consequences” at the end of lengthy sentences that “begin with prohibitions on disparate treatment”; and (iii) the placement of this language in the operative text of the statute.<sup>58</sup> Should we understand this proposed framework to be a part of, or to supersede, the two-pronged test identified by the Supreme Court? Is the framing Verizon suggests unduly restrictive given the text of section 60506 and Congress’s overarching goal of ensuring ubiquitous access to broadband services across the United States?

19. We also seek comment on the view shared by Lawyers’ Committee for Civil Rights Under Law and the Multicultural Media, Telecom and Internet Council that the *Inclusive Communities* standard encourages us to read section 60506 as primarily addressing disparate impacts. These commenters first argue that section 60506 is focused on the consequences of actions and not the mindset of actors. They identify subsection 60506(a)—which states that it is the policy of the United States to ensure that all people “benefit from equal access to broadband”<sup>59</sup>—as operating to shift the statute’s focus to the consequences of actions rather than the intent of actors in the same way that the Supreme Court interpreted the term “otherwise” in the context of the Fair Housing Act.<sup>60</sup> Furthering this argument, the Multicultural Media, Telecom and Internet Council asserts that the definition of “equal access” in subsection 60506(a)(2) is focused on the impact of provider practices on a subscriber’s “equal opportunity to subscribe,” not on provider intent.<sup>61</sup> The Lawyers’ Committee for Civil Rights Under Law argues that subsection 60506(b)(2)—which directs the Commission to identify necessary steps to “eliminate discrimination” based on the statute’s listed categories<sup>62</sup>—similarly refers to consequences,<sup>63</sup> and that subsection 60506(c)(3), in allowing the Commission to prohibit discrimination based on “other factors [it] determines to be relevant”<sup>64</sup> contains the kind of “consequence-oriented catchall[]” that the Supreme Court has found instructive in determining the appropriateness of a disparate impact approach.<sup>65</sup> In this regard, it also argues that interpreting section 60506 to encompass disparate impact claims is consistent with the statutory purpose, satisfying the second prong of the *Inclusive Communities* inquiry, because the language of subsection 60506(a) evinces Congress’s “clear intent to create a world where all Americans

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<sup>57</sup> *Id.* at 533, 545-46 (finding that this standard follows from the majority holding in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and the plurality holding in *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005)).

<sup>58</sup> Verizon Reply at 6 (quoting *Inclusive Communities*, 576 U.S. at 530-547).

<sup>59</sup> 47 U.S.C. § 1754(a).

<sup>60</sup> See Multicultural Media, Telecom and Internet Council Comments at 17-18; see also Lawyers’ Committee for Civil Rights Under Law Comments at 26-27.

<sup>61</sup> Multicultural Media, Telecom and Internet Council Comments at 18.

<sup>62</sup> 47 U.S.C. § 1754(b)(2).

<sup>63</sup> See Lawyers’ Committee for Civil Rights Under Law Comments at 26-27.

<sup>64</sup> 47 U.S.C. § 1754(c)(3); Lawyers’ Committee for Civil Rights Under Law Comments at 26.

<sup>65</sup> Lawyers’ Committee for Civil Rights Under Law Comments at 26-27; see also *Inclusive Communities*, 576 U.S. at 534-35 (finding that the statutes at issue in all three cases, *Griggs*, *Smith*, and *Inclusive Communities*, involve “catchall phrases looking to consequences, not intent”).

can maintain equal access to broadband.”<sup>66</sup> We seek comment on these arguments and whether they should persuade us to adopt a definition of digital discrimination based on (or including) disparate impact.

20. We next seek comment on the view of Verizon, AT&T, and USTelecom, which all argue that *Inclusive Communities* should limit our definition of digital discrimination to include only intentionally discriminatory acts. Verizon argues that section 60506 lacks the key word “otherwise,” which the Supreme Court has noted signals a shift in the statutory language away from an actor’s intent to the consequences of the actor’s actions.<sup>67</sup> Verizon, contrary to the Lawyers’ Committee for Civil Rights Under Law’s argument, contends that the statute lacks the sort of “catchall” phrase the Court has previously used to identify statutes that allow for disparate impact claims or any “effects-based language.”<sup>68</sup> Instead, Verizon interprets Congress’s direction in subsection 60506(b)(1) as focused on the “motive” of the acting entity, not on whether the action results in disparate impact.<sup>69</sup> AT&T and USTelecom similarly argue that section 60506 lacks the phrases that the Court has previously found to support claims under a disparate impact analysis, and also assert that section 60506’s use of the phrase “based on” when formulating the prohibition “requires a showing of purposeful discrimination rather than incidental effects.”<sup>70</sup> And as a structural matter, AT&T asserts that subsection 60506(a) is only aspirational and the fact that subsections 60506(b) and (c) do not specifically refer to equal access “within any given provider’s service area,” implies that Congress did not intend to apply a disparate impact standard.<sup>71</sup> We seek comment on these arguments and whether they should persuade us to adopt a definition of digital discrimination based solely on disparate treatment.

21. We seek comment on various additional interpretative questions. Under Supreme Court precedent, a “business necessity” generally constitutes a defense to a discrimination claim that is based solely on disparate impact.<sup>72</sup> In directing the Commission to take into account “issues of technical and economic feasibility,” when adopting our rules, did Congress effectively build a business justification defense into section 60506?<sup>73</sup> If so, would this indicate that Congress intended for section 60506 to encompass claims of digital discrimination based on disparate impact? For commenters arguing that the statute only permits liability for intentional digital discrimination, how would the Commission account for technical and economic feasibility in that circumstance? Should we understand Congress to have intended to allow providers to justify intentional discrimination on the basis of technical and economic feasibility? Are there other examples commenters can provide of a statute only providing a business justification defense to a claim of intentional discrimination?

22. Some commenters argue that the Commission should adopt rules that encompass disparate impact claims because the statute does not specify that intent is a required element of digital discrimination,<sup>74</sup> and Congress has included such language in recent telecommunications related

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<sup>66</sup> Lawyers’ Committee for Civil Rights Under Law Comments at 27 (a dditionally referencing quotes on the importance of broadband access from Rep. James Clyburn and Rep. Steny Hoyer during House of Representatives debate on the Infrastructure Investment and Jobs Act.); *see also* 47 U.S.C. 1754(a).

<sup>67</sup> Verizon Reply at 6.

<sup>68</sup> *Id.* at 6-7.

<sup>69</sup> *See id.* at 6.

<sup>70</sup> AT&T Comments at 16 (arguing both sections 1754(b) and (c) “use a verbal formula that, as Congress knows, has been construed to prohibit only intentional discrimination.”); USTelecom Comments at 11-12.

<sup>71</sup> AT&T Comments at 16.

<sup>72</sup> *Inclusive Communities*, 576 U.S. at 531-33.

<sup>73</sup> 47 U.S.C. § 1754(b); *see infra* paras. 34-39.

<sup>74</sup> Electronic Frontier Foundation et al. Comments at 13; Common Cause et al. Reply at 7-8 (rec. June 30, 2022); *see also* Local Governments Reply at 11-13 (noting that in 2019, Congress amended the Telephone Consumer

consumer protection laws, thus indicating that Congress intended to not require discriminatory intent.<sup>75</sup> We seek comment on these views. We also seek comment on whether broadband providers are already subject to laws and regulations prohibiting intentional discrimination.<sup>76</sup> And if so, do such laws extend to the full scope of digital discrimination contemplated by section 60506? For example, do they apply only to cable franchises, and only to discrimination based on income? Do they apply only to common carriers with respect to common carrier services? Are there state or local laws that address digital discrimination that we should note? If broadband providers are already subject to laws of general applicability preventing intentional discrimination, does that suggest section 60506 includes instances of disparate impact? Or are there intentionally discriminatory practices our rules could capture that are not already prohibited by other laws and regulations? We seek comment on these differing perspectives.

23. We also seek comment on AT&T's structural argument that under a disparate impact approach, section 60506 would be on a "collision course" with the other broadband provisions of the Infrastructure Act.<sup>77</sup> AT&T warns that broadband deployment efforts funded through other provisions in the Infrastructure Act "might skew [a provider's] deployment ratios for households inside and outside of protected classes," and thus increase that provider's risk of liability under a rule that includes a disparate impact standard.<sup>78</sup> Do others agree with this assertion that there is a tension between a disparate impact approach and the Infrastructure Act's deployment objectives? If so, how could we structure our rules to mitigate these concerns? Would a prohibition focused solely on discriminatory intent fit within the Infrastructure Act's other broadband-related provisions better than a rule that includes disparate impact liability? ACA Connects argues that, in contrast to statutes like the Civil Rights Act of 1964, the Fair Housing Act, and the Equal Credit Act, there is no record of a history of discriminatory conduct in the telecommunications industry that could justify adoption of a disparate impact rule.<sup>79</sup> We seek comment on this reasoning. Is it accurate that those entities currently providing broadband services (or their predecessors) have no record of a history of discriminatory action? Would such a record be necessary to adopt rules to prohibit digital discrimination based on disparate impact liability?

24. We seek comment on whether the inclusion of income level as a listed characteristic should guide our understanding of whether the statute applies to claims of discrimination based on disparate impact or disparate treatment. CTIA contends that the inclusion of income level as a characteristic supports a rule based solely on discriminatory intent because it is a novel approach to antidiscrimination laws and claims of discrimination based on income level under a disparate impact analysis would conflict with subsection 60506(b)'s direction that our rules account for economic feasibility.<sup>80</sup> In contrast, Communications Workers of America, Common Cause et al., and the Leadership Conference on Civil and Human Rights all point to the inclusion of income level as an indication that Congress intended section 60506 to cover a wide range of practices, including those giving rise to disparate impact claims.<sup>81</sup> We seek further comment on this divided record. Is the inclusion of

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Protection Act (TCPA) to create a private right of action for violations that added additional damages for violations that were done willfully or knowingly).

<sup>75</sup> Local Governments Reply at 11-13.

<sup>76</sup> See ACA Connects Comments at 29 (noting that its members "are subject to various federal laws that prohibit them from discriminating against any consumer," and citing to 47 U.S.C. §§ 541(a)(3) and 202(a) as examples).

<sup>77</sup> See AT&T Comments at 18.

<sup>78</sup> *Id.*

<sup>79</sup> See ACA Connects Comments at 31-33.

<sup>80</sup> CTIA Reply at 12-13.

<sup>81</sup> Communications Workers of America Comments at 7 (rec. May 16, 2022); Leadership Conference on Civil and Human Rights Comments at 5 (rec. May 16, 2022); Common Cause et al. Reply at 8.

income level as a listed characteristic in an antidiscrimination statute novel on a federal and state level? If so, does that counsel in favor of adopting a definition based solely on disparate treatment, one based solely on disparate impact, or one based on some combination of the two? Furthermore, how does a consumer's income level, or the average income level of a geographical area, relate to economic feasibility in the deployment and provision of broadband internet access services?

## 2. Other Components of the Definition

25. We next seek comment on other components of our proposed definitions. We seek comment to drive our understanding of what services, entities, and practices should be within the scope of our definition; how and on what bases we should understand policies and practices to be justified by technical and economic considerations; who can be subject to digital discrimination; and how we should determine when digital discrimination has occurred. We seek comment on each issue in turn.

26. *Covered Services.* We first seek comment on the scope of services that individuals use when they experience digital discrimination of access. We seek to answer the following question: what services are consumers using if and when they encounter “policies or practices. . . that differentially impact [their] access to broadband internet access service”? Commenters to the *Notice of Inquiry* differ on whether we should extend our definition of “digital discrimination of access” to broadband internet service provided over a variety of technologies, both fixed and mobile,<sup>82</sup> other communications services,<sup>83</sup> and services delivered over broadband.<sup>84</sup> These commenters argue that consumers should not be excluded from enjoying certain civil rights protections by virtue of the service they are using,<sup>85</sup> and that some consumers and communities cannot enjoy the benefits broadband has to offer without having non-discriminatory access to services accessed over broadband.<sup>86</sup> By contrast, other commenters argue that services other than broadband are outside the scope of section 60506 and this proceeding.<sup>87</sup> In the proposed definitions of “digital discrimination of access,” we propose to limit our focus to broadband internet access service. We seek comment on what technologies our definition should include.

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<sup>82</sup> American Foundation for the Blind Comments at 2 (arguing our digital discrimination rules should apply to fixed and mobile service); National Digital Inclusion Alliance Comments at 13 (suggesting that our rules should cover “internet service, including. . . broadband [accessed] through digital subscriber line (DSL), cable modem, fiber, wireless, and satellite, and whether fixed or mobile”); AT&T Reply at 25-27 (rec. June 30, 2022) (explaining that “section 60506—the only topic of the Commission’s Notice—speaks only to broadband internet access service”).

<sup>83</sup> The Lawyers’ Committee for Civil Rights Under Law Comments at 34-37 (arguing that the Commission should use our authority under sections 201 and 202 of the Communications Act to issue rules providing that the types of discrimination prohibited in section 60506 of the Infrastructure Act “also constitute an unjust or unreasonable practice under Section 202(a) if similar acts are taken by a common carrier”); *but see* AT&T Reply at 25-27 (arguing that the Commission cannot rely on sections 202 and 214 of the Communications Act to require network build out under our digital discrimination rules, even for common carriers).

<sup>84</sup> American Foundation for the Blind Comments at 2 (arguing the Commission should apply our digital discrimination rules to “digital devices, applications], and any other touch points involved in accessing, acquiring, maintaining, and benefiting from digital services”); National Urban League Comments at 4; Lawyers’ Committee for Civil Rights Under Law Comments at 34-35.

<sup>85</sup> Lawyers’ Committee for Civil Rights Under Law Comments at 34-35.

<sup>86</sup> American Foundation for the Blind Comments at 2-3 (“We believe that the definition of digital discrimination should be interpreted broadly to include all of the digital access needs of people with disabilities[.] . . . It is the belief of the American Foundation for the Blind that people who are blind or have low vision cannot ‘benefit from equal access to broadband internet access service’ if the websites accessed through a broadband internet connection are inaccessible.”); National Urban League Comments at 4 (“Because discrimination holds back communities and the country economically and socially, it is necessary to redefine the problem and expand the scope of impact.”).

<sup>87</sup> AT&T Reply at 25-27.

27. We seek comment on the types of technologies over which broadband internet access service is provided and to which our rules should apply. The record reflects that providers can use various forms of technologies to provision broadband to consumers, including digital subscriber line (DSL), cable modem, fiber, wireless, and satellite.<sup>88</sup> Are these types of technologies correctly understood as the technologies over which broadband internet access service is provided, and are there any other types of technologies we should consider? Should we consider the upload and download speeds of the types of technologies that providers use to provision broadband service and, if so, how? Are there any unique considerations associated with different technologies we should take into account and, if so, how should we address them? Does the language of section 60506 in any way require us to include or exclude broadband provided over certain types of technologies?

28. We seek comment on including other services, such as other communications services and services delivered over broadband, into our definition. In order to achieve the policy that “subscribers should benefit from equal access to broadband internet access service,”<sup>89</sup> and fulfill our direction to “facilitate equal access to broadband internet access service,”<sup>90</sup> is it necessary that we include other services in our definition? How do other services relate to that goal? Or do commenters believe that section 60506’s focus on broadband internet access service reflects Congressional intent that other services not be included in our definition?<sup>91</sup> Are other services distinct from broadband internet access service in ways that would complicate analysis of the problem of digital discrimination if we include them? And would their inclusion complicate administration of and compliance with any rules we adopt under this definition? If we did include other communications services or services offered over broadband, what specific services should we include? Does section 60506 give us authority to include these types of services in our definition? If not, can we rely on other sources of authority to do so?<sup>92</sup> If we were to address discrimination issues regarding other services under other authority, would it be better to develop dedicated rules for those services? Should we, at minimum, include services we find to provide the functional equivalent of broadband internet access service?<sup>93</sup>

29. *Covered Entities.* We next seek comment on what types of entities should be covered by our definition of digital discrimination of access. We seek to answer the following question: *whose* “policies or practices . . . that differentially impact consumers’ access to broadband internet access service” should be covered by our definition? In the record developed in response to the *Notice of Inquiry*,<sup>94</sup> some commenters argue that we should extend our definition broadly beyond broadband providers to include entities working on a provider’s behalf;<sup>95</sup> those involved in any of the logistical steps to provide broadband, such as local and state governments and those who maintain network infrastructure;<sup>96</sup> and generally to “any entity that can affect” an individual’s ability to access or afford

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<sup>88</sup> See National Digital Inclusion Alliance Comments at 13.

<sup>89</sup> 47 U.S.C. § 1754(a)(1).

<sup>90</sup> 47 U.S.C. § 1754(b).

<sup>91</sup> 47 U.S.C. § 1754(a)(1), (a)(3), (b), (c), (d).

<sup>92</sup> See Lawyers’ Committee for Civil Rights Under Law Comments at 34-37.

<sup>93</sup> See 47 CFR § 8.1(b) (excluding dial-up internet access service from the definition of broadband internet access service, and including “any service that the Commission finds to be providing a functional equivalent of the service”).

<sup>94</sup> *Notice of Inquiry* at 11, para. 25.

<sup>95</sup> National Digital Inclusion Alliance Comments at 13.

<sup>96</sup> See, e.g., Multicultural Media, Telecom and Internet Council Comments at 7 (suggesting that internet service providers are not the only entities that can create barriers to equitable broadband access and that state and local governments can also perpetuate digital inequities through their practices and policy choices); TURN Comments at 21 (arguing that “these rules should apply to those doing the deployment of physical infrastructure, those providing

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broadband, such as a business owner or landlord.<sup>97</sup> These commenters note that actions by a variety of entities can differentially impact consumers' access to broadband and thus, to address digital discrimination as directed by Congress, we should include these types of entities within the scope of the rules we adopt.<sup>98</sup> By contrast, the National Multifamily Housing Council and the National Apartment Association assert that the statutory language limits our focus to broadband providers.<sup>99</sup>

30. We seek comment on whether we should understand “digital discrimination of access” to include policies or practices by a broader range of entities than broadband providers. Can entities other than broadband providers engage in or contribute to digital discrimination of access?<sup>100</sup> If so, what are those entities and can they all be covered by the rules we ultimately adopt in this proceeding? Are these types of entities different from broadband providers in ways that would complicate analysis of the problem of digital discrimination if we defined it to include them? And would their inclusion complicate administration of and compliance with any rules we adopt? Would covering a broader range of entities allow any rules we adopt to better adapt to changes in the provision of broadband or how digital discrimination occurs?<sup>101</sup> Should we instead understand our definition to include only broadband providers and those working on their behalf? How would we understand when an entity is working on behalf of a broadband provider? To the extent we include agents of broadband providers in our definition, what expectations and obligations should we place on agents who are simply executing at their principal's direction? If we limit our definition to include only broadband providers, would such an approach leave a loophole or be too narrow to allow us to fulfill our direction to “facilitate equal access to broadband internet access service”?<sup>102</sup> Do we have authority to extend our rules to entities other than broadband providers? Should the analysis of what constitutes digital discrimination of access differ as applied to broadband providers and their related entities on the one hand, and entities unrelated to broadband providers on the other? If we understood covered services to extend beyond broadband service, are there other considerations we should take into account regarding covered entities?

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the subscription service and those responsible for equipment/infrastructure maintenance” of broadband); *see also* CEO Action for Racial Equity Comments at 7 (rec. May 16, 2022).

<sup>97</sup> Common Cause et al. Reply at 7 (suggesting that the Commission equitably apply our digital discrimination requirements “to other entities with direct power over broadband access and affordability outside of broadband providers”); *see also* CEO Action for Racial Equity Comments at 7; Lawyers' Committee for Civil Rights Under Law Comments at 28-30, 34-37.

<sup>98</sup> *See, e.g.*, CEO Action for Racial Equity Comments at 7 (arguing that the Commission's rules must cover a broad scope of entities to adequately dissuade discriminatory practices “[b]ecause digital discrimination can be both a systemic issue and an individual actor issue”); Lawyers' Committee for Civil Rights Under Law Comments at 28-30 (“Limiting the statutory application to broadband providers would fall short of the statutory goal of ‘eliminating [digital] discrimination,’ because there exist numerous other entities that have the capacity to engage in such discrimination.” (quoting 47 U.S.C. § 1754(b)(2))); Multicultural Media, Telecom and Internet Council Comments at 7-9; TURN Comments at 21 (explaining that “any type of broadband company”, not just broadband internet access service providers, can take action that leads to digital discrimination).

<sup>99</sup> National Multifamily Housing Council and National Apartment Association Reply at 5-6 (rec. June 30, 2022).

<sup>100</sup> *See, e.g.*, CEO Action for Racial Equity Comments at 7 (explaining that “there are any number of actors that can influence broadband access, affordability and adoption, from governments down to landlords”); National Digital Inclusion Alliance Comments at 13 (arguing that we should apply our digital discrimination rules to owners of multiple tenant environments and “[a]ny entity conducting work on behalf of or providing internet services on behalf of an internet service provider”); TURN Comments at 21 (explaining that “those conducting the deployment of physical infrastructure, those providing the subscription service and those responsible for equipment/infrastructure maintenance” can also possibly engage in digital discrimination).

<sup>101</sup> National Urban League at 4 (“It is also important for the Commission to broadly define digital discrimination to keep up with both the pace of technology and the role it will continue to play in our daily lives.”).

<sup>102</sup> 47 U.S.C. § 1754(b).

31. *Prohibited Practices and Policies.* We seek comment on how the Commission should understand the policies or practices that can lead to digital discrimination. We seek to answer the following question: *what* “policies or practices . . . differentially impact consumers’ access to broadband internet access service”? In the record developed in response to the *Notice of Inquiry*, some commenters suggest we consider policies and practices related to broadband infrastructure deployment, network upgrades, marketing or advertising, service provision, network maintenance, and customer service;<sup>103</sup> service provider use of algorithms to make decisions about deployment and other aspects of providing internet service;<sup>104</sup> and privacy and security practices.<sup>105</sup> These commenters argue that prohibiting discriminatory practices in these areas is necessary because they can lead to inequitable outcomes for consumers or exacerbate existing biases.<sup>106</sup>

32. We seek comment on what policies and practices should be covered by our definition. Do commenters agree that the practices and policies suggested in response to the *Notice of Inquiry* can differentially impact consumers’ access to broadband? What specific practices and policies related to broadband infrastructure deployment, network upgrades, marketing or advertising, service provision, network maintenance, customer service, sales, and ongoing technical support can do so? For example, can practices and policies related to certain terms and conditions of service, such as those concerning speeds, data caps, throttling,<sup>107</sup> late fees, equipment rentals and installation, contract renewal or

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<sup>103</sup> See, e.g., Lawyers’ Committee for Civil Rights Under Law Comments at 4, 18-20 (arguing the Commission should “[t]hink broadly about all aspects of broadband service, including customer service, accessibility, and bureaucratic friction”); Leadership Conference on Civil and Human Rights Comments at 5 (asserting the Commission should “include non-technical aspects of service quality, such as customer wait times, service outages or other service quality metrics”); Multicultural Media, Telecom and Internet Council Comments at 10 (asserting the Commission should include equal procurement, transactional, and advertising requirements in our non-technical aspects of comparability of service); National Digital Inclusion Alliance Comments at 10 (proposing that the Commission adopt a definition for digital discrimination that prohibits “practices that produce reasonably foreseeable and inequitable outcomes in broadband access, broadband affordability, broadband adoption, the actual use of broadband, quality of service, digital skills/literacy, and device access—along lines of income level geography, race, ethnicity, color, religion, age, gender, English proficiency, or national origin”); Public Knowledge Reply at 16-17 (rec. June 30, 2022) (highlighting commenters that state that non-technical aspects of broadband service are important to measure comparability).

<sup>104</sup> Free Press Comments at 8-9 (rec. May 16, 2022) (explaining that these tools could be used “for everything from bids in Commission auctions to automated deployment and marketing decisions, and customer service”); TURN Comments at 19 (explaining that providers could use algorithms “to make decisions about deployment, service offers, subscription pricing, and other metrics that are known to impact affordability, accessibility, and reliability”).

<sup>105</sup> National Urban League Comments at 4 (“For example, phones and devices that are most accessible to low-income consumers, particularly those that are made available to participants of the Lifeline and Affordable Connectivity Program, should come with the same level of security as high-end devices available in the marketplace.”).

<sup>106</sup> Free Press Comments at 8 n.22 (citing to a study that shows that algorithms can use proxies for race and class and arguing this could lead to algorithms producing inequitable outcomes); National Digital Inclusion Alliance Comments at 10 (arguing digital discrimination leads to inequitable outcomes for consumers “in broadband affordability, broadband adoption, quality of service, the actual use of broadband, digital skills/literacy, and device access”); National Urban League Comments at 4 (“Because discrimination holds back communities and the country economically and socially, it is necessary to redefine the problem and expand the scope of impact.”); TURN Comments at 19 (arguing that “many policies that seem neutral and objective on their face, have produced and continue to produce this negative externality of inequitable access to broadband adoption”).

<sup>107</sup> See, e.g., National Digital Inclusion Alliance Comments at 4 (arguing the Commission should include data caps and throttling as possible service metrics in addition to speed, capacity, and latency); Accessibility Advocacy Organizations and Research Groups Reply at 6-9 (arguing that data caps and slow speeds can lead to digital discrimination).

termination,<sup>108</sup> customer credit or account history,<sup>109</sup> or price,<sup>110</sup> constitute or lead to digital discrimination? Are there practices and policies related to how broadband internet access service is sold or how technical support is provided that can lead to digital discrimination? How can we account for the idea that policies and practices can cause or contribute to digital discrimination in combination, if not individually?<sup>111</sup> Can bias in algorithms lead to digital discrimination? And, what specific device and consumer data protection measures, and privacy and security practices, can differentially impact consumers' access to broadband? Are there other policies and practices that we should specifically consider in the context of understanding how to define digital discrimination of access to best meet our direction to "facilitate equal access to broadband"?<sup>112</sup>

33. We seek comment on how the language of section 60506 should influence the policies and practices we consider part of digital discrimination. Section 60506 also defines "equal access" with reference to "comparable speeds, capacities, latency, and other quality of service metrics" and "comparable terms and conditions."<sup>113</sup> Does this language give us discretion to include any practices that relate to quality of service, including non-technical aspects of service, such as customer service, marketing or advertising, or terms and conditions related to contract renewal, account history, or price?<sup>114</sup> Or, does the preceding reference to "speeds, capacities[, and] latency" reflect Congress's intent for the Commission to consider only policies and practices related to technical aspects of quality of service?<sup>115</sup> What types of policies and practices should fall within the statutory phrase "terms and conditions"?<sup>116</sup> Does that phrase include pricing?<sup>117</sup> What are the limitations, if any, on our ability to include policies and

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<sup>108</sup> See, e.g., Public Knowledge Comments at 9-10 (explaining that late fees, equipment rentals, security deposits, and disconnection terms can all substantially impact the affordability of service could lead to digital discrimination).

<sup>109</sup> See, e.g., Communications Workers of America Comments at 8 (explaining that income level discrimination should include discrimination on the basis of credit score or creditworthiness, if the subscriber has the ability to pay); Starry Comments at 3 (rec. May 16, 2022) (recommending that the Commission closely examine prohibitive terms and conditions such as requiring deposits from families with a low credit rating or requiring the payment of arrearages before initiating service).

<sup>110</sup> See, e.g., Lawyers' Committee for Civil Rights Under Law Comments at 22 (explaining that the Commission should consider the cumulative effect on access that terms and conditions may have, including price); Open Media and Information Companies Initiative Comments at 3-6 (rec. May 16, 2022) (suggesting that pricing could be a term that is a barrier to consumers affording broadband) (Open MIC Comments).

<sup>111</sup> Lawyers' Committee for Civil Rights Under Law Comments at 21-22 ("The Commission should consider in particular the cumulative effect on access that a series of terms and conditions may have even when each may be only slightly onerous on its own. Each policy, practice, or provision on its own may have a subtle whittling effect on the number of people able to obtain and maintain broadband access, especially lower income consumers.").

<sup>112</sup> 47 U.S.C. § 1754(b).

<sup>113</sup> 47 U.S.C. § 1754(a)(2).

<sup>114</sup> See, e.g., Lawyers' Committee for Civil Rights Under Law Comments at 20 ("To limit evaluation to a set group of metrics with static targets would be to ignore the inherently dynamic nature of broadband service and the need to keep pace with subscribers' expectations and demands based on current technologies."); Leadership Conference on Civil and Human Rights Comments at 5 ("Civil rights protections deserve maximum breadth"); Multicultural Media, Telecom and Internet Council Comments at 10 (arguing that incorporating non-technical elements into our notion of comparability "will ensure that the internet service market is not only robust but also serves all communities"); Common Cause et al. Nov. 7 *Ex Parte* at 1-2 (urging the Commission to "include both technical and non-technical aspects of service quality" in our digital discrimination rules).

<sup>115</sup> USTelecom Reply at 7-8 (rec. June 30, 2022); Verizon Reply at 12.

<sup>116</sup> 47 U.S.C. § 1754(a)(2).

<sup>117</sup> ACA Connects Comments at 3, 13 (explaining that Congress specifically mentions comparable terms and conditions but does not mention comparable prices).

practices that impact technical aspects of existing service, and the decision to deploy service in the first instance?

34. *Technical and Economic Feasibility.* We seek comment on how our definition should “tak[e] into account” justifications on the basis of technical and economic feasibility.<sup>118</sup> In the language of our proposed definitions: *in what circumstances* is a differential impact to consumers’ access to broadband “justified by genuine issues of technical or economic feasibility”? In the record developed in response to the *Notice of Inquiry*,<sup>119</sup> some commenters argue that providers should have a safe harbor and presumption of nondiscrimination when certain conditions are met or certain circumstances are present.<sup>120</sup> These commenters explain that in these situations a lack of deployment is most likely due to economic or technical factors that make deploying broadband impractical, and that providing a safe harbor in these instances will allow us to more thoroughly investigate more probable instances of digital discrimination.<sup>121</sup> Other commenters argue that we should instead analyze claims of infeasibility on a case-by-case basis.<sup>122</sup> Some of these commenters argue that individualized scrutiny and strict standards are necessary to fulfill Congress’s intent as set forth in section 60506, to ensure that meritless assertions

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<sup>118</sup> 47 U.S.C. § 1754(b).

<sup>119</sup> *Notice of Inquiry* at 13, 14, paras. 31, 33.

<sup>120</sup> See, e.g., NCTA Comments at 6-7 (rec. May 16, 2022) (arguing that a safe harbor should apply in “‘high cost’ (e.g., Rural Digital Opportunity Fund or Connect America Fund) areas, very rural areas, areas with environmental restrictions or terrain or outdated poles or similar infrastructure that make broadband deployments impractical or uneconomic, areas that present permitting issues, and households that have very long line drops.”); T-Mobile Comments at 18 (rec. May 16, 2022) (“The Commission should also adopt a safe-harbor or presumption of non-discrimination for providers that are participating in Lifeline or ACP, as participating providers are already subject to these programs’ non-discrimination rules[.]”); Utah Rural Telecom Association Comments at 2-3 (rec. May 16, 2022) (“Specifically, the Commission should adopt the presumption that [Eligible Telecommunications Carriers] receiving high-cost federal universal service support, and their ISP affiliates, provide equal access to supported services.”) (Utah Rural Telecom Association Comments); Verizon Comments at 12 (rec. May 16, 2022) (arguing that third party conduct and conduct outside of a provider’s control should not constitute digital discrimination); Multicultural Media, Telecom and Internet Council Reply at 10 (rec. June 30, 2022) (supporting NCTA’s proposed safe harbor).

<sup>121</sup> See, e.g., NCTA Comments at 6-7 (explaining that a safe harbor will allow the Commission to administer rules more effectively rather than focus on “situations that clearly meet an infeasibility standard”); T-Mobile Comments at 18-19 (explaining that Congress did not intend to interrupt provider decisions regarding when network deployment and service offerings are technically or economically feasible); Utah Rural Telecom Association Comments at 2 (explaining that adopting a safe harbor will allow the Commission to “focus its attention to address situations where digital discrimination may occur because of non-economic factors”); Verizon Reply at 5 (explaining that broadband providers must have the flexibility to take into account technical challenges such as access to buildings, rights of way, and existing infrastructure, as they make deployment decisions).

<sup>122</sup> See, e.g., Connecticut Office of State Broadband within the Connecticut Office of Consumer Counsel Comments at 4 n.9 (rec. May 16, 2022) (arguing that the Commission should set strict parameters around what constitutes economic infeasibility) (Connecticut Office of State Broadband Comments); National Digital Inclusion Alliance Comments at 8-9, 19 (urging “the Commission to always require that service providers prove instances of technical or economic infeasibility” and to adopt “a strict standard for what constitutes a valid instance of economic infeasibility”); Public Knowledge Comments at 28-31, 33-34 (arguing that “Congress intended the FCC to construe ‘feasibility’ questions narrowly”); TURN Comments at 17 (“[T]he burden of proof and production should be on the broadband internet access service provider to demonstrate the technical or economic infeasibility for the target area that the Commission has preliminarily identified.”); City of Dallas, Texas Reply at 3 (rec. June 16, 2022) (arguing the Commission should require providers to give evidence of infeasibility to ensure transparency and that “[s]uch waivers should be dispersed sparingly”) (City of Dallas Reply).

of infeasibility do not impede legitimate complaints alleging digital discrimination of access.<sup>123</sup>

35. We seek comment on whether to adopt safe harbors, establish a case-by-case standard for infeasibility, or both. As an initial matter, we seek comment on what the legal significance of any such safe harbor should be, in terms of shifting the burden of proof or otherwise. What would be the practical implications of adopting safe harbors generally or a case-by-case standard? Would a bright line safe harbor approach be more likely to excuse conduct that, on an individualized review, may not be justified? Are there ways we could design the safe harbor or safe harbors to increase the odds that we successfully identify cases of digital discrimination while excluding only non-meritorious claims or charges? Would a case-by-case standard be more effective at identifying justified, and unjustified, conduct? If so, does that increased effectiveness outweigh any administrative and compliance burdens that may accompany an individualized approach? How can we minimize any identified burdens? Would requiring an individualized analysis for each case of alleged infeasibility place an unreasonable burden on providers or create uncertainty that could chill network investment?<sup>124</sup> Would a combination of each approach, setting an individualized analysis accompanied by certain safe harbors, alleviate any identified concerns with each approach individually? Does the language of section 60506 require us to take one approach or the other? Would an individualized approach create uncertainty and potentially chill investment?<sup>125</sup> Or, would a safe harbor approach effectively immunize problematic behavior so as to undermine our ability to facilitate equal access to broadband?<sup>126</sup>

36. We seek comment on the substantive standard we should require under either approach, to best balance Congressional direction to “facilitate equal access” while “taking into account the issues of technical and economic feasibility presented by that objective.”<sup>127</sup> If we were to provide a safe harbor, which circumstances would be appropriate for a safe harbor? Should we provide a safe harbor under limited circumstances, encompassing a limited set of business necessity exemptions?<sup>128</sup> Should we provide a safe harbor under a wider variety of circumstances and, if so, what should those circumstances be? Would a safe harbor be appropriate when a provider acted in reliance on Commission requirements

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<sup>123</sup> See, e.g., Connecticut Office of State Broadband Comments at 4 n.9 (arguing the Commission should “make this provision less of an escape hatch for providers”); National Digital Inclusion Alliance Comments at 8-9, 19 (“The standards should be constructed in such a way that economic infeasibility waivers should only be granted on rare occasions and should be the exception, not the norm.”); Public Knowledge Comments at 28-31, 33-34 (“Too broad an interpretation of these terms would allow the exemption to swallow the rule.”).

<sup>124</sup> See, e.g., ACA Connects Comments at 27, 30-31, 34 (explaining that issues of technical and economic feasibility are fact-intensive and that the Commission, “should not impose obligations that tip the scales and jeopardize these providers’ ability to serve and undermine existing and future investments”); USTelecom Comments at 13, 15, 17 (“The Commission should not attempt to step into the shoes of experienced providers and second-guess their business judgment. Should the Commission do so, it risks chilling investment in contravention of the Infrastructure Act’s goal of driving broadband deployment to every American.”).

<sup>125</sup> See AT&T Comments at 21-22 (cautioning that the Commission should not “undermine the very deployment goals the Infrastructure Act is designed to promote” by interrupting a provider’s legitimate decision making); T-Mobile Comments at 18-19 (explaining that Congress did not intend to interrupt provider decisions regarding when network deployment and service offerings are technically or economically feasible); see also CTIA Comments at 20-21 (rec. May 16, 2022) (“In taking supportive measures to facilitate deployment, Section 60506 nonetheless directs the Commission to account for technical and economic feasibility, and the agency should recognize the technically challenging, competitive, and multifaceted environment in which wireless providers operate.”).

<sup>126</sup> See 47 U.S.C. § 1754(a)(1).

<sup>127</sup> 47 U.S.C. § 1754(b).

<sup>128</sup> See, e.g., Lawyer’s Committee for Civil Rights Under Law Comments at 28 (arguing that the Commission should “consider a broad range of prohibited adverse effects and a limited set of business necessity exemptions that does not include lack of demand or lesser profits”); TechFreedom Comments at 23-24 (explaining that civil rights laws recognize business necessity defense to civil rights claims).

or funding commitments, such as merger conditions, those associated with universal service funding, or build-out?<sup>129</sup> Or would a safe harbor be appropriate when conduct occurs that is outside of a provider's control, such as third-party conduct?<sup>130</sup> If we adopted an individualized analysis instead or in addition, what should be the standard for technical and economic infeasibility? How should we determine that an issue of feasibility is "genuine," and are there standards or concepts in other contexts we should consider to do so? For example, should we look to the summary judgment standard in federal court, which requires the party requesting relief to "show[] that there is no genuine dispute as to any material fact,"<sup>131</sup> or the final step of the *McDonnell Douglas* burden-shifting analysis where a complainant can show that a proffered justification for allegedly discriminatory conduct is mere pretext?<sup>132</sup> Should technical infeasibility require a showing that providing service was technically impossible, or some lower bar? Should economic infeasibility require a showing that providing service was unprofitable based on marginal cost, average cost, or some other basis? On what time horizon should we consider profitability or analyze claims of technical or economic infeasibility?<sup>133</sup> Should we adopt different safe harbors, or a different individualized analysis, for different types of providers, or differently-situated providers?<sup>134</sup> Does the language of section 60506 require us to include any particular safe harbors or factors in a standard for individualized analysis, beyond accounting for "technical and economic feasibility"? What specifically does it require us to include? More generally, how should we construe "feasibility" within the meaning of section 60506? Should we understand it to refer to capability, convenience or reasonableness? What would be the practical impact of each such interpretation?

37. *Consumers.* We seek comment on how we should identify those who might experience digital discrimination of access. We seek to answer the following question: *whose* experience of a "differential[] impact [on]. . . access to broadband internet access service," whether intended or not, is the focus of Section 60506? In the record developed in response to the *Notice of Inquiry*,<sup>135</sup> one commenter argues that we should consider claims by individuals and communities that meet one of the listed characteristics, because entire communities may experience digital discrimination.<sup>136</sup> Another argues that we should not include non-subscribers or "consumers generally."<sup>137</sup>

38. We seek comment on what consumers should be covered by our definition of digital discrimination of access. Should we understand digital discrimination of access to be a problem experienced by individuals or communities, or both? Is digital discrimination experienced differently at the individual and community levels such that our definition would need to account for that difference? What are the practical or administrative costs and benefits to the Commission, providers, and those who might suffer digital discrimination if both communities and individuals are covered by our definition?

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<sup>129</sup> See, e.g., T-Mobile Comments at 18 (arguing that we should "adopt a safe-harbor or presumption of non-discrimination for providers that are participating in Lifeline or ACP, as participating providers are already subject to these programs' non-discrimination rules"); NCTA Comments at 6-7; Utah Rural Telecom Association Comments at 2-3.

<sup>130</sup> Verizon Comments at 12.

<sup>131</sup> Fed. R. Civ. P. 56.

<sup>132</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see also *infra* para. 66 (further discussing this step of the *McDonnell Douglas* analysis).

<sup>133</sup> See Communications Workers of America Comments at 8-9; Public Knowledge Comments at 33-34; TURN Comments at 17.

<sup>134</sup> See Public Knowledge Comments at 32.

<sup>135</sup> *Notice of Inquiry* at 10, para. 23; 47 U.S.C. § 1754(b)(1).

<sup>136</sup> CEO Action for Racial Equity Comments at 6.

<sup>137</sup> ACA Connects Comments at 10 (explaining that "the policy statement in Section 60506(a), which underlies the entire statute, applies to 'subscribers' to broadband service; not potential subscribers or consumers generally").

Does section 60506 *require* us to include or exclude communities from coverage?

39. Do commenters agree with ACA Connects that we should limit our concept of “subscribers” to only current subscribers, and not include non-subscribers or consumers generally? Would excluding non-subscribers imply that those who do not currently subscribe to broadband cannot experience digital discrimination of access? Is such an approach reasonable, or does it exclude those who might experience digital discrimination most acutely? If we adopt such a definition, how would we account for consumers who don’t subscribe to broadband because the service is not available in their community, possibly because of digital discrimination? Does the use of the word “subscribers” in subsection 60506(a) require that the scope of our digital discrimination rules be tied to subscription status, or does the lack of reference to subscribers and general direction to “facilitate equal access” in subsection 60506(b) counsel in favor of covering non-subscribers? What would be the practical impact of limiting coverage to subscribers on the one hand, or extending it to non-subscribers on the other? If we include non-subscribers, are there distinctions between types of non-subscribers that we should consider, such as those who are and are not actively seeking broadband service? What distinctions or subcategories of non-subscribers should we consider and why?

40. *Listed Characteristics.* In our proposed definition, we propose to include the same characteristics as bases for discrimination as those identified in section 60506. We seek comment on how to give meaning to these characteristics and whether we should include any additional characteristics in the rules we ultimately adopt. In response to the *Notice of Inquiry*, commenters suggest interpreting the listed characteristics in accordance with existing “legislation, regulations, and precedent,” such as the Civil Rights Act of 1964 and/or the New York City Human Rights Law, because using existing understandings reduces uncertainty.<sup>138</sup> Other commenters argue that the Commission should include additional characteristics such as disability status, age, sex, sexual orientation, gender identity and expression, familial status, domestic violence survivor status, homelessness, and English language proficiency.<sup>139</sup> These commenters argue that the Commission should recognize characteristics of communities that are historically marginalized or underserved because doing so is consistent with Congress’s intent in section 60506.<sup>140</sup> By contrast, other commenters assert that the listed characteristics are exclusive, arguing that Congress was deliberate in its choice to specify the listed characteristics.<sup>141</sup>

41. We seek comment on whether we should give further meaning to the characteristics listed

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<sup>138</sup> CEO Action for Racial Equity Comments at 6; City of New York Comments at 2 n.7; *see also* TURN Comments at 20 (suggesting that we could consider “color” synonymous with “race” because both are based on outward appearance); Georgia Tech’s Center for Advanced Communications Policy Reply at 3 (rec. June 28, 2022) (supporting the suggestion to adopt definitions of the listed characteristics using existing legislation, regulations, and precedent, including the Civil Rights Act of 1964) (Center for Advanced Communications Policy Reply).

<sup>139</sup> *See, e.g.*, Lawyers’ Committee for Civil Rights Under Law at 32 (arguing that under subsection (c)(3), the Commission should also consider including other characteristics protected from discrimination in civil rights law); National Digital Inclusion Alliance Comments at 13 (arguing that the list of characteristics in section 60506 of the Infrastructure Act is not exclusive and should also address digital discrimination based on age, disability, and level of English proficiency); *see also* American Foundation for the Blind Comments at 2-3; Communications Workers of America Comments at 7.

<sup>140</sup> *See, e.g.*, American Council of the Blind Comments at 2 (rec. May 16, 2022) (“Of equal importance to marginalized groups, including people with disabilities, is accessibility. The Commission must ensure that broadband information, programs, and the services provided over broadband services are accessible.”); Assistive Technology of Alaska Comments at 2 (rec. May 16, 2022) (explaining that subsection 60506(c)(3) could be read to include persons with disabilities under its broad language “other factors the Commission determines to be relevant based on the findings in the record”); Center for Advanced Communications Policy Reply at 3-4 (explaining that a successful strategy to address digital discrimination must include persons with disabilities because they still face significant issues to accessing, affording, or adopting communications technologies).

<sup>141</sup> Verizon Comments at 11; WISPA Comments at 19; USTelecom Reply at 21.

in the statute and included in our proposed definition: income level, race, ethnicity, color, religion, and national origin. Is the meaning of some or all of these terms sufficiently established such that we do not need to give them further meaning? Even if their meaning is established, would it promote certainty to adopt further definitions or explanations consistent with other laws or precedent? Or would adopting definitions unnecessarily decide issues we could resolve on a case-by-case basis? If we did adopt further definitions based on existing law or precedent, what resources should we use to give meaning to the listed characteristics? Would the Civil Rights Act of 1964 or the New York City Human Rights Law most effectively define some or all of the listed characteristics? What other legislation, regulations, or precedent should we consider to give meaning to the listed characteristics?

42. We seek comment on whether we should expand our definition to include characteristics beyond those listed in section 60506.<sup>142</sup> If we did, what additional characteristics would we include? Should we include some or all of disability status, age, sex, sexual orientation, gender identity and expression, familial status, domestic violence survivor status, homelessness, and English language proficiency, as suggested in the record?<sup>143</sup> Should we include those residing in certain geographic areas, such as urban or rural areas,<sup>144</sup> or areas that have experienced historic redlining?<sup>145</sup> If we adopted some additional characteristics, but not all, on what basis should we decide which to include and which to exclude? Are these characteristics distinct from those listed in section 60506, or from one another, in ways that would complicate analysis of the problem of digital discrimination if we defined it to include them? And would their inclusion complicate administration of and compliance with any rules we adopt under this definition? Are the meanings of these various characteristics clear, or would we need to further define them? How would we do so? Might we adopt the meanings used by other federal agencies such as the Equal Employment Opportunity Commission? If we decline to include additional characteristics, are there nonetheless circumstances in which we could consider the impact based on an unlisted characteristic when analyzing claims of digital discrimination based on a listed characteristic?<sup>146</sup>

43. What would be the statutory basis for including additional characteristics in our definition? The term we propose defining, “digital discrimination of access,” in subsection 60506(b)(1) must be “based on income level, race, ethnicity, color, religion, or national origin.”<sup>147</sup> Does the Commission have discretion to include additional characteristics for purposes of implementing section 60506, or does the presence of specific listed factors in subsection 60506(b)(1) demonstrate

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<sup>142</sup> We note that section 60506 directs the Commission to adopt rules to facilitate equal access to broadband internet access service, “including”—but not limited to—addressing discrimination based on the listed characteristics. 47 U.S.C. § 1754(b).

<sup>143</sup> See, e.g., American Foundation for the Blind Comments at 2-3; Communications Workers of America Comments at 7; Lawyers’ Committee for Civil Rights Under Law Comments at 32; National Digital Inclusion Alliance Comments at 13. The Task Force to Prevent Digital Discrimination has also held listening sessions with stakeholders in the disability community, who the challenges that people with disabilities face to accessing broadband internet access service and argued that we should include disability status in our definition. See Task Force to Prevent Digital Discrimination Listening Session Transcript.

<sup>144</sup> See, e.g., Next Century Cities Comments at 4-5 (rec. May 16, 2022).

<sup>145</sup> See, e.g., Electronic Frontier Foundation et al. Comments at 4-5, 11-12; Lawyers’ Committee for Civil Rights Under Law Comments at 5-9.

<sup>146</sup> See American Council of the Blind Comments at 1-2 (explaining that “the prevalence of disability intersects with all the marginalized communities in which [the Infrastructure Act] requires the Commission to assess the impact of digital discrimination” and that the impact of digital discrimination amongst these intersectional populations may be particularly acute); see also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (recognizing a plaintiff’s discrimination claim under Title VII of the Civil Rights Act when one characteristic, sex, is enumerated in Title VII and a second characteristic, having preschool-age children, is not).

<sup>147</sup> 47 U.S.C. § 1754(b)(1).

Congressional intent to limit our focus to those factors?<sup>148</sup> Could we take action to address inequities faced by those with unlisted characteristics under a different provision of section 60506: the policy statement in subsection 60506(a)(3) that we should ensure “all people of the United States” benefit from equal access;<sup>149</sup> the broader direction in subsection 60506(b) to “facilitate equal access”;<sup>150</sup> or the separate direction in subsection 60506(c) to collaborate with the Attorney General to prohibit deployment discrimination based on “other factors the Commission determines to be relevant”?<sup>151</sup> Would any such action need to be distinct from action related to this definition of “digital discrimination of access”? Or should we read these other provisions to reflect Congress’s intent for the listed characteristics to evolve as communities or individuals demonstrate they face digital discrimination?<sup>152</sup> Are there other sections of the Communications Act, or other federal legislation, that would give us authority to include certain characteristics in our rules preventing digital discrimination of access?<sup>153</sup>

44. *Differential Impact.* We seek comment on the standard or standards we should use to determine when consumers face digital discrimination, relevant comparators, and data we should consider. We seek to answer the following question: *when* is consumers’ access to broadband internet access service “differentially impact[ed]” by policies or practices, whether intentionally or not? We seek comment on how the Commission should compare services, terms, and conditions to make this determination; the geographic area we should compare across; and data sources we should look to in making this determination. Commenters in response to the *Notice of Inquiry* suggest comparing technical metrics such as speed,<sup>154</sup> capacity,<sup>155</sup> and network outages,<sup>156</sup> as well as non-technical factors such as caliber of customer service.<sup>157</sup> Commenters variously cite geographic boundaries such as municipal lines<sup>158</sup> as well as a covered entity’s service area<sup>159</sup> as methods for defining a given area. Commenters also point to different ways that the Commission can use data in these efforts, such as by monitoring the

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<sup>148</sup> See USTelecom Reply at 21 (citing to *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993); and providing the Fair Housing Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964 as examples of antidiscrimination laws that demonstrate Congress’s intent for legislation to cover particular characteristics).

<sup>149</sup> 47 U.S.C. § 1754(a)(2), (3); see American Council of the Blind Comments at 2; Center for Advanced Communications Policy Reply at 3; Accessibility Advocacy Organizations and Research Groups Reply at 10.

<sup>150</sup> 47 U.S.C. § 1754(b).

<sup>151</sup> 47 U.S.C. § 1754(c)(3); Assistive Technology of Alaska Comments at 2; Leadership Conference on Civil and Human Rights Comments at 5; Lawyers’ Committee for Civil Rights Under Law Comments at 32.

<sup>152</sup> See 47 U.S.C. § 1754(c)(3); Assistive Technology of Alaska Comments at 2.

<sup>153</sup> See, e.g., Advocates for EMS Disabled Comments at 3-4 (rec. May 16, 2022) (suggesting the Commission address digital discrimination based on disability under sections 225, 255, 256 of the Communications Act, among others); Jonathan Avila Comments at 1 (rec. Mar. 21, 2022) (suggest the Commission consider creating rules or initiatives to address digital discrimination based on disability under the CVAA or section 255 of the Communications Act). Regarding disability status, American Foundation for the Blind also argues that the consideration to “ensure that Federal policies promote equal access to robust broadband internet access service[]” requires the Commission to consult with the Department of Justice on rulemakings that require websites and applications to be accessible. American Foundation for the Blind Comments at 2-3; see also 47 U.S.C. § 1754(c).

<sup>154</sup> See, e.g., Communications Workers of America Comments at 6-7.

<sup>155</sup> See, e.g., National Broadband Mapping Coalition Comments at 4 (rec. May 16, 2022).

<sup>156</sup> See, e.g., CEO Action for Racial Equity Comments at 3-4.

<sup>157</sup> See, e.g., Leadership Conference on Civil and Human Rights Comments at 5.

<sup>158</sup> See, e.g., National Digital Inclusion Alliance Comments at 7.

<sup>159</sup> See, e.g., ACA Connects Comments at 11-12.

status of fiber deployments in different communities<sup>160</sup> and examining whether there exists a statistical correlation between the characteristics listed in section 60506 in a community and lower levels of access to broadband.<sup>161</sup>

45. As an initial matter, we seek comment on the scope of our inquiry when identifying instances of differential impact. Should we understand “equal access” and “discrimination of access” to focus on availability of broadband, adoption of broadband, quality of broadband, or some combination of these factors? Are there other factors we should consider? The Electronic Frontier Foundation and other commenters observe that availability of broadband hinges on its deployment and highlights the lack of deployment in underserved areas despite the economic feasibility of doing so.<sup>162</sup> The Multicultural Media, Telecom and Internet Council argues that the statute should be viewed from the “perspective of subscribers,” which they assert means the Commission should also “focus on issues related to broadband adoption, not just broadband availability.”<sup>163</sup> Other commenters agree that we should consider the barriers that affordability<sup>164</sup> and a lack of digital literacy present to adoption of services, even where available.<sup>165</sup> Conversely, the International Center for Law & Economics posits that matters of adoption and affordability have no basis in the statutory language, which it argues focuses only on physical availability.<sup>166</sup> We seek comment on these arguments. When determining whether a consumer’s access to broadband has been “differentially impact[ed],” should we look to availability of service or should we look to adoption, affordability, and quality of service where service is already available? What would be the practical impact of either interpretation, and would it be appropriate to consider both? Is there a statutory basis for including barriers to adoption in our definition? We also seek comment on how we should consider substitutability of service in determining whether a given area benefits from equal access. For example, does the availability of a comparable service where another service is unavailable mean that a consumer “benefit[s] from equal access” in a given area?<sup>167</sup> Should the availability of one service utilizing a different technology, such as 5G wireless service versus traditional wireline service, impact the analysis where the other is otherwise incomparable or unavailable?<sup>168</sup>

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<sup>160</sup> Electronic Frontier Foundation et al. Comments at 20-21.

<sup>161</sup> See CEO Action for Racial Equity Comments at 6; TURN Comments at 20.

<sup>162</sup> See Electronic Frontier Foundation et al. Comments at 16.

<sup>163</sup> Multicultural Media, Telecom and Internet Council Comments at 4.

<sup>164</sup> Lawyers’ Committee for Civil Rights Under Law Comments at 20; see also National Broadband Mapping Coalition Comments at 2-3 (arguing that “affordability needs to be a key factor” in determining whether there is “equal access” or “equal opportunity” to subscribe to broadband); National Digital Inclusion Alliance Comments at 5 (arguing that “equal access” must mean “affordable for the average household,” noting that even if a service costs the same amount in a given area, that amount represents a “larger proportion of a low-income household’s budget compared to that of a higher income household’s budget”); Starry Comments at 6 (highlighting the need for affordability).

<sup>165</sup> Engine Comments at 3 (rec. May 16, 2022) (arguing that we should consider a more comprehensive view of whether consumers not only have access to high-speed Internet but also “Wi-Fi enabled devices . . . and digital skills to participate online”) (Engine Comments); see also TURN Comments at 9, 12-13 (arguing that the Commission “should take a broad perspective and address discrimination in multiple contexts,” looking beyond deployment).

<sup>166</sup> International Center for Law & Economics Comments at 10; see also NCTA Comments at 15 (arguing that focusing on issues beyond deployment would “exceed the scope of the direction set forth by Congress”).

<sup>167</sup> 47 U.S.C. § 1754(a)(3).

<sup>168</sup> See City and County of San Francisco Comments at 10 (rec. May 16, 2022) (observing that extension of 5G infrastructure to communities lacking access to high-speed internet could aid underserved neighborhoods); but see TURN Comments at 16 (observing that the Commission has previously “recognized that fixed and mobile broadband services are not substitutes”).

46. We seek comment on the standard and methods we should use to identify when a consumer's broadband internet access is differentially impacted with respect to the technical aspects of available service. Should we simply compare network performance metrics, and if so, at what threshold would we determine that performance was meaningfully better or worse for certain consumers? The National Digital Inclusion Alliance argues for establishing a prescriptive range for the quality-of-service metrics that would indicate that a service is "comparable."<sup>169</sup> If we establish prescriptive ranges of acceptable differences in service metrics, how do we ensure those ranges are not overly broad or narrow? Should we adopt different ranges depending on the service or geographic area?<sup>170</sup> Is the number of relevant variables too large for this approach to be easily administered and complied with? How will any methods we adopt comparing technical quality of service need to change across services and technologies? What analytical approach should we take to account for the technical practicalities of provisioning broadband, such as when providers conduct network upgrades, network degradation occurs, or a provider experiences a network outage?<sup>171</sup> Should we temporarily relax these standards when these circumstances occur?<sup>172</sup> Some commenters argue that the Commission should require providers to undergo network performance testing similar to models that they assert have previously been effective.<sup>173</sup> If we adopt periodic assessment requirements, how often would be practical to assess technical performance while accounting for changes that may occur over time, such as network upgrade cycles? How could we minimize the burden of this approach on providers? Should we assess comparability of service quality from the consumer's perspective and provide that service quality and terms and conditions are "comparable" if a consumer would not recognize differences in their broadband experience?<sup>174</sup> Should we consider the unique needs of particular communities?<sup>175</sup> What metrics and data sources can we employ in making these comparisons? Should we measure, for example, rates of service interruptions and cut-offs?<sup>176</sup> Does section 60506 counsel that we take any particular approach when assessing comparability and determining whether there is a differential impact? For example, do the terms "equal access" or "discrimination" include any concept of scope or exclude any requirement of materiality for such differential impact?<sup>177</sup>

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<sup>169</sup> National Digital Inclusion Alliance Comments at 3.

<sup>170</sup> *Id.*

<sup>171</sup> See National Digital Inclusion Alliance Comments at 4 (recognizing that "[t]emporary technical developments such as network outages and periods of network degradation are sometimes unavoidable").

<sup>172</sup> See *id.* (arguing that "[p]roviders implementing network upgrades or technological developments should face temporarily relaxed comparability standards, but such upgrades or developments should not occur disproportionately to certain demographics to the extent that services are not comparable throughout a given service area"); *but see* Public Knowledge Reply at 16 ("Degraded or inefficient service can mask the realities of digital discrimination, making communities seem well-served on paper while suffering from low-quality service in reality.").

<sup>173</sup> See Public Knowledge Comments at 7-8 (arguing that the Commission should use testing in the universal service context to establish a baseline for network performance).

<sup>174</sup> AT&T Comments at 12; CTIA Comments at 21 & n.66; NCTA Comments at 13-14; USTelecom Comments at 10; USTelecom Reply at 5.

<sup>175</sup> American Foundation for the Blind Comments at 2 (suggesting the Commission consider that "[p]eople with disabilities have unique needs . . . [and] may need higher speed, bandwidth, and data limits in order to benefit equally from broadband access"); Accessibility Advocacy Organizations and Research Groups Reply at 6-9.

<sup>176</sup> See Communications Workers of America Comments at 8; EveryoneOn Comments at 2 (rec. May 16, 2022); *see also* Communications Workers of America, National Digital Inclusion Alliance, Lumen's Digital Disparity: Underinvestment in Infrastructure Discriminates Against Lower-Income, Rural, and Native American Customers at 7-8 (2021), [https://cwa-union.org/sites/default/files/20210624\\_lumen\\_report.pdf](https://cwa-union.org/sites/default/files/20210624_lumen_report.pdf) (citing complaints regarding Internet outages in underserved communities).

<sup>177</sup> 47 U.S.C § 1754(a)(2), (b)(1).

47. We seek comment on the standard and methods we should use to identify when a consumer's broadband access is differentially impacted with regard to non-technical aspects of available service. How can we determine when, for example, customer service, late fees, equipment rentals and installation policies, access to specific service plan offerings or speeds, contract renewal or termination policies, availability of customer credit or account history practices, and prices are meaningfully better or worse for certain consumers?<sup>178</sup> Should we establish certain known thresholds to promote compliance and make it easier for consumers to know when they have experienced digital discrimination? Or is this inquiry better suited to a case-by-case determination? What standard would we use for any individualized analysis? To the extent we include price in our conception of digital discrimination, how should we consider plans that are identical along all features except for price? How should we consider the practice of price discrimination (i.e., charging different consumers different prices for the identical service)?

48. We seek comment on the relevant geographic comparators to use in identifying when a consumer's broadband access is differentially impacted. Commenters in response to the *Notice of Inquiry* suggest various methods for defining geographic areas for relevant comparators. The National Digital Inclusion Alliance, for example, proposes that the Commission use a provider's legally defined service area, such as its cable franchise area, within a given metropolitan or micropolitan statistical area.<sup>179</sup> ACA Connects similarly contends that the relevant area should be defined as a provider's service area, and further argues that the Infrastructure Act does not provide us with authority to take a different approach.<sup>180</sup> Conversely, Public Knowledge argues that our definition "should be broad and flexible" and that such an approach is consistent with the language of section 60506.<sup>181</sup> Public Knowledge further argues that limiting our inquiry to a provider's service area would render the Commission incapable of addressing instances where services are not offered in the first instance as a result of discriminatory practices.<sup>182</sup> Does the language of section 60506 counsel or require us to understand this geographic area in any particular way? The statement of policy in subsection 60506(a)(1) states "the policy of the United States" is that "subscribers should benefit from equal access to broadband . . . within the service area of a provider of such service."<sup>183</sup> Does this language reflect that our focus under section 60506 should be limited to a provider's existing service area?<sup>184</sup> If so, how should a provider's existing service area be defined? Is it in all Census blocks that the provider has a current subscriber? Or is it any area that the provider could deploy services to within a certain timeframe, and if so, what is the appropriate timeframe?

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<sup>178</sup> See, e.g., Public Knowledge Comments at 8-10 (explaining that late fees, equipment rentals, security deposits, and disconnection terms can all substantially impact the affordability of service, which could lead to digital discrimination); Starry Comments at 3 (recommending that the Commission closely examine prohibitive terms and conditions such as requiring deposits from families with a low credit rating or requiring the payment of arrearages before initiating service).

<sup>179</sup> National Digital Inclusion Alliance Comments at 7; see also Public Advocates Office at the California Public Utilities Commission Reply at 3-4.

<sup>180</sup> ACA Connects Comments at 11-12; see also AT&T Comments at 12-13; National Broadband Mapping Coalition Comments at 5; Next Century Cities Comments at 8; TechFreedom Comments at 18.

<sup>181</sup> Public Knowledge Comments at 19-20; see also CEO Action for Racial Equality Comments at 5 (arguing that "a given area" should be defined by, for example, ZIP code because "limit[ing] markets at even the city or county level" may lead to consumers "not be[ing] afforded the digital discrimination protections as outlined in the [Infrastructure Act]").

<sup>182</sup> Public Knowledge Reply at 12-14; see also #OaklandUndivided Coalition Reply at 12-13 (rec. June 30, 2022) (claiming that providers overstate their service areas and that broadband availability is impacted by historical redlining).

<sup>183</sup> 47 U.S.C. § 1754(a)(1).

<sup>184</sup> See ACA Connects Comments at 11-12; see also AT&T Comments at 12; National Broadband Mapping Coalition Comments at 5; Next Century Cities Comments at 8; TechFreedom Comments at 18.

Should we include areas in a certain proximity to a provider's current service area, and if so, what is the appropriate range? In subsection 60506(b), we are directed to adopt rules to "facilitate equal access,"<sup>185</sup> and "equal access" is defined with reference to comparable service "in a given area."<sup>186</sup> Does the use of a different term in that definition reflect Congress's intent to understand geographic area differently, and if so, in what way?

49. We seek comment on these methods for understanding the geographic areas we should compare to determine if access to broadband internet has been differentially impacted. Should we compare only current subscribers to other consumers in a provider's service area? If so, are there instances where the Commission should expand or constrict the boundaries of such an area?<sup>187</sup> What circumstances would necessitate or counsel doing so? Would an approach based on a provider's current service area prevent us from addressing instances when an individual or community completely lacks access to service from that provider? If we define the relevant area based on a provider's service area, should that understanding be cabined by the technology employed (such as wired versus wireless broadband) when a covered entity offers different kinds of services? Alternatively, should we adopt a broader understanding of the relevant area for comparison? Should we compare different providers within the same service area? Should we tie the relevant area to municipal boundaries, such as city, county, or state lines? Should we use concepts such as a metropolitan statistical area to capture similar areas that are not bound by municipal boundaries? If and how should comparisons be made between rural and urban areas? Should we work with state, local, and Tribal governments to identify the appropriate comparison area?<sup>188</sup> Should we use different concepts of geographic area in different contexts?<sup>189</sup> Are there any unique considerations we should take into account when examining differential impact on the basis of income level?

50. We seek comment on data sources we can or should use to help us identify instances where consumers' access to broadband internet is differentially impacted. Commenters highlight various studies in responding to the *Notice of Inquiry*, and we seek comment on those cited. These include, among others, investigations into the correlation between median area income and broadband deployment;<sup>190</sup> the sources and effects of digital redlining;<sup>191</sup> availability of fiber and high-speed broadband in lower-income and marginalized communities;<sup>192</sup> and broadband gaps in rural

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<sup>185</sup> 47 U.S.C. § 1754(b).

<sup>186</sup> 47 U.S.C. § 1754(a)(2).

<sup>187</sup> See, e.g., TechFreedom Comments at 18-20 (observing that "natural geographic barriers" and "man-made impediments" may interfere with a service provider's ability to offer service).

<sup>188</sup> See, e.g., City and County of San Francisco Comments at 7; National Broadband Mapping Coalition Comments at 6.

<sup>189</sup> See, e.g., National Digital Inclusion Alliance Comments at 7; Public Knowledge Comments at 19-20.

<sup>190</sup> See Lawyers' Committee for Civil Rights Under Law Comments at 8 n.25 (citing Allan Holmes et al., *The Center for Public Integrity, Rich People Have Access to High-Speed Internet; Many Poor People Still Don't* (2016), <https://publicintegrity.org/inequality-poverty-opportunity/rich-people-have-access-to-high-speed-internet-many-poor-people-still-dont-2/>).

<sup>191</sup> Communications Workers of America and National Digital Inclusion Alliance, *AT&T's Digital Redlining: Leaving Communities Behind for Profit* (2020), [https://www.digitalinclusion.org/wp-content/uploads/dlm\\_uploads/2020/10/ATTs-Digital-Redlining-Leaving-Communities-Behind-for-Profit.pdf](https://www.digitalinclusion.org/wp-content/uploads/dlm_uploads/2020/10/ATTs-Digital-Redlining-Leaving-Communities-Behind-for-Profit.pdf)); see also Leadership Conference on Civil and Human Rights Comments at 4 n.17 (citing Benjamin Skinner et al., *Brown University Annenberg Institute, Digital Redlining: The Relevance of 20th Century Housing to 21st Century Broadband Access and Education* (2021), <https://www.edworkingpapers.com/sites/default/files/ai21-471.pdf>).

<sup>192</sup> See, e.g., Leadership Conference on Civil and Human Rights Comments at 3 n.13 (citing USC Annenberg Research Network for International Communication, *Who Gets Access to Fast Broadband? Evidence from Los Angeles County 2014-2017* (2019), <https://arnicusc.org/wp-content/uploads/2019/10/Policy-Brief-4-final.pdf>);

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communities.<sup>193</sup> AT&T, for example, cites a study that examines publicly available data from the Commission and the U.S. Census Bureau and asserts that non-white and lower income households are not systemically and disproportionately underserved.<sup>194</sup> Are these assertions well grounded? Do commenters agree with this study's conclusions, and why or why not? Conversely, the Electronic Frontier Foundation and other commenters cite to a survey in California that examines racial and income disparities and the correlation between historical and digital redlining.<sup>195</sup> Should the Commission consider survey data such as the study cited? Is the study offered by these commenters persuasive, and why or why not? Are there studies aside from those cited in the record that the Commission should examine, and why?

51. We also seek comment on how we should leverage our own existing data and whether we should undertake new data collection efforts. What existing data sources could help us to identify when consumers' access to broadband internet has been differentially impacted? For example, should we look to the Broadband Data Collection,<sup>196</sup> the Broadband Data Act mapping process,<sup>197</sup> or other collections?<sup>198</sup>

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Common Cause et al. Reply at 4 n.14 (citing Communications Workers of America and National Digital Inclusion Alliance, Lumen's Digital Disparity: Underinvestment in Infrastructure Discriminates Against Lower-Income, Rural, and Native American Customers (2021), [https://cwa-union.org/sites/default/files/20210624\\_lumen\\_report.pdf](https://cwa-union.org/sites/default/files/20210624_lumen_report.pdf)); Lawyers' Committee for Civil Rights Under Law Comments at 10 n.34 (citing Sara Atske and Andrew Perrin, Pew Research Center, Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S. (2021), <https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/>).

<sup>193</sup> See Lawyers' Committee for Civil Rights Under Law Comments at 10 n.33 (citing Shelley McKinley, Microsoft, Microsoft Airband: An Annual Update on Connecting Rural America (2020), <https://blogs.microsoft.com/on-the-issues/2020/03/05/update-connecting-rural-america/>); Common Cause et al. Reply at 4 n.14 (citing Communications Workers of America and National Digital Inclusion Alliance, Lumen's Digital Disparity: Underinvestment in Infrastructure Discriminates Against Lower-Income, Rural, and Native American Customers (2021), [https://cwa-union.org/sites/default/files/20210624\\_lumen\\_report.pdf](https://cwa-union.org/sites/default/files/20210624_lumen_report.pdf)).

<sup>194</sup> AT&T Reply at 6 & n.13; Declaration of Glenn Woroch, Attach. to AT&T Reply.

<sup>195</sup> Electronic Frontier Foundation et al. Comments at 12 n.37; Common Cause et al. Reply at 4 & n.15; #OaklandUndivided Coalition Reply at 13 & n.30; Vinhcent Le and Gissela Moya, Greenlining Institute, On the Wrong Side of the Digital Divide: Life Without Internet Access, and Why We Must Fix It in the Age of COVID-19 (2020), <https://greenlining.org/publications/online-resources/2020/on-the-wrong-side-of-the-digital-divide/>.

<sup>196</sup> CEO Action for Racial Equity Comments at 8-9; Free Press Comments at 5; TURN Comments at 21; USTelecom Comments at 20; CTIA Reply at 6-7; U.S. Chamber of Commerce Reply at 2.

<sup>197</sup> See ACT| The App Association Comments at 3 (rec. May 16, 2022) (App Association Comments); CEO Action for Racial Equity Comments at 10; Free Press Comments at 5; Microsoft Comments at 4-6 (rec. May 16, 2022); NCTA Comments at 25; TURN Comments at 23.

<sup>198</sup> See, e.g., CEO Action for Racial Equity Comments at 10 (noting that the Commission can use self-collection methods like the FCC speed test app); City of Dallas Reply at 3 (arguing that the Commission should make available detailed information about unsuccessful ACP applications due to lack of a available internet service); Common Cause et al. Reply at 3 (pointing to ACP data and other "existing FCC programs" as well as third-party data collection efforts); Free Press Comments at 5 (pointing to ACP data and other programs); Leadership Conference on Civil and Human Rights Comments 4 (identifying Form 477 and other Commission data, as well as the U.S. Census Bureau's American Community Survey data and state broadband maps); National Digital Inclusion Alliance Comments at 6-7, 14 (pointing to various types of data the Commission should collect); National Urban League Comments at 3 (pointing to, in addition to FCC data sources, outside data such as the American Community Survey); NCTA Comments at 26-28 (pointing to various data sources that the Commission should or should not use and arguing that the Commission should invite comment on what data sources it plans to rely on); TURN Comments at 21-24 (highlighting publicly available data submitted by providers as well as data from external, including nonprofit, entities in addition to the Commission's own data sources, such as Form 477 data); WISPA Comments at 21-22 (pointing to the Broadband Serviceable Location Fabric, a program to aid in enhancing broadband deployment maps); Digital Progress Institute Reply at 4 (rec. June 30, 2022) (urging the Commission to use U.S. Census

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How specifically should we use the data offered by these collections? How can we best leverage the data collected through our informal consumer complaint process? If we undertake new data collections, what data should we collect? Should we collect data on broadband adoption not captured by other collections;<sup>199</sup> on marketing and advertising practices;<sup>200</sup> on broadband usage and adoption;<sup>201</sup> on technical and non-technical quality of service;<sup>202</sup> pricing and service plan availability; or on other subjects? How should those data collections be designed to maximize their utility for the Commission's efforts to address digital discrimination of access, while minimizing the burden on entities who must provide these data? If the Commission does collect new data, at what geographic level should this data be collected so that it can adequately address complaints of digital discrimination but not be too burdensome on providers?

### B. Revising the Commission's Informal Consumer Complaint Process

52. We propose to revise our informal consumer complaint process to accept complaints of digital discrimination of access, as directed in section 60506.<sup>203</sup> In the *Notice of Inquiry*, we explained that the Commission receives complaints through its Consumer Complaint Center and sought comment on how to modify our complaint processes to best execute this direction.<sup>204</sup> In response, commenters suggest a variety of modifications to our consumer complaint process for purposes of accepting digital discrimination complaints. In light of this record, we propose to revise our consumer complaint process to (1) add a dedicated pathway for digital discrimination of access complaints; (2) collect voluntary demographic information from filers who submit digital discrimination of access complaints; and (3) establish a clear pathway for organizations to submit digital discrimination of access complaints. We further propose to make anonymized complaint data available to the public through the FCC's Consumer Complaint Data Center to inform third-party analyses. We seek comment on these proposals, and on any other revisions to our informal complaint rules and process that would be appropriate with respect to complaints regarding digital discrimination of access.

53. We seek comment on our proposal to add a dedicated pathway for digital discrimination of access complaints to our consumer complaint system. Commenters who propose this idea argue we

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Bureau's American Community Survey data); *but see* American Consumer Institute Center for Citizen Research Reply at 2 (rec. June 29, 2022) (arguing that various data sources proposed by commenters are unreliable); AT&T Reply at 10-11 (contesting the reliability of various studies highlighted by commenters); Lumen Reply at 18 (rec. June 30, 2022) (arguing that various papers cited in the *Notice* are "inherently flawed"); NCTA Reply at 27-28 (arguing that the "Commission should . . . rely on data that measures broadband availability rather than adoption" and criticizing studies cited by other commenters); USTelecom Reply at 16 (contending that studies highlighted by other commenters "are either outdated or lack either the statistical or economic rigor that should be required for any study purporting to show discrimination").

<sup>199</sup> See CTIA Comments at 6-7 (arguing that it would be premature to establish new data collection requirements); NCTA Reply at 26 (arguing that the costs of new data collection efforts would outweigh the benefits); T-Mobile Comments at 19 (opposing any new data collection requirements).

<sup>200</sup> CTIA Comments at 6-7; Free Press Comments at 7; Massachusetts Department of Telecommunications and Cable Reply at 2, 7 (rec. June 30, 2022).

<sup>201</sup> See Electronic Frontier Foundation et al. Comments at 17-18; League of United Latin American Citizens Comments at 2 (rec. May 16, 2022); Microsoft Comments at 6-7; National Digital Inclusion Alliance Comments at 6-7.

<sup>202</sup> National Digital Inclusion Alliance Comments at 6, 13-14; Massachusetts Department of Telecommunications and Cable Reply at 2, 10-11; National Digital Inclusion Alliance Reply at 10 (rec. June 30, 2022); Ranking Digital Rights Reply at 3-7 (rec. June 28, 2022).

<sup>203</sup> 47 U.S.C. § 1754(e).

<sup>204</sup> *Notice of Inquiry* at 14, para. 34.

should do so because it will help the Commission identify trends that warrant further action.<sup>205</sup> Do others agree that adding a digital discrimination of access pathway would offer these benefits? Or are digital discrimination complaints better understood as a subset of “Internet” complaints, for which there is already a category on our Consumer Complaint Center?<sup>206</sup> If we did adopt this proposal—demographic information aside—should we create new or different fields for the digital discrimination of access complaint form from those offered for other types of complaints? If so, what specific changes should we make and what purpose would they serve?

54. We seek comment on our proposal to establish a pathway for organizations representing communities experiencing digital discrimination of access to submit digital discrimination complaints. We propose establishing a complaint pathway for state, local, Tribal, and community-based organizations, which would include separate processes for individual and organizational filers.<sup>207</sup> Commenters who support this proposal argue that it will ensure that organizations can advocate on behalf of disenfranchised and marginalized individuals who are either unserved or underserved as a result of digital discrimination of access; and that it will enable the Commission better to identify and respond to substantive complaints and collaborate with State, local and Tribal governments.<sup>208</sup> What specific improvements can be made to the current informal consumer complaint process to make it more accessible for submission by organizations on behalf of groups of individuals? In what ways would a digital discrimination of access complaint from a community-based organization be different from an individual consumer’s digital discrimination complaint, and how could we account for those differences in our consumer complaint system? Should organizational complainants be expected or required to share statistics and other information regarding the community in question and the services offered, or not offered, so that the Commission could more efficiently evaluate the bases of the complaint? What tools and resources should the Commission provide community-based organizations in order to submit digital discrimination of access complaints on behalf of the individuals they serve? Is the informal complaint process the appropriate entry point for organizational submissions? Would a dedicated collection portal help to differentiate consumer versus organizational submissions and better set clear expectations for the filer? Should we impose associational standing or other requirements on the filing of organizational complaints? If so, what such requirements would be appropriate?

55. We seek comment on our proposal to collect voluntary demographic information from filers who submit digital discrimination of access complaints. Commenters who support this idea argue that we should collect demographic information from individuals filing complaints because doing so will enable us to better identify underlying patterns of discrimination that complainants themselves may be unaware of, and thus increase the efficiency and utility of the informal complaint process.<sup>209</sup> We seek comment on how we should collect demographic information from filers who submit digital discrimination of access complaints. What specific demographic information should we collect? Should we instead make the submission of demographic information mandatory for digital discrimination of access complaints? Would requiring demographic information discourage the filing of complaints, and if it would, would this potential loss of complaints be justified given the potential benefits of collecting this information? If the complaint process requests, but does not demand, demographic information, should

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<sup>205</sup> CTIA Comments at 23; National Digital Inclusion Alliance Comments at 20-21; New York State Public Service Commission Comments at 2 (rec. May 16, 2022); Starry Comments at 5.

<sup>206</sup> See FCC, Consumer Complaint Center, <https://consumercomplaints.fcc.gov/hc/en-us> (last visited Nov. 29, 2022).

<sup>207</sup> See Next Century Cities Comments at 14 (clarifying that differentiating between subscribers and state, local, or Tribal governments would allow government entities to submit data and provide ways in which more formal collaboration could address digital discrimination).

<sup>208</sup> See Next Century Cities Comments at 14; Public Knowledge Comments at 25; Public Knowledge Reply at 20-21.

<sup>209</sup> National Digital Inclusion Alliance Comments at 13-14; TURN Comments at 28; Public Knowledge Reply at 20.

complainants be advised that their information will not be readily useable for uncovering the presence of digital discrimination of access? Would doing so give complainants an incentive to provide demographic information? Are there specific privacy concerns we should account for when collecting this demographic information? How would we accommodate organizational complainants in any demographic information requirements we adopt? Given the temptation to make frivolous, malicious or prank complaints, and the ease of machine generation of such complaints, should complainants be required to provide enough information about themselves to enable the commission to verify the existence of the complainant? Does the collection of demographic information have an impact on a filer's willingness to complete the complaint form? If a complaint is misfiled through a different pathway, how should we collect demographic information from that filing?

56. We seek comment on any other changes we should make to our informal consumer complaint process to accept complaints of digital discrimination of access. Commenters variously propose that we make it easier to file a complaint for individuals who do not speak English;<sup>210</sup> develop screening questions to guide consumers toward the appropriate category for their complaint;<sup>211</sup> and improve our processes for submitting a complaint other than through our internet-based Consumer Complaint Center.<sup>212</sup> We seek comment on whether to adopt these suggestions and, if we do, how to best implement them. We seek comment on whether the Commission should engage in some form of complaint validation. Is it sufficient that providers who may be impacted by such complaints are able to review these complaints and respond?

57. *Making Complaint Data Available to the Public.* We seek comment on our proposal to make digital discrimination complaint data available to the public through the FCC's Consumer Complaint Data Center.<sup>213</sup> The record in this proceeding reflects widespread support for ensuring that the data collected from digital discrimination of access complaints, including demographic information, are made publicly available for third-party review and analysis.<sup>214</sup> Making these data available could promote transparency and empower third parties to identify trends in digital discrimination.<sup>215</sup> We seek comment on how to best make these data publicly available and useful while protecting complainant privacy. Some of the data currently collected from consumer complaints are made publicly available on our website in the Consumer Complaint Data Center.<sup>216</sup> Should we make the same data publicly available for digital discrimination of access complaints? To the extent we receive and make available demographic data unique to digital discrimination complaints, to protect the privacy of complainants, we propose taking steps to aggregate, anonymize, or otherwise de-identify those data. We seek comment on how best to do so while protecting complainant privacy. Would it be useful and effective to buffer, aggregate, or remove some information in the data to protect consumer privacy?<sup>217</sup> Instead, are disaggregated data necessary to be useful?<sup>218</sup> If so, how could we protect the privacy of complainants

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<sup>210</sup> TURN Comments at 27; CTIA Reply at 14.

<sup>211</sup> See Public Knowledge Comments at 24-25.

<sup>212</sup> See National Digital Inclusion Alliance Comments at 20; Public Knowledge Comments at 24; City of Dallas Reply at 4; Public Knowledge Reply at 20.

<sup>213</sup> See FCC, Consumer Complaint Data Center, <https://www.fcc.gov/consumer-help-center-data> (last visited Nov. 29, 2022) (listing the complaint data fields available publicly in the Consumer Complaint Center).

<sup>214</sup> See, e.g., Free Press Comments at 9.

<sup>215</sup> See Public Knowledge Comments at 26-27.

<sup>216</sup> Federal Communications Commission, Consumer Complaint Data Center, <https://www.fcc.gov/consumer-help-center-data> (last visited Nov. 29, 2022).

<sup>217</sup> See National Digital Inclusion Alliance Comments at 6.

<sup>218</sup> See CEO Action for Racial Equity Comments at 7; Multicultural Media, Telecom and Internet Council Comments at 19-20; Multicultural Media, Telecom and Internet Council Reply at 5.

while still publishing disaggregated data? Should we make additional data available to parties that agree to certain terms regarding confidentiality and use of that data? What additional data would we make available, and on what terms?

### C. Adoption of Rules

58. We seek comment on the rules we should adopt to fulfill the Congressional direction to address digital discrimination of access. Section 60506 requires us to adopt rules to facilitate equal access to broadband, accounting for “issues of technical and economic feasibility,” that include “preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin,” and “identifying necessary steps for the Commission to take to eliminate [digital] discrimination.”<sup>219</sup> To execute this direction, we seek comment on whether we should adopt a broad prohibition of digital discrimination of access and if so, how to structure and enforce it; place affirmative obligations on broadband providers; and take action in other proceedings that bear on or relate to addressing digital discrimination. In addition, we seek comment on various other proposals received in response to our *Notice of Inquiry*.

#### 1. Broad Prohibition on Digital Discrimination of Access

59. In our *Notice of Inquiry*, we sought comment on whether we should adopt rules that broadly and directly prohibit digital discrimination of access and on what other approaches we should take to implement the statute, such as prohibiting specifically enumerated conduct.<sup>220</sup> Some commenters in response, such as the National Digital Inclusion Alliance, express support for a direct prohibition as a way for the Commission to “be comprehensive and straightforward in its fulfillment of its Congressional obligation to prevent and eliminate such discrimination.”<sup>221</sup> Other commenters, such as WISPA, warn that we should be cautious in adopting rules because too broad of a prohibition could “discourage deployment and investment for service providers, especially small providers,” while rules that are too narrow “will not identify actual cases of digital discrimination and will not serve the public interest.”<sup>222</sup> The National Digital Inclusion Alliance argues that we should identify and enumerate specific prohibited conduct and that such an approach would benefit the industry, subscribers, and the government by making clear what is barred by our rules.<sup>223</sup>

60. We seek comment on whether we should adopt a broad prohibition on digital discrimination of access, and how to structure and enforce such a prohibition. Would adopting a broad prohibition on digital discrimination of access be our best course to effectuate Congress’s direction to adopt rules to “facilitate equal access,” including “preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin,” and “identifying necessary steps for the Commissions to take to eliminate [digital] discrimination”?<sup>224</sup> Would it present administrative challenges for government or a lack of clarity for providers or consumers? Would that lack of clarity chill

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<sup>219</sup> 47 U.S.C. § 1754(b).

<sup>220</sup> *Notice of Inquiry* at 13, para. 30.

<sup>221</sup> National Digital Inclusion Alliance Comments at 17 (advocating for us also to adopt a list of prohibited conduct); *see also* TURN Comments at 24-26; Accessibility Advocacy Organizations and Research Groups Reply at 13-14.

<sup>222</sup> WISPA Comments at 17-18; *see also* ACA Connects Comments at 7 (stating “the Commission should avoid adopting broad, proscriptive rules that limit or otherwise inhibit broadband providers from investing in their networks and services or that impose unnecessary compliance costs on providers.”); AT&T Reply at 17 (explaining “Congress viewed the nondiscrimination requirement not as a source of major new regulatory burdens, but as a simple ban on intentional discrimination that applies equally to all ISPs.”).

<sup>223</sup> *See* National Digital Inclusion Alliance Comments at 17; *see also* Next Century Cities Comments at 12; TURN Comments at 25; Accessibility Advocacy Organizations and Research Groups Reply at 13-14.

<sup>224</sup> 47 U.S.C. § 1754(b)(1)-(2).

investment? How could we address any identified practical challenges? Should we accompany any broad prohibition we adopt with specific, enumerated prohibited practices? If so, would this take the place of a broad prohibition of digital discrimination or be supplementary? If we were to publish a list of prohibited practices considered examples of digital discrimination, what practices should we include? Are the answers to these questions different if we adopt a definition of digital discrimination based on disparate impact or disparate treatment? If we adopt a definition of digital discrimination of access that includes a disparate impact standard, should we nonetheless limit our broad prohibition to instances of disparate treatment? Would a rule prohibiting only intentionally discriminatory policies or practices be effective in achieving the stated goal of subsection 60506(a)?<sup>225</sup> If not, why not? Would such a rule establish a bar too high for claimants (or the Commission) to clear,<sup>226</sup> and would it be easy to evade?<sup>227</sup> Is there any context in which we should adopt a prohibition on disparate impact and not disparate treatment? Or does disparate impact inherently include disparate treatment?

61. We seek comment on how to address claims of digital discrimination of access under any broad prohibitions we might adopt. We first seek comment on the analytical framework we should use for claims of digital discrimination of access under disparate impact and disparate treatment prohibitions. We next seek comment on how to effectuate enforcement of any prohibition we might adopt.

#### a. Analytical Framework

62. *Disparate Impact Framework.* We seek comment on how we should structure our rules and procedures to implement a prohibition of digital discrimination based on disparate impact. Courts have generally used a three-part test to determine whether a facially neutral policy or practice discriminates against members of protected groups under civil rights statutes.<sup>228</sup> First, the complainant must establish a *prima facie* case of discrimination by proving that the challenged practice or policy causes a disproportionate, adverse impact on a group determined by reference to a protected characteristic. This showing creates an inference of discrimination.<sup>229</sup> Second, the burden shifts to the respondent to establish a substantial, legitimate justification for the challenged practice or policy. This second step is typically referred to as the “rebuttal” phase. And third, where the respondent provides a substantial, legitimate justification, the complainant can still prevail on the claim by demonstrating the

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<sup>225</sup> See Multicultural Media, Telecom and Internet Council Comments at 14-15 (arguing that a disparate treatment approach would not adequately capture most forms of modern discrimination, which are structural and institutional rather than individual or interpersonal); National Digital Inclusion Alliance Comments at 11 (contending that if proof of discriminatory intent is required, “the record will vastly underestimate the prevalence of digitally discriminatory practices, limiting the Commission’s ability to prevent and eliminate such practices and combat the digital divide”); Public Advocates Office at the California Public Utilities Commission Reply at 3 (“An intent-based standard will not achieve the goal of facilitating universal equal access to high-quality, affordable broadband.”).

<sup>226</sup> See Lawyers’ Committee for Civil Rights Under Law Comments at 28 (arguing that because “contemporary digital discrimination is largely structural in nature, and because corporations would be careful not to document intent to disenfranchise a protected class, it would be near-impossible to enforce the statute under this prohibitively onerous standard,” and interpreting section 60506 to only encompass discriminatory intent claims “would drastically curtail the effectiveness of the statute . . . and, thus, would conflict with the statutory purpose”); National Digital Inclusion Alliance Comments at 11 (“rendering discriminatory intent a necessary element of digital discrimination will result in the drastic underenforcement of Section 60506 because discriminatory intent is near impossible to prove”). *But see* Verizon Reply at 7-8 (writing that “intent-based standards are effectively used in other contexts to provide relief to aggrieved parties and would also provide an effective mechanism to address unlawful discrimination here”).

<sup>227</sup> National Digital Inclusion Alliance Comments at 11 (suggesting that “actors may discriminate by using proxies for protected classes, obfuscating any appearance of intent”).

<sup>228</sup> See Department of Justice, *Title VI Legal Manual, Section VII: Proving Discrimination – Disparate Impact* (Feb. 3, 2021), <https://www.justice.gov/crt/fcs/T6Manual7>.

<sup>229</sup> See *id.*

existence of an available, alternative practice or policy that would achieve the same legitimate objective but with less discriminatory effect.<sup>230</sup> Public Knowledge suggests that we implement such a burden shifting approach so that once a prima facie showing of discrimination has been made, “the burden would shift to the alleged violator to demonstrate that digital discrimination has not taken place, either by rebutting the evidence, or by providing a ‘substantial legitimate justification’ for the unequal access to broadband that the complainant has shown.”<sup>231</sup> We seek comment on whether to adopt this type of framework. Is this the best way to analyze claims of disparate impact? How burdensome is it, and would another framework be less burdensome? The Leadership Conference on Civil and Human Rights observes that courts have created a three-step analysis to evaluate claims of whether a carrier has violated section 202 of the Communications Act that includes a burden shifting framework.<sup>232</sup> Should this inform our decision regarding the utility and effectiveness of a burden-shifting framework for claims of digital discrimination of access? Should we adopt all three of the steps used in Federal court cases involving disparate impact, a selection of them, or different steps? If not, what specific components of a burden-shifting framework should we include?

63. If we adopt a burden-shifting framework similar to that used in Federal court, what specifically should we require at each step of the analysis? What type of evidence or data sources would we look for to substantiate the presence of a policy or practice that disproportionately affects an individual, group or community that meets one of the listed characteristics?<sup>233</sup> EveryoneOn supports the adoption of rules that, similar to those established under the Fair Housing Act, would prohibit practices based on “discriminatory effect, even if not motivated by discriminatory intent,” and suggests that examples of such discriminatory effect could be found in “the assessment of unduly high fees, service interruptions, unreliable internet service in low-income neighborhoods, and unfair barriers such as credit checks, deposits, etc. when subscribing to or reestablishing service.”<sup>234</sup> Should we identify these and other types of practices as prima facie evidence of disparate impact when supported by statistical or other reliable evidence of their disproportionate impact on individuals or groups determined by reference to protected characteristics? The Multicultural Media, Telecom and Internet Council suggests that the existence of a statistical disparity connected to a provider’s policies or practices would be required to make an initial case of disparate impact.<sup>235</sup> Should we adopt that standard, or a different one? Under a traditional burden-shifting approach, how would a provider show that it had a substantial legitimate justification for its policy or practice? Would proof that the challenged practice or procedure was necessitated by genuine technical and economic feasibility concerns provide the necessary showing to rebut the prima facie case? Are there any substantial business justifications that we should recognize in this context other than genuine technical and economic feasibility concerns? Are there other ways that we might incorporate the consideration of technical and economic feasibility into this step of the traditional, three-step analysis?<sup>236</sup> And what should we require to establish an alternative practice that would achieve the same objective but with less discriminatory effect? Can we look to existing precedent to answer these questions? And do we need to establish these standards at this point, or should we allow them to be refined on a case-by-case basis going forward?

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<sup>230</sup> *See id.*

<sup>231</sup> Public Knowledge Comments at 22.

<sup>232</sup> Leadership Conference on Civil and Human Rights Comments at 9.

<sup>233</sup> *See* Free Press Comments at 2, 7 (writing that the Commission should use “methods used to detect discrimination in other domains, including matched pair or spatial analysis”).

<sup>234</sup> EveryoneOn Comments at 2.

<sup>235</sup> Multicultural Media, Telecom and Internet Council Comments at 16.

<sup>236</sup> *See, e.g., id.; see also* TURN Comments at 25 (arguing that we should “establish a process in which the broadband internet access service provider would have the burden of production and the burden of proof to show that broadband service deployment to a target area is not economically or technically feasible”).

64. *Disparate Treatment Framework.* We seek comment on how we should structure our rules to implement a prohibition of digital discrimination of access based on disparate treatment. In general, courts have used several analytical frameworks to evaluate claims of intentional discrimination. The Connecticut Office of State Broadband & Office of Consumer Counsel suggests that we use a burden shifting system based on the *McDonnell Douglas* framework.<sup>237</sup> Under the *McDonnell Douglas* framework, a claim of discrimination proceeds through three steps: (1) the complainant proves a prima facie case of discrimination by typically showing that they are a member of a protected group, were eligible for a service or employment opportunity, were denied or otherwise treated in an adverse manner, and that a similarly situated individual who is not a member of the protected group was treated better; (2) the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged practice or action; and (3) if the defendant meets the burden to provide a legitimate, non-discriminatory reason, the burden shifts back to the plaintiff to demonstrate that this reason is pretext for discrimination.<sup>238</sup> We seek comment on whether to adopt this framework to analyze claims of intentional digital discrimination of access. Is this the best way to analyze claims of intentional discrimination? Are there certain situations in which it would work better than others? If so, what situations and why? How burdensome is this analysis, and would other frameworks be less burdensome? If we adopt rules incorporating this framework, would we need to make any changes to accommodate the specific direction of section 60506 and, if so, what changes would be appropriate?

65. If we adopt a burden-shifting framework similar to the *McDonnell Douglas* framework, what specifically would we require at each step of the analysis? What types of evidence should we consider sufficient to demonstrate discriminatory intent?<sup>239</sup> For example, without access to the internal communications of a broadband provider, how would a subscriber support a claim of intentional digital discrimination? What types of data sources could the Commission or subscribers use to analyze potential claims? How might a Commission data collection fit into this process? In the context of broadband internet access service, how would the Commission evaluate the “fit” between the challenged practice and the justifications offered in support of it? Does consideration of technical and economic feasibility fit in this step of the analysis? On what basis might we determine that any proffered reasons are pretextual? Can we look to existing precedent to answer these questions? And do we need to establish these standards at this point, or should we allow them to be refined on a case-by-case basis going forward?

66. We seek more focused comment on how to incorporate section 60506’s direction to account for “technical and economic feasibility” into any intentional discrimination prohibition we adopt. In the *McDonnell Douglas* framework, once a prima facie case is made, the burden shifts to the provider to demonstrate that the conduct is not motivated by discrimination but is instead based on legitimate reasons. Does following that model adequately “tak[e] into account the issues of technical and economic feasibility”? Or are there instances in the context of broadband service where intentional discrimination is justified by technical and economic feasibility? In particular, we seek comment on how subsection 60506(b)(1)’s inclusion of “income level” as a listed characteristic fits into this framework. For example, should a provider be permitted to defend a claim of income-based intentional discrimination by offering projections showing that deploying to a particular community would likely produce a lower-than-normal rate of return on investment? How are we to determine whether a proffered economic justification, such

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<sup>237</sup> Connecticut Office of State Broadband Comments at 3-4. *See also* Verizon Reply at 7-8 (arguing that “the *McDonnell Douglas* ‘burden shifting’ framework has long been the standard for analyzing claims brought under the Civil Rights Act and would enable a plaintiff to make out an intentional discrimination claim without direct evidence, based on a circumstantial case”).

<sup>238</sup> *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); Department of Justice, *Title VII Legal Manual, Section VI: Proving Discrimination – Intentional Discrimination* (Feb. 3, 2021), <https://www.justice.gov/crt/fcs/T6Manual6#106>.

<sup>239</sup> Public Knowledge Comments at 22 (suggesting documentary evidence would be difficult to find because such evidence might have been destroyed, lost, or never generated, and key witnesses may have died).

as rate of return, is a pretext for income-based discrimination? Some commenters argue that a smaller-than-normal profit margin should not be a sufficient reason to claim economic infeasibility and that the Commission should rarely excuse discrimination on such grounds.<sup>240</sup> We seek comment on this view and on the National Digital Inclusion Alliance’s suggestion that we establish a process for providers to identify a technical or economic feasibility justification, provide relevant proof, and request a waiver from the obligations we impose under section 60506.<sup>241</sup> Would such a system operate as a standalone waiver process in the context of any rules preventing digital discrimination of access or function only as part of a provider’s defense to claims of digital discrimination?<sup>242</sup> Would a standalone process confer benefits that are not already available under the Commission’s general waiver authority?<sup>243</sup>

67. *Other Frameworks.* Rather than adopt one of the frameworks elaborated above, should we take a different approach to analyzing claims of digital discrimination of access under a broad prohibition? CTIA argues that a burden shifting process is a “poor fit here” because it would be highly burdensome on broadband internet access service providers, and broadband coverage and service varies from location to location.<sup>244</sup> We seek comment on these arguments. Under an alternative framework for intentional discrimination called the *Arlington Heights* approach, courts look to a “mosaic” of factors, that when taken together, can demonstrate discriminatory intent.<sup>245</sup> These factors might include: (i) statistics demonstrating a pattern of discriminatory effect; (ii) historical background; (iii) the sequence of events leading up to the decision; (iv) departures from normal procedures or conclusions; (v) relevant legislative or administrative history; and (vi) a consistent pattern of actions that impose a much greater harm on minorities than non-minorities.<sup>246</sup> Would this type of framework be better suited to this context? Why or why not? Are there other frameworks we should consider? Rather than adopting a framework for case-by-case review, should we simply list prohibited practices? Would that approach adequately address digital discrimination of access or would it be too limited to adequately capture all instances of digital discrimination of access? How could that approach evolve with changing practices and a changing market? Alternatively, does the inaccessibility of intent evidence require some form of burden shifting framework?<sup>247</sup>

## b. Enforcement

68. If we were to adopt a broad prohibition on digital discrimination, we seek comment on the most effective framework for enforcing it. In the *Notice of Inquiry*, we sought comment on whether

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<sup>240</sup> See City of Dallas Reply at 3; Connecticut Office of State Broadband Comments at 4 n.9; Lawyers’ Committee for Civil Rights Under Law Comments at 28; National Digital Inclusion Alliance Comments at 8-9, 19-20; Public Knowledge Comments at 30-31. *But see* USTelecom Comments at 13-14 (identifying several cost-related considerations that factor into deployment decisions).

<sup>241</sup> National Digital Inclusion Alliance Comments at 9, 20 (recommending that we establish “appropriate parameters for assessing return-on-investment financial projections” that require providers to “utilize a long-term profitability model”); TURN Comments at 17 (advocating for the Commission to create a framework to “proactively” consider issues of technical and economic feasibility that is “structured with the understanding that broadband internet access service infrastructure is a long-term asset”).

<sup>242</sup> See National Digital Inclusion Alliance Comments at 20.

<sup>243</sup> See 47 CFR § 1.3.

<sup>244</sup> CTIA Reply at 14-15.

<sup>245</sup> *Vill. Of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

<sup>246</sup> Department of Justice, *Title VI Legal Manual, Section VI: Proving Discrimination – Intentional Discrimination* (Feb. 3, 2021), <https://www.justice.gov/crt/fcs/T6Manual6#106>.

<sup>247</sup> See TURN Comments at 17 (arguing that “the burden of proof and production should be on the broadband internet access service provider to demonstrate the technical or economic infeasibility for the target area that the Commission has preliminarily identified”); National Digital Inclusion Alliance Comments at 19.

we should establish an alternative complaint process, separate from our existing informal complaint system, for violations of the rules we adopt.<sup>248</sup> We now seek comment on whether to rely on the standard FCC enforcement model, establish a complaint system, or enable or empower third parties to enforce the rules we adopt, and on the scope of our authority to adopt each approach.

69. *FCC Enforcement.* We seek comment on whether our current FCC enforcement capabilities are the best and most effective avenue to accomplish Congressional intent. Are there certain characteristics or features of our various enforcement processes that would make it difficult for us to enforce compliance with our rules implementing section 60506? If so, how might we address those issues so as to effectively enforce the rules we ultimately adopt? TURN encourages us to consider using our existing enforcement toolkit of letters of inquiry, notice of apparent liability, and forfeiture orders to enforce our rules prohibiting digital discrimination of access.<sup>249</sup> We seek comment on these ideas and on whether these tools are appropriate and sufficient for enforcing claims of digital discrimination of access. Should we rely principally or exclusively on FCC staff-initiated investigations to enforce our rules, with the possibility of monetary forfeitures or other penalties for offending conduct? Would such an approach unduly constrain enforcement of the rules by channeling most, if not all, of the enforcement activity through our investigations staff? Are there better, more effective ways for us to enforce our rules in this context? If we adopt a burden-shifting analysis for enforcement of any prohibition we adopt, is the Commission's traditional investigative process sufficiently flexible to accommodate such a framework? Or would we need to modify or adopt new processes to enable a burden-shifting analysis?

70. We seek comment on the punishments or remedies the Commission could impose and award as part of our enforcement of rules prohibiting digital discrimination of access. Are monetary forfeitures the appropriate punishment in proven cases of digital discrimination of access? What other punishments or remedies might be appropriate? The Leadership Conference on Civil and Human Rights urges us to create rules that will enable us to effectively collect any financial penalties we impose.<sup>250</sup> We seek comment on what rules we might adopt to ensure our ability to collect any monetary forfeitures we might impose upon determining that a respondent has engaged in digital discrimination of access. Many of our staff-initiated investigations of alleged violations of the Communications Act or our rules are resolved through consent decrees. The Leadership Conference on Civil and Human Rights argues that, for consent decrees to be effective in the context of digital discrimination of access, we need to have sufficient "capacity to monitor and ensure that any consent decrees are fully complied with."<sup>251</sup> We seek comment on what changes, if any, we should make to our consent decree process to ensure it is an effective remedy in this context.

71. We seek comment on our authority to address violations of any rules prohibiting digital discrimination of access we adopt through Commission enforcement. Are there limitations on our ability to enforce violations of such rules or act upon complaints of digital discrimination of access?<sup>252</sup> The Commission routinely uses section 503 authority under the Communications Act to impose monetary forfeitures against those who, among other things, "willfully or repeatedly" violate "any rule, regulation, or order issued by the Commission."<sup>253</sup> Violations of Commission rules can also be enforced under

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<sup>248</sup> *Notice of Inquiry* at 14-15, paras. 34-35.

<sup>249</sup> TURN Comments at 25.

<sup>250</sup> Leadership Conference on Civil and Human Rights Comments at 7.

<sup>251</sup> *See id.*

<sup>252</sup> The Communications Act general enforcement and penal authority are provided for in section 401 and Title V of the Communications Act. 47 U.S.C. §§ 401, 501 *et seq.*

<sup>253</sup> 47 U.S.C. §§ 503(b)(1)(B), 504; *see* 47 CFR §§ 1.80, 1.89 (rules governing forfeiture proceedings and notice of violations).

sections 501, 502, and 401 of the Communications Act.<sup>254</sup> AT&T argues that the Communications Act’s Subchapter V enforcement remedies may not be available to the Commission because section 60506 was not enacted “as part of the Communications Act even though [Congress] explicitly [took] that step with other Infrastructure Act provisions.”<sup>255</sup> We seek comment on this argument and on whether we lack authority to enforce rules adopted consistent with Congressional direction in section 60506. Does the inclusion of subsection 60506(e), which requires us to revise our “public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination,”<sup>256</sup> evidence Congress’s intent that the Commission act on digital discrimination complaints and enforce rules prohibiting digital discrimination of access? Does the inclusion of subsection 60506(b), which directs us to adopt rules to “facilitate equal access” including addressing digital discrimination of access, evidence the same?<sup>257</sup> Do we have ancillary authority under section 4(i) of the Communications Act to enforce rules prohibiting digital discrimination of access as necessary to discharge our statutory mandate of “preventing” digital discrimination of access?<sup>258</sup> Could we enforce these rules in other ways, such as by barring offending providers from participating in funding programs or finding that violations of our digital discrimination rules raise character qualification issues? Should we expand our character policy statement to include violations of our rules barring digital discrimination of access?<sup>259</sup> If so, how? Should it apply only to a pattern of discrimination?

72. *Structured Complaint Process.* We next seek comment on whether we should establish a structured process for adjudicating formal complaints alleging violations of any rules we adopt in this proceeding. Under our informal consumer process, discussed above, there is no filing fee and any complaints would aid the Commission in identifying potential areas for investigation. A structured complaint process, in contrast, would include a more defined dispute mechanism that results in a Commission determination on the issue, such as currently exists under our rules promulgated pursuant to section 208 of the Communications Act. WISPA argues that there is no need for the Commission to create an alternative complaint process because our informal consumer complaint process is sufficient,<sup>260</sup> and other commenters argue that a complaint process requiring provider response and formal Commission

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<sup>254</sup> 47 U.S.C. §§ 501-502 (establishing a penalty of up to \$10,000 or one-year imprisonment, and up to \$500 per day of a continuing offense, for any person convicted of “willfully and knowingly” violating “any rule, regulation, restriction, or condition made or imposed by the Commission under the authority of this chapter”); *id.* § 401 (providing that the Commission or United States also may seek district court enforcement of “any order of the Commission other than for the payment of money”).

<sup>255</sup> AT&T Reply at 17-18 (arguing further that Congress did not “incorporate [Subchapter] V enforcement remedies by reference [into section 60506] even though other Infrastructure Act provisions do”).

<sup>256</sup> 47 U.S.C. § 1754(e).

<sup>257</sup> 47 U.S.C. § 1754(b).

<sup>258</sup> 47 U.S.C. § 154(i); *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (quoting *Am. Library Assn. v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

<sup>259</sup> *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986). The character policy provides a framework for use in determining whether the public interest would be served by granting a particular application in the broadcast, common carrier, wireless, and other services, and is especially “concerned with misconduct which violates . . . a Commission rule or policy.” *Id.* at 1190, para. 23. *See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628-29 (D.C. Cir. 1978) (“A documented pattern of intentional discrimination would put seriously into question a licensee’s character qualification to remain a licensee.”).

<sup>260</sup> *See WISPA Comments* at 30 (stating that the Commission should propose to enhance its current process to make it more accessible, but overall its “current complaint process is quite comprehensive and consumer-friendly and its existing Consumer Complaint Data Center and Consumer Help Center are technically sufficient to handle informal consumer complaints”).

adjudication may be overly burdensome.<sup>261</sup> We seek comment on whether we should adopt a structured complaint process to provide parties with the flexibility to choose between two systems. Would our structured complaint process be accessible to and effective for complainants, or would the resource imbalance between consumers and providers render the process ineffective at resolving complaints of digital discrimination?<sup>262</sup> Are there steps we could take to ensure that our structured complaint process is accessible and effective? And would a structured complaint system be unduly burdensome to the Commission, providers, or complainants? Does that burden outweigh any benefits that might be offered by such a formal complaint process? Would our decision to adopt a particular definition of digital discrimination of access, or to adopt a particular analytical framework for claims of digital discrimination of access, have any bearing on what types of complaint processes we should create?

73. If the Commission were to adopt a structured complaint process for claims of digital discrimination of access, we seek comment on the design of this process and remedies it could provide. Should we model our complaint process on the existing complaint process established pursuant to section 208 of the Communications Act?<sup>263</sup> Under section 208, complainants can file using an informal or formal process. Under the informal process, the complainant submits a statement in writing identifying the carrier against which the complaint is made, a complete statement of facts and the relief sought.<sup>264</sup> No fee is required and the Commission will transmit the complaint to the carrier for investigation with a prescribed response time.<sup>265</sup> In contrast, the formal complaint process requires a fee and is similar to civil litigation in that it involves a complaint, answer, reply, and often discovery, motions and briefs.<sup>266</sup> Formal complaints require the complainant to include in the complaint specific facts and evidence supporting all claims in the complaint.<sup>267</sup> What aspects of these section 208 complaint processes should we incorporate into any new process we might establish?<sup>268</sup> Should we maintain a separate informal and formal process for digital discrimination of access complaints or should we consolidate and just have one complaint process? If we just have one, what aspects would we retain from each process? Would it be appropriate to permit fact discovery in such a process? If so, how could that process be tailored to avoid undue burdens while providing relevant information? We also seek comment on whether a dispute assistance process modeled after section 14.32 of the Commission's rules would be useful in the context of resolving claims of digital discrimination of access.<sup>269</sup> Under this system, a consumer or other party

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<sup>261</sup> USTelecom Comments at 22 (arguing that the Commission should not require providers to respond to every digital discrimination complaint, like it does for billing, service, and ACP complaints); U.S. Chamber of Commerce Reply at 4 (suggesting that we should evaluate all complaints but that we should not require providers to automatically review or respond to complaints because doing so would overwhelm us and impose a significant burden on providers).

<sup>262</sup> Multicultural Media, Telecom and Internet Council Comments at 22-23 (urging the Commission to ensure that whatever enforcement approach is taken, the process must at least be "as accessible and user-friendly as its current Consumer Complaint Center," and not requiring an individual complainant to seek the assistance of a lawyer).

<sup>263</sup> See 47 U.S.C. § 208; 47 CFR §§ 1.711-1.740.

<sup>264</sup> 47 CFR § 1.716.

<sup>265</sup> 47 CFR § 1.717.

<sup>266</sup> 47 CFR §§ 1.720-1.735.

<sup>267</sup> 47 CFR § 1.721.

<sup>268</sup> See Leadership Conference on Civil and Human Rights at 8-9 ("[S]ome of the FCC's prior caselaw under Sections 202 and 208—which, respectively, establish a non-discrimination standard and the right to file a complaint—apply to telecommunications and could be useful as the FCC implements the digital non-discrimination law.").

<sup>269</sup> 47 CFR § 14.32; see also FCC, *Request for Dispute Assistance for Access to Communications* (Oct. 19, 2021), <https://www.fcc.gov/consumers/guides/request-dispute-assistance-access-communications>.

can submit to the Commission a claim that a manufacturer or service provider is acting in violation of certain sections of the Communications Act and Commission rules, the Commission forwards the request for dispute assistance to the specified provider/manufacturer and assists the claimant and provider/manufacturer in reaching a settlement. If after thirty days a settlement has not been reached, the claimant can file an informal complaint with the Commission.<sup>270</sup> Would a similar system aid in the timely and effective resolution of digital discrimination claims?

74. We further seek comment on whether we should borrow aspects of the EEOC's complaint adjudication model.<sup>271</sup> For example, similar to EEOC processes, should we authorize an expert within the Commission to review and investigate complaints and vest such expert with the authority to dismiss the complaint or issue a "non-binding probable cause determination letter"?<sup>272</sup> Would this, as the Multicultural Media, Telecom and Internet Council argues, encourage settlement, prevent the Commission from being overwhelmed with complaints, and still ensure that individuals have access to the legal system if necessary?<sup>273</sup> As with the EEOC's process, should we also include a voluntary alternative dispute resolution option such as mediation?<sup>274</sup> How could we design any complaint process to ensure it is not abused,<sup>275</sup> promotes transparency,<sup>276</sup> and mitigates any privacy concerns? What remedies could the Commission offer to consumers that successfully prove a claim of digital discrimination of access? Would a financial penalty be a meaningful remedy in most such cases? Or would we need to direct the provider or target of the complaint to take certain action? Are there other models of enforcement employed in similar regulatory regimes by other federal agencies that would be appropriate for consideration here?

75. We seek comment on any limits to our authority to adopt a structured complaint process for claims of digital discrimination of access. Do we have authority under section 208 of the Communications Act to accept and investigate claims of violations of rules prohibiting digital discrimination of access?<sup>277</sup> If not, do we have authority to create a new formal complaint process under section 60506, whether under subsection 60506(e)'s direction to revise our complaint process or some other provision? If not, on what basis do we "ha[ve] the power to review and act upon" complaints *sua sponte*, as Public Knowledge argues?<sup>278</sup> Are there other sources of authority we could rely on to create a structured complaint process? Does the scope of our authority to adopt a structured complaint process depend in any way on whether we define discrimination as based on disparate impact or disparate treatment? If we have authority to create a complaint process, are there nonetheless limits on our authority to offer complainants certain types of relief, or any relief at all?

76. *State and Local Enforcement.* We also seek comment on what processes our rules could include for two suggestions put forth in the record: enforcement by state and local officials, and by private right of action. In what ways might we incorporate state and local officials into our enforcement approach for claims of digital discrimination of access, and what roles might we play in state and local

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<sup>270</sup> See 47 CFR § 14.32.

<sup>271</sup> See Multicultural Media, Telecom and Internet Council Comments at 22.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See U.S. Equal Employment Opportunity Commission, *Mediation*, <https://www.eeoc.gov/mediation> (last visited Nov. 29, 2022).

<sup>275</sup> See TechFreedom Comments at 29-30.

<sup>276</sup> National Digital Inclusion Alliance Comments at 17-18.

<sup>277</sup> 47 U.S.C. § 208; 47 CFR §§ 1.720-40; see also 47 U.S.C. § 224.

<sup>278</sup> Public Knowledge Comments at 15 ("It is self-evident that if the Commission is to accept public complaints of digital discrimination, it has the power to review and act upon those complaints.").

enforcement schemes? Should we encourage states and localities to adopt and enforce independently rules that are substantively similar to those we adopt in this proceeding? What other models of coordination with state and local officials might we look to when considering the enforcement of our rules? Do we have authority to create rights that private parties could enforce or prosecute before state and local governmental bodies or in the courts? On what basis, and before which entities would we do so? Should we interpret section 60506 as solely directing the Commission to update its administrative complaint process and not providing separate authority to create a private right of action?<sup>279</sup>

77. *Other Enforcement Processes.* Are there any other enforcement processes, beyond the three categories identified above, that we should consider creating or adopting? What would those processes be, and why would they be better suited to enforcing our rules than the processes discussed above?

## 2. Affirmative Obligations

78. We next seek comment on what affirmative obligations we could place on providers to address digital discrimination of access. In the *Notice of Inquiry*, we sought comment on whether the Commission should “adopt rules to require, encourage, or otherwise incentivize” covered entities to “take affirmative steps to prevent digital discrimination.”<sup>280</sup> In response, commenters offer various proposals about steps providers could affirmatively take to address digital discrimination of access, including having providers voluntarily devise and adopt plans to address digital equity, mirroring rules from other agencies, and providing consumers information that could highlight potential discrimination. We seek comment on these proposals.

79. First, we seek comment on Microsoft’s proposal for providers to use Commission data to formulate plans to address digital discrimination of access. Microsoft observes that providers, using the new Broadband Data Collection tool, could “gather demographic and usage information from . . . surveys they would conduct of their subscribers,” which could then be filed with the Commission.<sup>281</sup> Microsoft asserts that this demographic data could also be used by providers, on a voluntary basis, to “create a plan to enhance digital equity in their operations,” which would act as “an early step” in identifying issues involving digital discrimination.<sup>282</sup> Microsoft argues that the Commission should require submission of such plans before enacting any other rules of its own, as it asserts that both the Commission and industry lack sufficient data on issues regarding digital discrimination.<sup>283</sup> Would this proposal meaningfully address digital discrimination, and should we adopt it? What would such plans look like? Should, as Microsoft argues, the Commission allow providers to adopt such plans on a voluntary basis and have them treated as confidential by the Commission?<sup>284</sup> Although Microsoft argues we should adopt this proposal before adopting rules addressing digital discrimination of access, would this approach nonetheless be a useful complement to other rules we consider in this Notice? If we adopt a broad prohibition on digital discrimination of access, how would this type of transparency regime relate to that prohibition? Would certain practices be expected or required in the filings; and would participation be chilled if providers are concerned that certain practices could evidence noncompliance with our rules?

80. We next seek comment on Leadership Conference on Civil and Human Rights’ proposal that the Commission adopt rules mirroring a provision of the Fair Housing Act that requires HUD

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<sup>279</sup> See USTelecom Reply at 20.

<sup>280</sup> *Notice of Inquiry* at 13-14, para. 31.

<sup>281</sup> Microsoft Comments at 6-7.

<sup>282</sup> *Id.* at 7.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

grantees to affirmatively further fair housing.<sup>285</sup> Under this provision, HUD grantees, as recipients of HUD funding, must not only abide by HUD rules on fair housing, but also generally promote equity in housing, although HUD “does not require any specific form of planning or submission of fair housing plans to HUD.”<sup>286</sup> The Leadership Conference on Civil and Human Rights argues that the Commission could require providers to do the same with respect to combating digital discrimination, with implementation modeled after HUD’s approach.<sup>287</sup> What should rules modeled after HUD’s entail in this context? Would it necessitate that covered entities take any specific steps to combat or monitor for instances of digital discrimination of access? Should the Commission impose such an obligation, a variation thereof, or other general requirement? What would such a rule look like, and what would it accomplish in this context?

81. We seek comment on record proposals that we require providers to give information to their subscribers on relevant requirements and resources related to the Infrastructure Act, this proceeding, and digital discrimination of access more generally. For example, TURN proposes that information about programs that subsidize the cost of broadband should be disseminated to consumers by providers.<sup>288</sup> TURN also proposes that providers distribute public safety information regarding “outages, the need for backup power, [and] emergency phone numbers,” particularly in low-income areas and those subject to natural disasters.<sup>289</sup> Additionally, TURN and other commenters contend that providers should offer information about how to seek redress if a consumer believes that they have experienced digital discrimination of access.<sup>290</sup> Should we adopt any of these proposals, or do so with any adjustments? How should we require that any such information be distributed, both in terms of frequency and format?<sup>291</sup> Are there other kinds of information not specified in TURN’s comments that covered entities should be required to disseminate? TechFreedom suggests that proposals requiring dissemination of such information would increase the price of broadband for consumers by increasing costs to providers.<sup>292</sup> What would the costs be to providers, would they have the effect claimed by TechFreedom, and how do any costs measure up against the potential benefits of TURN’s proposals?

82. What other affirmative steps should we consider requiring (whether of providers or others) in order to more effectively combat digital discrimination of access? Are there other types of self-assessment or reporting obligations the Commission should impose? For example, should we require

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<sup>285</sup> Leadership Conference on Civil and Human Rights Comments at 10; *see also* Verizon Reply at 9.

<sup>286</sup> Department of Housing and Urban Development, Affirmatively Furthering Fair Housing Interim Final Rule Fact Sheet at 2, [https://www.hud.gov/sites/dfiles/FHEO/documents/10\\_6\\_21\\_AFFH\\_IFR\\_Fact\\_Sheet.pdf](https://www.hud.gov/sites/dfiles/FHEO/documents/10_6_21_AFFH_IFR_Fact_Sheet.pdf); 42 U.S.C. § 3608(e)(5) (requiring that HUD “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies” of the Fair Housing Act); Department of Housing and Urban Development, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779, 30780 (June 10, 2021) (explaining that “[w]hile this mandate is directly imposed on HUD, HUD carries it out primarily by extending the obligation to certain recipients of HUD funding” and that “Congress has repeatedly reinforced the AFFH mandate for funding recipients”).

<sup>287</sup> Leadership Conference on Civil and Human Rights Comments at 10.

<sup>288</sup> TURN Comments at 26.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*; *see also* EveryoneOn Comments at 2-3 (proposing that we require providers to include, on all communications to consumers, information about the option to file a digital discrimination complaint with the Commission); Public Knowledge Reply at 21 (supporting EveryoneOn proposal).

<sup>291</sup> For example, TURN argues that disclosure of available channels for redress in the event of digital discrimination should be made with the same “frequency that privacy notices are provided and available in various mediums, including, but not limited to, websites, billing inserts, and emails.” TURN Comments at 26.

<sup>292</sup> TechFreedom Comments at 31-32 (arguing that “obligations regarding dissemination of service offerings” would affect broadband affordability by increasing costs that “are . . . passed on to consumers”).

providers to audit whether they may be engaging in practices that could have a disparate impact on groups determined by reference to protected characteristics? How should such audits be conducted and using what standards? Should the Commission require that covered entities report the results of such audits, and if so, how frequently should they be conducted and reported? Should the results of such audits be made public? Are there any other transparency or disclosure requirements we should impose? Should we require providers to disclose or explain to consumers why offerings (whether in terms of price, speed, or other aspects) differ as between two given geographic areas? Should we adopt rules modeled on cable franchising rules to promote the build-out of broadband infrastructure?<sup>293</sup> Are there other rules, whether from other agencies, state and local governments, or other entities, that we should look to? Should we consider different auditing and/or reporting requirements for different types of entities?

### 3. Other Proceedings

83. We seek further detailed comment on what actions we should take in other policy areas identified in the record to address digital discrimination of access. In response to the *Notice of Inquiry*,<sup>294</sup> commenters identified a variety of proceedings in which we could take action to address digital discrimination.

84. We first seek comment on actions we could take to promote infrastructure deployment in furtherance of our goal to address digital discrimination. Commenters identify topics including addressing state and local laws that may impact infrastructure deployment,<sup>295</sup> spectrum policy,<sup>296</sup> and

<sup>293</sup> See Local Governments Reply at 22-28 (arguing that cable build-out requirements should serve as a model for addressing digital discrimination, contending that Congress previously deemed such requirements necessary for cable and that a similar model for broadband should be adopted, and that the Commission should revisit previous orders that have made it harder for states and localities to impose such obligations); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Further Notice of Proposed Rulemaking, 33 FCC Rcd 8952, 8953-59, paras. 3-14 (2018) (summarizing history of cable franchising rules); see also Next Century Cities Reply at 5 (rec. June 30, 2022) (citing California legislation as a model for build-out and service requirements).

<sup>294</sup> *Notice of Inquiry* at 14, para. 32.

<sup>295</sup> See, e.g., ACA Connects Comments at 41 (arguing that the Commission should intervene when “government agencies or private entities . . . inhibit or stymie broadband network maintenance and upgrades,” such as by “expediting government permitting and facilitating access to poles and public and private rights-of-way”); City and County of San Francisco Comments at 10 (arguing that the Commission should “examine whether its regulations can be revised” in ways to “provide cities greater latitude to encourage providers to address underserved areas”); USTelecom Comments at 20 (arguing that the Commission should preempt regulations such as right-of-way access fees charged by municipalities and consider steps to streamline permitting of infrastructure deployment); City and County of San Francisco Reply at 4-5 (rec. Jun. 30, 2022) (identifying a state law that interferes with local governments’ ability to encourage providers to address underserved areas); Connecticut Office of State Broadband within the Connecticut Office of Consumer Counsel Reply at 4-7 (rec. June 30, 2022) (urging the Commission to examine the discriminatory impact “legacy state laws” may have, arguing that statutory schemes from the mid-2000s fail to address issues of digital discrimination) (Connecticut Office of State Broadband Reply); cf. WISPA Comments at 28-29 (recommending that the Commission “adopt model policies and best practices . . . that encourage States and localities to review existing statutes and regulations to determine whether they are still effective and do not discriminate against providers using modern technology”).

<sup>296</sup> See, e.g., App Association Comments at 4 (arguing that the Commission should “prioritize enabling wireless 5G innovations”); CTIA Comments at 14-16 (arguing that the Commission should “replenish the spectrum pipeline” and continue efforts to improve federal spectrum coordination with NTIA); Public Knowledge Comments at 37-38 (arguing the Commission can use its authority to regulate spectrum to promote greater access to broadband, such as by expanding access to unlicensed spectrum and leveraging sections 309(j)(3)(B) and 309(j)(4) of the Communications Act to provide opportunities for women and minority-owned business to acquire licenses for spectrum-based services; as well as by expanding Citizens Broadband Radio Service General Authorized Access Spectrum to provide access to both licensed and unlicensed spectrum to communities or providers wishing to “serve

(continued....)

municipal broadband as areas for further Commission action to address digital discrimination.<sup>297</sup> We seek comment on what specific action we should take in these proceedings to address digital discrimination, and how that action furthers the goals identified by Congress in section 60506. We seek further comment on the record's focus on issues regarding broadband service in multiple tenant environments (MTEs) such as apartment buildings and offices. Commenters cite issues such as conflicts over access to inside wiring;<sup>298</sup> insufficient infrastructure for high-speed broadband;<sup>299</sup> lack of economic incentives for providers in low-income communities;<sup>300</sup> and exclusive rooftop access agreements<sup>301</sup> as areas in which the Commission could act to address digital discrimination of access. Should we address some or all of these issues in the MTEs proceeding to combat digital discrimination of access? How specifically would these actions do so?

85. We also seek comment on the record discussion about whether and how the Commission can use its funding programs to combat digital discrimination of access.<sup>302</sup> What programs should the Commission consider using in undertaking this effort? What programs relate to digital discrimination of access and how? What kinds of modifications, if any, would need to these programs? Are there any statutory barriers to using these programs to combat digital discrimination of access? Further, we seek comment on record arguments that inclusion of section 60506 in Division F of the Infrastructure Act signals that the Commission should focus on providing funding in its efforts to prevent digital discrimination.<sup>303</sup> AT&T argues, for example, that the Infrastructure Act primarily concerns spending and that section 60506's directive to facilitate equal access, read in this context, primarily represents a funding

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communities suffering from digital discrimination"); Starry Comments at 4 (arguing that a lack of competition, which "often exacerbates digital inequities," can be addressed by "facilitating low-barrier access to finite spectrum resources," and that the Commission should "further optimize innovation in remaining frequencies" to connect "consumers in hard-to-reach and underserved areas"); T-Mobile Comments at 15 (contending that the Commission should authorize additional spectrum for licensed broadband use, which can "promote a more inclusive digital environment").

<sup>297</sup> See, e.g., Law and Technology Research Institute of Recife Comments at 12-13 (rec. May 16, 2022) (arguing that the Commission should encourage the expansion of publicly owned networks, such as municipal and community networks, which some states prohibit); National Association of Telecommunications Officers and Advisors Comments at 5 (rec. May 16, 2022) (arguing that the Commission should encourage municipal broadband networks and services); *but see* Americans for Tax Reform and Digital Liberty Reply at 4 (rec. June 30, 2022) (arguing that government-owned or municipal broadband networks "do[] not offer any kind of reasonable solution for the FCC's examination of digital discrimination").

<sup>298</sup> See City and County of San Francisco Comments at 6-7.

<sup>299</sup> See *id.* at 5-6; Next Century Cities Reply at 5.

<sup>300</sup> See National Multifamily Housing Council and National Apartment Association Reply at 8-11.

<sup>301</sup> See WISPA Comments at 27-28 (arguing that exclusive rooftop access should be prohibited because they act as a "de facto exclusive building access agreement for fixed wireless providers" and thus harm consumers, particularly those in marginalized communities).

<sup>302</sup> See, e.g., ACA Connects Comments at 40-41 (arguing that one of the principal methods of fulfilling the mandate of section 60506 of the Infrastructure Act is to enroll individuals in the ACP and to provide financial support to providers to offer service in areas where it may be technically or economically infeasible to offer service comparable to other locations); Asian Americans Advancing Justice et al. Comments at 4-5 (rec. May 17, 2022) (arguing that the Commission should consider how funds can be used to address racial barriers); CTIA Comments at 17-18 (contending that the Commission should adopt a technologically neutral approach to funding and provide subsidies to encourage deployment, as well as use the Broadband Data Collection to target universal service funds to communities in need); League of United Latin American Citizens Comments at 3 (urging the Commission to direct funding efforts "to deploy broadband networks to communities who do not have access" and "utilize digital equity program funding" to help close the digital divide).

<sup>303</sup> See, e.g., AT&T Reply at 12-18 & n.48.

commitment.<sup>304</sup> Is this interpretation correct? Or should we understand section 60506 to direct us to take separate and complementary action from that elaborated elsewhere in the Infrastructure Act? Does the inclusion of section 60506 counsel us to tie our funding efforts to preventing and eliminating digital discrimination? Should our existing funding programs be revised in any way to ensure they do not perpetuate existing inequities? Should receipt of funds be contingent on compliance with anti-discrimination requirements?<sup>305</sup>

#### 4. Other Record Proposals

86. We seek comment on other record proposals for action we should take to fulfill congressional direction to address digital discrimination of access beyond the proposals discussed above. In response to the *Notice of Inquiry*, commenters suggest various other proposals such as assisting those on Tribal lands promoting digital education, undertaking outreach efforts to promote awareness of any digital discrimination rules we adopt, and making organizational changes to the Commission. We seek further comment on these proposals and any additional steps we should take to eliminate digital discrimination of access.

87. *Tribal Lands.* We seek comment on any actions we can take to address digital discrimination of access on Tribal lands. In response to the *Notice of Inquiry*, one commenter argues that we should take dedicated action to facilitate equal access on Tribal lands, including by “offer[ing] technical assistance to Tribal Nations planning their own networks . . . creat[ing] a resource to connect Tribes and infrastructure partners . . . [and] connect[ing] infrastructure partners interest in working with Tribal Nations with training” on issues unique to deploying infrastructure on Tribal lands.<sup>306</sup> We seek comment on these record proposals and whether to adopt them, following engagement with Tribal partners. In what specific ways do those living on Tribal lands uniquely experience digital discrimination of access? Is dedicated action necessary to address those issues, or can they be addressed by more general rules addressing digital discrimination of access? Would some or all of these record proposals effectively address any unique digital discrimination of access faced by those living on Tribal lands, and would they do so more effectively with any modifications? Are there other proposals we should consider?

88. *Outreach.* We next seek comment on addressing digital discrimination of access through outreach efforts. Numerous commenters in the record express support for educational efforts to promote digital literacy, including developing a digital literacy program to raise awareness of the benefits and availability of broadband<sup>307</sup> and using available FCC data to help the National Telecommunications and Information Administration (NTIA) direct funds for digital literacy to communities most in need,<sup>308</sup> arguing that these efforts can address a lack of adoption in areas where providers have already deployed

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<sup>304</sup> *Id.* (arguing that, read “within its larger statutory context,” section 60506 is part of a “funding commitment to digital equity” from Congress, with the Commission’s role focused in large part on “administration of massive subsidy programs”).

<sup>305</sup> See Common Cause et al. Nov. 7 *Ex Parte* at 3 (urging that Commission require recipients of deployment funding such as through “the Broadband Equity, Access, and Deployment Program are in compliance with the digital discrimination rules”).

<sup>306</sup> 3Red8 Comments at 9 (rec. May 16, 2022).

<sup>307</sup> See, e.g., CTIA Comments at 18; League of United Latin American Citizens Comments at 4-5; National Diversity Coalition Reply at 3-4 (rec. June 30, 2022).

<sup>308</sup> See generally T-Mobile Comments at 16-17. NTIA’s Broadband Equity, Access, and Deployment (BEAD) Program provides \$42.45 billion to expand high-speed internet access by funding planning, infrastructure deployment and adoption programs in all 50 states, Washington, D.C., Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. National Telecommunications and Information Administration, *Broadband Equity, Access, and Deployment (BEAD) Program*, <https://broadbandusa.ntia.doc.gov/resources/grant-programs/broadband-equity-access-and-deployment-bead-program> (last visited Nov. 29, 2022).

broadband. Another commenter advocates that the Commission create an outreach program to educate consumers on any rules we adopt addressing digital discrimination of access and the avenues of relief available to them.<sup>309</sup> We seek comment on these proposals in particular and whether dedicated outreach efforts to promote digital literacy and awareness of our rules would further prevention or elimination of digital discrimination of access. Would digital education efforts be effective to promote adoption? If so, what specific digital education efforts should we pursue, and should we pursue the suggestions in the record? What issues would be most useful to educate consumers about? Are there entities or organizations we should collaborate with if we undertake digital education efforts? What steps would most effectively promote awareness of any digital discrimination rules we adopt? Should we take steps beyond those our Consumer and Governmental Affairs Bureau routinely takes to advise consumers about Commission rules and public-facing processes? If so, what steps should we take?

89. *Commission Organization.* We seek comment on any organizational changes we should make to the Commission to promote our efforts to address digital discrimination of access and assist in enforcement of any rules we adopt. Commenters to the *Notice of Inquiry* offer that we should hire staff with experience in discrimination law<sup>310</sup> and argue that we should establish a dedicated ombudsperson role<sup>311</sup> and Office of Civil Rights<sup>312</sup> as part of our process for addressing claims of digital discrimination of access. Should we pursue these organizational changes? What would be the benefits of establishing an ombudsperson for digital discrimination, and what specific responsibilities would they have?<sup>313</sup> Should an ombudsperson publish an annual report? Would an independent, impartial, and confidential ombudsperson be useful for consumers and entities subject to our rules in navigating any rules and complaint processes we adopt?<sup>314</sup> Would it be useful to house an ombudsperson, and any Commission staff with expertise on discrimination issues, in an Office of Civil Rights? Would establishing a new organizational unit be preferable to distributing this expertise among the Commission's current Bureaus and Offices? If we did establish an Office of Civil Rights, what would be the scope of its authority and responsibilities?

90. *Other Necessary Steps.* We seek comment on any other steps we should take to eliminate digital discrimination of access. Section 60506 directs us to “identify[] necessary steps for the Commission[] to take to eliminate” digital discrimination of access.<sup>315</sup> What steps, beyond adopting and enforcing rules to “prevent” digital discrimination of access, are necessary for the Commission to take to “eliminate” such discrimination? And how would any such steps specifically “eliminate” digital discrimination of access rather than “prevent” it?<sup>316</sup>

## 5. Legal Authority

91. We seek comment on the scope of our authority to adopt rules under section 60506 of the Infrastructure Act. Do the novel structure and language of section 60506 provide the Commission with

<sup>309</sup> TURN Comments at 25.

<sup>310</sup> Leadership Conference on Civil and Human Rights Comments at 6.

<sup>311</sup> Public Knowledge Comments at 26; WISPA Comments at 30.

<sup>312</sup> See e.g., Black Women's Roundtable Comments at 2, 5; Communications Workers of America Comments at 11; Lawyers' Committee for Civil Rights Under Law Comments at 38; Common Cause et al. Reply at 5-6.

<sup>313</sup> See Public Knowledge Comments at 26 (arguing that an ombudsperson “should oversee the collection, resolution, and reporting of all consumer complaints related to digital discrimination and . . . serve as an expert resource for service providers or other organizations that have questions or concerns regarding digital discrimination rules”).

<sup>314</sup> See *id.*; WISPA Comments at 30.

<sup>315</sup> 47 U.S.C. § 1754(b)(2).

<sup>316</sup> 47 U.S.C. § 1754(b)(1), (2).

broad rulemaking authority? Paragraph (b) of section 60506 gives us the broad direction to “adopt final rules to facilitate equal access to broadband. . . including” addressing digital discrimination of access.<sup>317</sup> Since this grant “include[s]” adopting rules to address digital discrimination of access, can the Commission adopt rules to facilitate equal access that address issues other than, but related to, digital discrimination of access? If so, what issues do commenters believe we have the authority to address under section 60506 of the Infrastructure Act? We also observe that while anti-discrimination laws often revolve around a prohibition of a policy or practice, Congress in this instance gave us the broad direction and the authority to develop our own rules to “facilitate equal access,” of which addressing digital discrimination of access is a part. Does this structure signify a broad grant of authority to combat digital discrimination of access as part of efforts to “facilitate equal access to broadband”?<sup>318</sup> Is that authority broader, or narrower, than that given to other federal agencies tasked with administering and enforcing statutory prohibitions on discrimination? We seek comment on the scope of the Commission’s rulemaking authority in light of the structure and language of section 60506 of the Infrastructure Act.

92. We seek further comment on our authority under paragraphs (b)(1) and (b)(2) of section 60506. In the Notice of Inquiry, the Commission sought comment on whether “preventing digital discrimination” in paragraph (b)(1) and “eliminat[ing] discrimination” in paragraph (b)(2) provided the Commission with distinct authority to enact digital discrimination rules.<sup>319</sup> Commenters agree that “prevent” and “eliminate” offer different authority, and that “prevent” confers upon the Commission the authority to stop digital discrimination before it occurs.<sup>320</sup> Regarding “eliminate,” some commenters argue that the term allows the Commission to remove discrimination that already exists and the impact thereof.<sup>321</sup> Other commenters argue that “eliminate” does not provide the Commission with the authority to impose “retroactive liability” for past deployment decisions.<sup>322</sup> We seek further comment on the authority offered by each of these terms. Does the word “prevent” give us broad discretion to adopt prophylactic measures to stop digital discrimination of access from occurring going forward?<sup>323</sup> What are the bounds of that authority? How does that authority differ from a more standard prohibition on discriminatory conduct or outcomes? What does the word “eliminate” offer? Does it give us discretion to address digital discrimination of access that already exists? Is there a distinction between addressing currently existing digital discrimination of access and imposing “retroactive liability”? Does the statutory language that we should “*identify[] necessary steps . . . to eliminate [digital] discrimination*” in any way

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<sup>317</sup> 47 U.S.C. § 1754(b).

<sup>318</sup> *Id.*

<sup>319</sup> *Notice of Inquiry* at 8-9, para. 20.

<sup>320</sup> See ACA Connects Comments at 6, 10, 17; AT&T Comments at 25; Black Women’s Roundtable Comments at 3; CTIA Comments at 22; Lawyers’ Committee for Civil Rights Under Law Comments at 5, 13-15; Multicultural Media, Telecom and Internet Council Comments 11-12; National Digital Inclusion Alliance Comments at 9; National Urban League Comments at 4; Public Knowledge Comments at 14; TURN Comments at 18; WISPA Comments at 18; City of Dallas Reply at 4.

<sup>321</sup> See ACA Connects Comments at 17; Black Women’s Roundtable Comments at 3; CTIA Comments at 22; Engine Comments at 1; Lawyers’ Committee for Civil Rights Under Law Comments at 5, 13-15; Local Governments Reply at 4-7; Multicultural Media, Telecom and Internet Council Comments at 11-12; National Digital Inclusion Alliance Comments at 9; National Urban League Comments at 4; Public Knowledge Comments at 14; TURN Comments at 18; WISPA Comments at 18; City of Dallas Reply at 4.

<sup>322</sup> AT&T Comments at 22-23; U.S. Chamber of Commerce Reply at 1; Verizon Reply 14.

<sup>323</sup> See Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69, at 5 (filed Nov. 4, 2022) (arguing that section 60506 obligates the Commission to adopt measures to affirmatively facilitate equal access irrespective of evidence of existing discrimination and that requiring “irrefutable proof of discrimination . . . before it can apply its predictive judgment” is contrary to both the language of the Infrastructure Act and the history of the Communications Act).

guide how we understand this direction?<sup>324</sup> Did Congress intend for us to merely identify steps, and not take them? Since this term is used in the context of our greater direction to “facilitate equal access,” do we nonetheless have discretion to address current-existent digital discrimination of access as part of that effort?

#### **D. State and Local Model Policies and Best Practices**

93. We propose to adopt, as guidelines for states and localities, the best practices to prevent digital discrimination and promote digital equity recommended by the Communications Equity and Diversity Council (CEDC).<sup>325</sup> Subsection 60506(d) of the Infrastructure Act directed the Commission to “develop model policies and best practices that can be adopted by states and localities to ensure that broadband internet access service providers do not engage in digital discrimination.”<sup>326</sup> To help fulfill this direction, Chairwoman Rosenworcel directed the CEDC to issue recommendations on this subject.<sup>327</sup> The Digital Equity and Inclusion (DEI) Working Group issued a report recommending both (1) model policies and best practices to prevent digital discrimination by broadband providers, and (2) best practices to advance digital equity for states and localities. On November 7, 2022, the members of the full CEDC voted unanimously in favor of finalizing the report for the Commission.<sup>328</sup> We now propose to adopt both sets of recommendations as guidelines for states and localities, in fulfillment of subsection 60506(d), acknowledging that this does not limit states and localities from taking additional steps to prevent and eliminate digital discrimination of access, and seek comment on this proposal.

94. First, we seek comment on our proposal to adopt the report’s “Model Policies and Best Practices to Prevent Digital Discrimination by ISPs.”<sup>329</sup> The report outlines six model policies and best practices for states and localities: (1) developing and making available recurring “broadband equity assessments”; (2) facilitating awareness among landlords regarding “tenant choice and competition” in MTEs; (3) identifying ways to “incentivize equitable deployment”; (4) managing public property (such as rights-of-way) “to avert discriminatory behaviors that result in or sustain digital discrimination and redlining”; (5) convening regular meetings of stakeholders to evaluate “areas and households unserved and underserved with competitive and quality broadband options”; and (6) encouraging “fair competition and choice.”<sup>330</sup> These model policies and best practices reflect the perspective of the industry, public interest stakeholders, local government representatives, and others, and we tentatively conclude that adopting these consensus recommendations will be effective in addressing digital discrimination of access at the state and local level. We seek comment on whether to adopt these best practices. Do they provide states and localities with the tools and resources necessary to provide equal access to broadband service in their communities? And do they appropriately cover the scope of issues these model policies and best practices should address? Should any be removed, or should we consider adding any additional model policies and best practices? We seek comment on whether the best practices, as recommended in the report, can be improved and how. We also seek comment on any additional support the Commission can provide to states, localities, and internet service providers to effectuate these recommendations.

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<sup>324</sup> 47 U.S.C. § 1754(b)(2) (emphasis added).

<sup>325</sup> The report is attached as Appendix B.

<sup>326</sup> 47 U.S.C. § 1754(d).

<sup>327</sup> See Appx. C at 63; see also *Agenda Released For February 23, 2022 Virtual Meeting Of The Communications Equity And Diversity Council*, Public Notice, DA 22-164 (MB Feb. 16, 2022).

<sup>328</sup> See *id.* at 12.

<sup>329</sup> See *id.* at 14-15.

<sup>330</sup> *Id.*

95. Second, we seek comment on our proposal to adopt the report’s “Best Practices to Advance Digital Equity for State and Localities.”<sup>331</sup> The report outlines thirteen model policies and best practices for states and localities, which, in sum, recommend: (1) raising awareness about and streamlining the application process for government benefit programs such as the Affordable Connectivity Program; (2) promoting digital literacy; and (3) increasing access to devices and spaces to access the internet.<sup>332</sup> The best practices to advance digital equity for state and localities reflect the consensus of industry and public interest stakeholders, and we believe that they can serve as an effective framework for states and localities to advance digital equity. We seek comment on whether to adopt these best practices as guidelines for states and localities. Do they equip states and localities with the tools and resources necessary to advance digital equity? And do they appropriately cover the scope of issues these model best practices should address? Should any be removed, or should we consider adding any additional best practices? We seek comment on whether the best practices, as recommended in the report, can be improved and how?

#### **E. Other Efforts to Promote Digital Equity and Inclusion**

96. The Commission, as part of its continuing effort to advance digital equity for all,<sup>333</sup> including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations<sup>334</sup> and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission’s relevant legal authority.

#### **IV. OTHER PROCEDURAL MATTERS**

97. *Filing Instructions.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <https://www.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.

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<sup>331</sup> *See id.* at 15-16.

<sup>332</sup> *Id.*

<sup>333</sup> Section 1 of the Communications Act of 1934 as amended provides that the FCC “regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.” 47 U.S.C. § 151.

<sup>334</sup> The term “equity” is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021).

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.<sup>335</sup>
  - During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.
  - After COVID-19 restrictions are lifted, the Commission has established that hand-carried documents are to be filed at the Commission's office located at 9050 Junction Drive, Annapolis Junction, MD 20701. This will be the only location where hand-carried paper filings for the Commission will be accepted.<sup>336</sup>

98. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

99. *Ex Parte Requirements.* This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>337</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc,

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<sup>335</sup> See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (OMD 2020), <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

<sup>336</sup> See *Amendment of the Commission's Rules of Practice and Procedure*, Order, 35 FCC Rcd 5450 (OMD 2020).

<sup>337</sup> 47 CFR § 1.1200 *et seq.*

.xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

100. *Initial Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act (RFA),<sup>338</sup> we have prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this Notice of Proposed Rulemaking. The text of the IRFA is set forth in Appendix A. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice of Proposed Rulemaking. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>339</sup>

101. *Paperwork Reduction Act.* This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

102. *Contact Person.* For additional information on this proceeding, contact Aurélie Mathieu, Wireline Competition Bureau, Competition Policy Division, at [Aurelie.Mathieu@fcc.gov](mailto:Aurelie.Mathieu@fcc.gov) or (202) 418-2194.

## V. ORDERING CLAUSES

103. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i)-(j), 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 303(r), and section 60506 of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, 1245-46 (2021), codified at 47 U.S.C. § 1754, that this Notice of Proposed Rulemaking IS ADOPTED.

104. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking on or before 30 days after publication in the Federal Register, and reply comments on or before 60 days after publication in the Federal Register.

105. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>338</sup> See 5 U.S.C. § 603.

<sup>339</sup> See 5 U.S.C. § 603(a).

## APPENDIX A

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (Notice). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for and Objectives of the Proposed Rules**

2. The *Notice* furthers the Commission's efforts to promote equal access to broadband to all people living in the Nation. Specifically, the *Notice* seeks focused comment on the rules the Commission should adopt to fulfill the Congressional direction in section 60506 of the Infrastructure Act to facilitate equal access to broadband, prevent digital discrimination of access, and identify steps necessary to eliminate such discrimination.<sup>4</sup> The *Notice* also proposes and seeks comment on possible definitions of "digital discrimination of access" as used in the Infrastructure Act.<sup>5</sup> The *Notice* next proposes to revise the Commission's public complaint process to accept complaints related to digital discrimination.<sup>6</sup> The *Notice* also proposes to adopt the model policies and best practices for states and localities regarding digital discrimination that have been recommended by the Communications Equity and Diversity Council.<sup>7</sup>

**B. Legal Basis**

3. The *Notice* proposes to identify authority under section 60506 of the Infrastructure Act and seeks comment on the bounds of the Commission's authority to enact the proposed rules.<sup>8</sup>

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and by the rule revisions on which the *Notice* seeks comment, if adopted.<sup>9</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>10</sup> In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.<sup>11</sup> A "small-business concern" is one which: (1) is independently

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> *Notice* Section III.C.

<sup>5</sup> *Id.* Section III.A.

<sup>6</sup> *Id.* Section III.B.

<sup>7</sup> *Id.* Section III.D.

<sup>8</sup> *Id.*

<sup>9</sup> See 5 U.S.C. § 603(b)(3).

<sup>10</sup> See *id.* § 601(6).

<sup>11</sup> *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 (continued...))

owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>12</sup>

5. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe, at the outset, three broad groups of small entities that could be directly affected herein.<sup>13</sup> First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>14</sup> These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.<sup>15</sup>

6. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>16</sup> The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.<sup>17</sup> Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.<sup>18</sup>

7. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."<sup>19</sup> U.S. Census Bureau data from the 2017 Census

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U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>12</sup> See 15 U.S.C. § 632.

<sup>13</sup> See 5 U.S.C. § 601(3)-(6).

<sup>14</sup> See SBA, Office of Advocacy, Frequently Asked Questions, "What is a small business?," <https://cdnadvocacy.sba.gov/wp-content/uploads/2021/11/03093005/Small-Business-FAQ-2021.pdf>. (Nov 2021).

<sup>15</sup> *Id.*

<sup>16</sup> See 5 U.S.C. § 601(4).

<sup>17</sup> The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. See Annual Electronic Filing Requirement for Small Exempt Organizations – Form 990-N (e-Postcard), "Who must file," <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

<sup>18</sup> See Exempt Organizations Business Master File Extract (EO BMF), "CSV Files by Region," <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for businesses for the tax year 2020 with revenue less than or equal to \$50,000 for Region 1-Northeast Area (58,577), Region 2-Mid-Atlantic and Great Lakes Areas (175,272), and Region 3-Gulf Coast and Pacific Coast Areas (213,840) that includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

<sup>19</sup> See 5 U.S.C. § 601(5).

of Governments<sup>20</sup> indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>21</sup> Of this number, there were 36,931 general purpose governments (county,<sup>22</sup> municipal, and town or township<sup>23</sup>) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts<sup>24</sup> with enrollment populations of less than 50,000.<sup>25</sup> Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”<sup>26</sup>

## 1. Wireline Carriers

8. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks.<sup>27</sup> Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services.<sup>28</sup> By exception, establishments providing satellite television distribution services using facilities

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<sup>20</sup> See 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

<sup>21</sup> See U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). See also tbl.2. CG1700ORG02 Table Notes \_Local Governments by Type and State\_ 2017.

<sup>22</sup> See *id.* at tbl.5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

<sup>23</sup> See *id.* at tbl.6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

<sup>24</sup> See *id.* at tbl.10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also tbl.4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes \_Special Purpose Local Governments by State\_ Census Years 1942 to 2017.

<sup>25</sup> While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

<sup>26</sup> This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations tbls.5, 6 & 10.

<sup>27</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>28</sup> *Id.*

and infrastructure that they operate are included in this industry.<sup>29</sup> Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.<sup>30</sup>

9. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>31</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>32</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>33</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 5,183 providers that reported they were engaged in the provision of fixed local services.<sup>34</sup> Of these providers, the Commission estimates that 4,737 providers have 1,500 or fewer employees.<sup>35</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

10. *Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include both incumbent and competitive local exchange service providers. Wired Telecommunications Carriers<sup>36</sup> is the closest industry with an SBA small business size standard.<sup>37</sup> Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.<sup>38</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>39</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>40</sup> Of this number, 2,964 firms operated with fewer than

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<sup>29</sup> *Id.*

<sup>30</sup> Fixed Local Service Providers include the following types of providers: Incumbent Local Exchange Carriers (ILECs), Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, and Other Local Service Providers. Local Resellers fall into another U.S. Census Bureau industry group and therefore data for these providers is not included in this industry.

<sup>31</sup> See 13 CFR § 121.201, NAICS Code 517311.

<sup>32</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?v=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>33</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>34</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/pub/ld/attachmets/DOC-379181A1.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>37</sup> See 13 CFR § 121.201, NAICS Code 517311.

<sup>38</sup> Fixed Local Exchange Service Providers include the following types of providers: Incumbent Local Exchange Carriers (ILECs), Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers.

<sup>39</sup> *Id.*

<sup>40</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?v=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

250 employees.<sup>41</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 5,183 providers that reported they were fixed local exchange service providers.<sup>42</sup> Of these providers, the Commission estimates that 4,737 providers have 1,500 or fewer employees.<sup>43</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

11. *Competitive Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers.<sup>44</sup> Wired Telecommunications Carriers<sup>45</sup> is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>46</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>47</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>48</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 3,956 providers that reported they were competitive local exchange service providers.<sup>49</sup> Of these providers, the Commission estimates that 3,808 providers have 1,500 or fewer employees.<sup>50</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

12. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA have developed a small business size standard specifically for Interexchange Carriers. Wired Telecommunications Carriers<sup>51</sup> is the closest industry with a SBA small business size standard.<sup>52</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as

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<sup>41</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>42</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/publd.lic/attachments/DOC-379181A1.pdf>.

<sup>43</sup> *Id.*

<sup>44</sup> Competitive Local Exchange Service Providers include the following types of providers: Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers.

<sup>45</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517311 Wired Telecommunications Carriers," <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>46</sup> See 13 CFR § 121.201, NAICS Code 517311.

<sup>47</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>48</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>49</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/publd.lic/attachments/DOC-379181A1.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517311 Wired Telecommunications Carriers," <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>52</sup> See 13 CFR § 121.201, NAICS Code 517311.

small.<sup>53</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>54</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>55</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 151 providers that reported they were engaged in the provision of interexchange services. Of these providers, the Commission estimates that 131 providers have 1,500 or fewer employees.<sup>56</sup> Consequently, using the SBA's small business size standard, the Commission estimates that the majority of providers in this industry can be considered small entities.

13. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>57</sup> For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 677,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator based on the cable subscriber count established in a 2001 Public Notice.<sup>58</sup> Based on industry data, only six cable system operators have more than 677,000 subscribers.<sup>59</sup> Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>60</sup> Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

14. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card

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<sup>53</sup> *Id.*

<sup>54</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?v=2017&n=517311&t=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>55</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>56</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/public/attachments/DOC-379181A1.pdf>.

<sup>57</sup> 47 U.S.C. § 543(m)(2).

<sup>58</sup> *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (CSB 2001) (*2001 Subscriber Count PN*). In this Public Notice, the Commission determined that there were approximately 67.7 million cable subscribers in the United States at that time using the most reliable source publicly available. *Id.* We recognize that the number of cable subscribers changed since then and that the Commission has recently estimated the number of cable subscribers to be approximately 58.1 million. See *Communications Marketplace Report*, GN Docket No. 20-60, 2020 Communications Marketplace Report, 36 FCC Rcd 2945, 3049, para. 156 (2020) (*2020 Communications Marketplace Report*). However, because the Commission has not issued a public notice subsequent to the *2001 Subscriber Count PN*, the Commission still relies on the subscriber count threshold established by the *2001 Subscriber Count PN* for purposes of this rule. See 47 CFR § 76.901(e)(1).

<sup>59</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited Nov. 29, 2022); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

<sup>60</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(e) of the Commission's rules. See 47 CFR § 76.910(b).

providers, satellite service carriers, or toll resellers. Wired Telecommunications Carriers<sup>61</sup> is the closest industry with a SBA small business size standard.<sup>62</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>63</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.<sup>64</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>65</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 115 providers that reported they were engaged in the provision of other toll services.<sup>66</sup> Of these providers, the Commission estimates that 113 providers have 1,500 or fewer employees.<sup>67</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

## 2. Wireless Carriers

15. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves.<sup>68</sup> Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>69</sup> The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>70</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year.<sup>71</sup> Of that number, 2,837 firms employed fewer than 250 employees.<sup>72</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services.<sup>73</sup> Of these providers, the Commission estimates that 715 providers have 1,500 or fewer

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<sup>61</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>62</sup> See 13 CFR § 121.201, NAICS Code 517311.

<sup>63</sup> *Id.*

<sup>64</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>65</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>66</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/pub/ld/lic/attachments/DOC-379181A1.pdf>.

<sup>67</sup> *Id.*

<sup>68</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (except Satellite),"* <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>69</sup> *Id.*

<sup>70</sup> See 13 CFR § 121.201, NAICS Code 517312.

<sup>71</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>72</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>73</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/pub/ld/lic/attachments/DOC-379181A1.pdf>.

employees.<sup>74</sup> Consequently, using the SBA’s small business size standard, most of these providers can be considered small entities.

16. *Satellite Telecommunications.* This industry comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>75</sup> Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with \$38.5 million or less in annual receipts as small.<sup>76</sup> U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year.<sup>77</sup> Of this number, 242 firms had revenue of less than \$25 million.<sup>78</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 71 providers that reported they were engaged in the provision of satellite telecommunications services.<sup>79</sup> Of these providers, the Commission estimates that approximately 48 providers have 1,500 or fewer employees.<sup>80</sup> Consequently, using the SBA’s small business size standard, a little more than of these providers can be considered small entities.

### 3. Resellers

17. *Local Resellers.* Neither the Commission nor the SBA have developed a small business size standard specifically for Local Resellers. Telecommunications Resellers is the closest industry with a SBA small business size standard.<sup>81</sup> The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households.<sup>82</sup> Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure.<sup>83</sup> Mobile virtual network operators (MVNOs) are included in this industry.<sup>84</sup> The SBA small business size standard for Telecommunications Resellers classifies a business as small if it has 1,500 or fewer employees.<sup>85</sup> U.S. Census Bureau data for 2017

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<sup>74</sup> *Id.*

<sup>75</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517410 Satellite Telecommunications,” <https://www.census.gov/naics/?input=517410&year=2017&details=517410>.

<sup>76</sup> See 13 CFR § 121.201, NAICS Code 517410.

<sup>77</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 517410, <https://data.census.gov/cedsci/table?v=2017&n=517410&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePrevious=false>.

<sup>78</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

<sup>79</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/publd/lic/attachments/DOC-379181A1.pdf>.

<sup>80</sup> *Id.*

<sup>81</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517911 Telecommunications Resellers,” <https://www.census.gov/naics/?input=517911&year=2017&details=517911>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See 13 CFR § 121.201, NAICS Code 517911.

show that 1,386 firms in this industry provided resale services for the entire year.<sup>86</sup> Of that number, 1,375 firms operated with fewer than 250 employees.<sup>87</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 293 providers that reported they were engaged in the provision of local resale services.<sup>88</sup> Of these providers, the Commission estimates that 289 providers have 1,500 or fewer employees.<sup>89</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

18. *Toll Resellers.* Neither the Commission nor the SBA have developed a small business size standard specifically for Toll Resellers. Telecommunications Resellers<sup>90</sup> is the closest industry with a SBA small business size standard. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure.<sup>91</sup> Mobile virtual network operators (MVNOs) are included in this industry.<sup>92</sup> The SBA small business size standard for Telecommunications Resellers classifies a business as small if it has 1,500 or fewer employees.<sup>93</sup> U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services for the entire year.<sup>94</sup> Of that number, 1,375 firms operated with fewer than 250 employees.<sup>95</sup> Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 518 providers that reported they were engaged in the provision of toll services.<sup>96</sup> Of these providers, the Commission estimates that 495 providers have 1,500 or fewer employees.<sup>97</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

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<sup>86</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517911, <https://data.census.gov/cedsci/table?q=2017&n=517911&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>87</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>88</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/pub/ld/lic/attachments/DOC-379181A1.pdf>.

<sup>89</sup> *Id.*

<sup>90</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517911 Telecommunications Resellers,"* <https://www.census.gov/naics/?input=517911&year=2017&details=517911>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See 13 CFR § 121.201, NAICS Code 517911.

<sup>94</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517911, <https://data.census.gov/cedsci/table?q=2017&n=517911&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>95</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>96</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/pub/ld/lic/attachments/DOC-379181A1.pdf>.

<sup>97</sup> *Id.*

#### 4. Other Entities

19. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.<sup>98</sup> This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.<sup>99</sup> Providers of Internet services (e.g. dial-up ISPs) or voice over Internet protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry.<sup>100</sup> The SBA small business size standard for this industry classifies firms with annual receipts of \$35 million or less as small.<sup>101</sup> U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year.<sup>102</sup> Of those firms, 1,039 had revenue of less than \$25 million.<sup>103</sup> Based on this data, the Commission estimates that the majority of “All Other Telecommunications” firms can be considered small.

##### D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

20. The *Notice* proposes to revise the Commission’s public complaint process to accept complaints regarding digital discrimination of access, as directed in section 60506 of the Infrastructure Act by: (1) adding a digital discrimination of access category to our public complaint system; (2) collecting demographic information from filers who submit digital discrimination of access complaints; (3) establishing a clear pathway for organizations to submit digital discrimination of access complaints; and (4) creating instructional materials regarding filing a digital discrimination of access complaint.<sup>104</sup> The *Notice* seeks comment on these proposals. The *Notice* also seeks comment and any other changes that the Commission should make to the public complaint process to accept complaints related to digital discrimination of access. The *Notice* also seeks comment on record proposals to place affirmative obligations the Commission should place on broadband providers, including reporting and recordkeeping requirements.

##### E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

21. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance

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<sup>98</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517919 All Other Telecommunications,” <https://www.census.gov/naics/?input=517919&year=2017&details=517919>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See 13 CFR § 121.201, NAICS Code 517919.

<sup>102</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 517919, <https://data.census.gov/cedsci/table?v=2017&n=517919&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>.

<sup>103</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

<sup>104</sup> *Notice* Section III.B.

rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.<sup>105</sup>

22. The *Notice* seeks comment how to incorporate section 60506 of the Infrastructure Act's direction to account for "technical and economic feasibility" in the Commission's definition of "digital discrimination of access," including issues of technical and economic feasibility faced by small entities.<sup>106</sup> The *Notice* also seeks comment on the burden that various record proposals to combat digital discrimination of access would place on covered entities, including small entities, and ways to minimize that burden.<sup>107</sup>

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

None.

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<sup>105</sup> 5 U.S.C. § 603(c)(1)-(4).

<sup>106</sup> *Notice* Section III.C.1.

<sup>107</sup> *Notice* Section III.A.1; Section III.C.1.

**APPENDIX B****Report of the Communications Equity and Diversity Council****Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity**

[Link to the Appendix B Report of the Communications Equity and Diversity Council Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity available here:  
<https://www.fcc.gov/sites/default/files/cedc-digital-discrimination-report-110722.pdf>]

**Recommendations and Best Practices to Prevent Digital Discrimination  
and Promote Digital Equity**

**Submitted to the Federal Communications Commission  
by the Working Groups of the Communications Equity and Diversity Council**

**November 7, 2022**

**Recommendations and Best Practices to  
Prevent Digital Discrimination  
and  
Promote Digital Equity**



**Submitted to the  
Federal Communications Commission  
by the Working Groups of the  
Communications Equity and Diversity Council**

**Adopted: November 7, 2022**

**Communications Equity and Diversity Council  
Federal Communications Commission**

**November 7, 2022**

Jessica Rosenworcel, Chairwoman  
Federal Communications Commission

Holly Saurer, Chief  
Media Bureau  
Federal Communications Commission

**CEDC Chairpersons**

Heather Gate, Chair, Vice President of Digital Inclusion  
Connected Nation

Nicol Turner Lee, Ph.D., Vice Chair, Director – Center for Technology Innovation  
Senior Fellow – Governance Studies Program, Brookings Institution

Susan Au Allen, Vice Chair, Chairman, National President and CEO  
US Pan Asian American Chamber of Commerce Education Foundation

**Digital Empowerment and Inclusion Working Group**

Dominique Harrison, Ph.D., Chair  
Joint Center for Political and Economic Studies

**Members**

Clayton Banks, CEO  
Silicon Harlem

Robert Branson, President and CEO  
Multicultural Media Telecom and Internet Council

Joi Chaney, Executive Director of the National Urban League Washington Bureau  
Senior Vice President for Policy & Advocacy  
National Urban League

Michele Cober, Director of External Affairs & Strategic Alliances in Public Policy Group  
Verizon

Sarah Kate Ellis, President and CEO  
GLAAD

Rebecca Gibbons, Strategic Initiatives Manager, Office for Community Technology  
City of Portland, Oregon

Chris James, President and CEO  
National Center for American Indian Enterprise Development

Broderick Johnson, Executive Vice President for Public Policy and  
Executive Vice President for Digital Equity  
Comcast Corporation

Nicolaine Lazarre, Vice President of Policy and External Affairs  
Charter Communications, Inc.

Louis Peraertz, Vice President of Policy  
Wireless Internet Service Providers Association

Vickie Robinson, General Manager – Airband Initiative  
Microsoft

**Alternates for CEDC Members**

Laura Berrocal, Vice President, Policy and External Affairs  
Charter Communications, Inc.

Antonio Williams, Vice President, Government Affairs and Local Advocacy  
Comcast Corporation

**Working Group Members**

Matthew F. Wood, Vice President of Policy and General Counsel  
Free Press

Anisa Green, Director, Federal Regulatory  
AT&T

Hooman Hedayati, Strategic Associate for Telecommunications Policy  
Communications Workers of America

Angela Siefer, Founder and Executive Director  
National Digital Inclusion Alliance

John C. Yang, President and Executive Director  
Asian Americans Advancing Justice

**Alternates for Working Group Members**

Tsion Tesfaye, Research and Policy Manager  
National Digital Inclusion Alliance

**Subject Matter Experts**

Dr. Christopher Ali, Pioneers Chair in Telecommunications  
Professor of Telecommunications  
Bellisario College of Communications  
Penn State University

Dr. Jon Gant, Dean, School of Library and Information Sciences  
North Carolina Central University

Dr. Gooyong Kim, Assistant Professor of Communications Arts  
Cheney University of Pennsylvania

**Innovation and Access Working Group**

Robert Brooks, Chair, Digital Solutions Specialist  
WHUR-FM, Howard University, Washington, DC

**Members**

Raúl Alarcón, Chairman and CEO  
Spanish Broadcasting System

Matthew Bauer, Vice President and Executive Director of Connected Communities  
Wireless Research Center

Caroline Beasley, CEO  
Beasley Media Group, LLC

Anna Gomez  
ACDDE Chair *Emeritus*, Representing Hispanic National Bar Association

Cecelia Gordon, Vice President, Distribution  
Starz

David Honig, President and CEO  
JulGlo Productions, LLC

Sherman Kizart, Managing Director and Founder  
Kizart Media Partners

Henry Rivera, Partner, Wiley Rein, LLP  
Representing Emma Bowen Foundation

Steven Roberts, President and Principal  
The Roberts Companies

Joycelyn Tate, Senior Policy Advisor  
Black Women's Roundtable, National Coalition on Black Civic Participation

**Working Group Members**

Barbara Ciara, Managing Editor  
WTKR-TV, Norfolk, VA, Representing the National Association of Black Journalists

Susan Corbett, Founder  
National Digital Equity Center

Monica Desai, Global Head, Connectivity and Access Policy  
Meta, Representing INCOMPAS

Charles Harrell, II, President and CEO  
The IT Architect Corporation

C. Howie Hodges, II, Co-founder and Sr. Vice President of Government and External Affairs  
Centri Tech

Jennifer J. Jackson, Executive Vice President  
Stellar TV and Central City Productions

Leticia Latino-Van Spluteren, CEO  
Neptuno USA

Eve Lewis, Assistant City Attorney  
City of Coconut Creek, Florida

**Alternates for Working Group Members**

Dan Ball, Head of North America Connectivity Policy  
Meta, Representing INCOMPAS

**Subject Matter Experts**

Dr. Jon Gant, Dean, School of Library and Information Sciences  
North Carolina Central University

Dr. Dianne Lynch, President  
Stephens College

**Diversity and Equity Working Group**

Christopher Wood, Chair, Executive Director  
LGBT Technology Partnership & Institute

**Members**

Melody Spann Cooper, Chair and CEO  
Midway Broadcasting Corporation

Graham “Skip” Dillard, Brand Manager  
Audacy New York 94.7 WXBX-FM

Jill Houghton, President and CEO  
Disability:IN

Ronald Johnson, Ph.D., Senior Advisor and Chief Strategist for Diversity, Equity and Inclusion  
Wireless Infrastructure Association

Rosa Mendoza, Founder, President & CEO  
ALLvanza

Aama Nahuja, Legal Counsel  
A Wonder Media Company, LLC

Brian Scarpelli, Senior Policy Counsel  
ACT/The App Association

Charlyn Stanberry, Vice President, Government Relations  
National Association of Broadcasters

Antonio Tijerino, President and CEO  
Hispanic Heritage Foundation

James Winston, President  
National Association of Black Owned Broadcasters

## **Working Group Members**

Jenna Alsayegh, Senior Director of Strategic Initiatives & Partnerships  
US Telecom

Joon Bang, CEO  
Iona Senior Services

Faith Bautista, CEO  
National Diversity Coalition

Bridgette Daniel Corbin, CEO  
Wilco Electronics Systems, Inc

Lili Gangas, Chief Technology Community Officer  
Kapor Center

Otto Padron, President and CEO  
Meruelo Media

Randi Parker, Senior Director of Partnership Engagement  
Creating IT Futures

Ellen Schned, CEO  
Strong Women Alliance

Dr. Cathy Schubert, Fellow  
American Geriatric Society

Mona Thompson, General Manager  
Cheyenne River Sioux Tribe Telephone Authority, Representing NTCA

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## EXECUTIVE SUMMARY

Under the leadership of Federal Communications Commission (FCC or Commission) Chairwoman Jessica Rosenworcel, the Communications Equity and Diversity Council (CEDC), a federal advisory committee, was chartered on June 29, 2021. Under the charter of the CEDC's formation, the Commission appointed members from public interest groups, think tanks, and industry organizations to the federal advisory committee, and divided such members into three Working Groups, which include the Digital Empowerment and Inclusion Working Group ("DEI Working Group"), Innovation and Access Working Group ("I&A Working Group"), and the Diversity and Equity Working Group ("D&E Working Group").<sup>1</sup>

One of the inaugural and urgent tasks of the CEDC was to present recommendations to the Commission on the public policies, programs, and other strategic initiatives to "advance[e] equity in the provision of and access to digital communication services and products for all people of the United States, without discrimination on the basis of race, color, religion, national origin, sex, or disability."<sup>2</sup> The particular request of the Commission in December 2021 was to: (a) examine issues around lack of access to broadband services and products; (b) help better understand the reasons and causes for such lack of access; and (c) offer recommendations for addressing digital discrimination and other barriers that impact equitable access to emerging technology in the U.S., including its territories, particularly in communities that remain unserved, underserved or "under-connected."<sup>3</sup> Such call to action was explicitly legislated by the Congress's Infrastructure Investment and Jobs Act (IIJA), or Bipartisan Infrastructure Law (BIL), that was enacted on November 15, 2021.<sup>4</sup> The legislation directed the Commission to "adopt final rules to facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility...."<sup>5</sup>

This document, or the "Report," compiles the findings from the three CEDC Working Groups, and particularly offers guidance to States and localities<sup>6</sup> seeking to prohibit "digital

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<sup>1</sup> Federal Communications Commission, "Working Group Members Announced for FCC Diversity Council," January 13, 2022, <https://www.fcc.gov/document/working-group-members-announced-fcc-diversity-council>. See also, Federal Communications Commission, "FCC Announces Working Group Members of the Communications Equity and Diversity Council," Public Notice, DA 22-41, January 13, 2022, <https://docs.fcc.gov/public/attachments/DA-22-41A1.pdf>.

<sup>2</sup> Federal Communications Commission, "Communications Equity and Diversity Council (2021)", <https://www.fcc.gov/communications-equity-and-diversity-council>.

<sup>3</sup> Federal Communications Commission, "Working Group Members Announced for FCC Diversity Council," January 13, 2022, <https://www.fcc.gov/document/working-group-members-announced-fcc-diversity-council>. See also, Federal Communications Commission, "FCC Announces Working Group Members of the Communications Equity and Diversity Council," Public Notice, DA 22-41, January 13, 2022, <https://docs.fcc.gov/public/attachments/DA-22-41A1.pdf>.

<sup>4</sup> Congress.gov. "H.R.3684 - 117th Congress (2021-2022): Infrastructure Investment and Jobs Act," Div. F, Tit. I, Sec. 60506 et seq., Pub. L. 117-58 (Nov. 15, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/3684/text>. Section 60506 of the Infrastructure Act is codified at 47 U.S.C. § 1754, Digital Discrimination.

<sup>5</sup> *Id.* § 1754(b).

<sup>6</sup> Since localities were not defined in the Infrastructure Investment and Jobs Act or in the charge to the CEDC, for purposes of this report, includes within the term "localities" Native communities and Tribal lands through

discrimination” in broadband deployment, adoption, and use, as well as in the contracting and grants processes for funds related to forthcoming broadband infrastructure. This Report was developed with the input of the Working Group Members, and a range of interview respondents (See Appendix A). While all CEDC members may not agree on every detail included in the report, the report is an accurate representation of the work conducted.

The Report is organized by Working Group into three sections:

1. The DEI Working Group presents in Part One model policies and best practices for States and localities to adopt to ensure that broadband internet access service providers do not engage in digital discrimination.
2. Part Two expresses the findings and recommendations of the I&A Working Group that includes a roadmap for inclusive participation among diverse, small, and medium-sized businesses to prevent discrimination in the awarding of IJA loans and grants.
3. Part Three reflects the findings from the D&E Working Group that promotes universal access among intersectional groups and encourages the Commission to be more inclusive and protective of other vulnerable populations, including those from older, disabled, non-gender conforming, and rural areas.

In accordance with the Commission’s request for the CEDC to investigate, compile, and present findings about what States and localities can implement to prevent discriminatory behaviors and activities, the Report provides a starting point for further deliberations and actions that promote increased deployment, adoption, and use of high-speed broadband that not only make it easier for populations to engage in daily activities of remote work, learning, and health care, but also encourage affordable and widely deployed connectivity.

The Report aligns with the statutory language of the IJA, which in Section 60506(d) requires the agency to “develop model policies and best practices that can be adopted by States and localities to ensure that broadband internet access service providers do not engage in digital discrimination.”<sup>7</sup> Further, Section 60506(c) requires the Commission and the Attorney General to ensure that “federal policies promote equal access to robust broadband internet access service by prohibiting deployment discrimination based on — (1) the income level of an area; (2) the predominant race or ethnicity composition of an area; or (3) other factors the Commission determines to be relevant . . . .”<sup>8</sup> The IJA statute also directs the Commission to “revise its public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination.”<sup>9</sup>

Various other requirements regarding the prevention and elimination of digital discrimination are further considered in the statute, including the requirement of the Commission to adopt rules “to

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government-to-government coordination and collaboration, as well as, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, and the United States Virgin Islands.

<sup>7</sup> 47 U.S.C. § 1754(d). See also, Agenda Released for February 23, 2022, Virtual Meeting of the Communications Equity and Diversity Council, Public Notice, DA 22-164 (WCB Feb. 16, 2022).

<sup>8</sup> 47 U.S.C. § 1754(d).

<sup>9</sup> *Id.* § 1754(e).

facilitate equal access to broadband internet access service.”<sup>10</sup> In satisfying that obligation, the Commission must consider “the issues of technical and economic feasibility presented by that objective.”<sup>11</sup> The Commission’s rules must be aimed at “(1) preventing digital discrimination of access based on income level, race, ethnicity, color, religion or national origin; and (2) identifying necessary steps for the Commission to take to eliminate discrimination.”<sup>12</sup>

The three combined draft reports and recommendations from each of the Working Groups present a series of critical and distinguishable next steps for the Commission to consider with findings largely extracted from structured interviews with subject matter experts and secondary research. Among the three Working Groups, numerous individuals were interviewed, and various documents and research reports were further analyzed and discussed for inclusion in each part.

The tireless work of CEDC Members presents to the Commission recommendations for a series of model policies and best practices that can be adopted by States, localities, and Internet Service Providers (ISPs) working to promote equitable broadband deployment while preventing digital discrimination. The Report also includes a series of other considerations to advance digital equity, including increased community engagement and K-12 digital skilling, among other action items. Notwithstanding, States and localities should seek to prevent “digital discrimination” based on income level, race, ethnicity, color, religion, or national origin to the extent they have the authority to do so. ISPs should ensure that they will not discriminate between or among any individuals in the availability of broadband. Respectively, the three Working Groups also offer the following recommendations as model policies and best practices for States and localities looking to close the digital divide and other economic opportunity gaps.

### **DEI Working Group Recommendations for Model Policies and Best Practices That Can Be Adopted for States and Localities to Prevent Digital Discrimination by ISPs:**

The DEI Working Group presents a series of recommendations for consideration to prevent digital discrimination by ISPs:

- 1. Develop, implement, and make publicly available periodic broadband equity assessments in partnership with ISPs, the community, and other local stakeholders.**
- 2. Facilitate greater awareness and information sharing among multi-dwelling unit owners regarding tenant choice and competition considering broadband service agreements.**
- 3. Identify local opportunities that could be used to incentivize equitable deployment.**

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<sup>10</sup> *Id.* § 1754(b).

<sup>11</sup> Federal Communications Commission, “FCC Initiates Inquiry on Preventing Digital Discrimination,” March 17, 2022, <https://www.fcc.gov/document/fcc-initiates-inquiry-preventing-digital-discrimination>.

<sup>12</sup> 47 U.S.C. § 1754(b)(1) - (2).

4. **Engage, where permissible under state and federal law, in the management of public property, such as public rights-of-way, to avert discriminatory behaviors that result in or sustain digital discrimination and redlining.**
5. **Convene regular meetings of broadband providers and other stakeholders, including community anchor institutions, public interest groups, community advocates, labor organizations, and faith-based institutions, to evaluate areas and households unserved or underserved with competitive and quality broadband options.**
6. **Encourage fair competition and choice.**

### **DEI Working Group Recommendations to Support Digital Equity:**

In addition to fulfilling the FCC’s charge to the DEI working group to provide recommendations to address digital discrimination, the Working Group also provides recommendations to support digital equity more generally. The Working Group seeks to help the FCC remove barriers to equal opportunity and deliver resources and benefits equitably to all Americans to access and use digital communication and technologies.<sup>13</sup> Our interviews shed light on many factors, including possible digital discrimination, that may contribute to the lack of digital equity in the United States.

The recommendations presented in this section go beyond the goal to address digital discrimination. The DEI Working Group recognizes the importance of increasing affordability and digital navigation services for historically disadvantaged and other vulnerable populations. The Working Group does not put these recommendations forward to diminish or conflate the distinctly different effort needed to address “digital discrimination” based on income level, race, ethnicity, color, religion, or national origin presented above.<sup>14</sup> The Working Group encourages the FCC to work with States and localities to seek, develop and deepen resources and capabilities to:

1. **Make low-cost broadband available to low-income households through government benefit programs, in combination with internet service providers’ low-income programs.**
2. **Build on the success of existing benefit programs that allow low-income households to apply a credit to an internet service of their choice.**
3. **Raise awareness about connectivity programs for programs among eligible households.**

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<sup>13</sup> Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Pub. L. No. 13985 (2021). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>. See also, Federal Communications Commission, “Federal Communications Commission Equity Action Plan,” April 14, 2022, <https://www.fcc.gov/document/federal-communications-commission-equity-action-plan>.

<sup>14</sup> 47 U.S.C. § 1754.

- 4. Strengthen marketing and communications about available federal and state connectivity programs and other programs that target low-income or other unconnected members of a community.**
- 5. Streamline the application process for government benefit programs referred to above.**
- 6. Increase support and funding for organizations such as schools, nonprofits, and faith-based organizations to provide digital navigation assistance in communities they serve.**
- 7. Fund, promote and leverage the use of digital navigators.**
- 8. Stakeholders should encourage Congress to create a digital public service and engagement program (e.g., digital navigators), which could conduct trainings and outreach in non-adopting communities.**
- 9. Increase device access and participation.**
- 10. Use public-private partnerships to facilitate remote learning and close the homework gap.**
- 11. Ensure that members of the community have safe spaces to access the internet.**
- 12. Strengthen digital skilling efforts in underserved communities.**
- 13. Encourage the creation of workforce development/training opportunities, focusing on historically underrepresented communities.**

#### **I&A Working Group Recommendations (Part Two):**

The I&A Working Group presents a series of recommendations for consideration to close the opportunity gaps for diverse, and predominantly minority- and women-owned businesses by encouraging States and localities to:

- 1. Adopt definitions of small minority- and women-owned (SMW) businesses.**
- 2. Designate a government-wide office to oversee supplier diversity initiatives, including the creation of an annual plan to increase supplier diversity.**
- 3. Adopt an accountable goal of no less than 30% participation of SMW businesses in state and local infrastructure grant and contract opportunities and provide incentives to first-tier contractors to partner with SMW businesses.**

- 4. Include auditing and in-progress reporting in the contracts/subgrants; implement thoughtful auditing, in-progress reporting, real-time accountability, and enforcement to ensure that SMW goals are met.**
- 5. The grantees, working in conjunction with the supplier diversity office, should proactively identify contracting and procurement forecasts and needs.**
- 6. Ensure diverse participation in task forces or committees that advise grantees on their broadband plans, including broadband supplier diversity.**
- 7. Promote certifications prior to disbursement of funds so that SMW businesses are prepared to participate in the funding opportunities.**
- 8. Grantees, subgrantees, and contractors should be required to reach out to SMW businesses.**

### **D&E Working Group Recommendations (Part Three):**

The D&E Working Group presents a series of recommendations for consideration by States and localities to ensure the diversity and inclusion of the range of marginalized populations in the U.S. who should benefit from the economic and social benefits of increased broadband access, as well as the digital skills – whether postsecondary or adult workforce training – to compete in the digital economy.

- 1. The Commission needs to examine and expand the definition of “equal access” to facilitate greater adoption and use of high-speed broadband, especially among populations experiencing a range of inequalities resulting from a protected characteristic, or an intersection of various attributes or social determinants that limit their full digital engagement.**
- 2. The Commission should play a more active role in promoting the relevance of high-speed broadband among populations where broadband can improve quality of lives and increase consumer demand for more equitably deployed broadband services.**

In conclusion, this Report presents findings from the three Working Groups and responds to the Commission’s request for recommendations to inform its work in developing model policies and best practices for States and localities to prevent digital discrimination by ISPs and advance digital equity.

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## **PART ONE: REPORT AND RECOMMENDATIONS FROM THE DEI WORKING GROUP**

### **Introduction**

All communities deserve to have equal access to high-speed broadband, which should embolden “[an] equal opportunity to subscribe to an offered [internet access] service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions.”<sup>15</sup> At least, this is the language in the recently enacted Infrastructure Investment and Jobs Act (IIJA) that is poised to accelerate high-speed broadband as one of its core pillars. According to a recent study from BroadbandNow, 42 million Americans lack affordable, high-speed, quality internet with actual download speeds of at least 25 megabits per second (Mbps) and upload speeds of at least 3 Mbps.<sup>16</sup> The Federal Communications Commission reports that 14.5 million Americans lack access to broadband internet, including wired and fixed wireless connections.<sup>17</sup> Microsoft’s data usage suggests as many as 120.4 million people in the U.S. do not use the internet at broadband speeds 25/3 Mbps.<sup>18</sup> This data reflects digital access before the pandemic, and not necessarily the millions of Americans who were left digitally disconnected during the beginning of the COVID-19 pandemic.

As many jobs, schools, healthcare, and government services shifted to online environments over the last two years, the need to deliver high-speed broadband connectivity across the U.S. has been amplified. The COVID-19 pandemic exposed the challenges Americans from unserved and underserved communities face in accessing high-speed internet access to meet their basic needs from working at home, participating in distance learning, or taking part in many other important activities for which internet access is crucial. One research study found that nearly half of all adults said that internet access has been essential during the COVID-19 pandemic.<sup>19</sup> School-aged children from low-income households were at an acute disadvantage as schools shut down, with one survey finding that nearly a quarter of those students used public WI-FI to complete homework assignments due to lack of home internet access.<sup>20</sup> The use of telehealth—some of which utilized video services—also expanded rapidly in some communities during this time,

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<sup>15</sup> 47 U.S.C. § 1754(a)(2).

<sup>16</sup> John Busby, Julia Tanberk, and BroadbandNow Team, “FCC Reports Broadband Unavailable to 21.3 Million Americans, BroadbandNow Study Indicates 42 Million Do Not Have Access,” February 3, 2020, <https://broadbandnow.com/research/fcc-underestimates-unserved-by-50-percent>.

<sup>17</sup> Federal Communications Commission, “Fourteenth Broadband Deployment Report,” January 19, 2021, <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/fourteenth-broadband-deployment-report>

<sup>18</sup> Microsoft Airband Initiative, “Maps showing FCC fixed broadband availability and broadband usage based on Microsoft data updated as of October 2020,” October 2020, <https://app.powerbi.com/view?r=eyJrIjoiYzlhZWYiNWEtMDI0OS00MWJkLWExZGYtOWQ3NTNjNzJiNDIwIiwidCI6ImMxMzZlZWwLWZlOTItNDVlMCIiZWZlTQ2OTg0OTczZTIzMiIsImMiOiF9>.

<sup>19</sup> Emily A. Vogels, Andrew Perrin, Lee Rainie, and Monica Anderson, “53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak,” Pew Research Center, April 30, 2020, <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.

<sup>20</sup> Katherine Schaeffer, “What we know about online learning and the homework gap amid the pandemic,” Pew Research Center, October 1, 2021, <https://www.pewresearch.org/fact-tank/2021/10/01/what-we-know-about-online-learning-and-the-homework-gap-amid-the-pandemic/>.

accommodating those who could not see their doctors in person but had broadband access.<sup>21</sup> In earnest, the COVID-19 pandemic brought into focus the gap between those who could easily transition to conducting important activities at home—and those who could not.

### ***Race, Income, Geography and Broadband***

For some communities, COVID-19 exacerbated economic disparities for those who did not already have access to broadband services, especially in communities of color, where a lack of broadband access can reinforce systemic inequality.<sup>22</sup> Black and Hispanic adults in the United States remain less likely than white adults to say they have high-speed internet at home, according to data from the Pew Research Center.<sup>23</sup> While studies have shown that 78% of English-speaking Asian Americans use the Internet, these analyses are often limited in scope and obscure key inequities within API communities.<sup>24</sup> The American Indian Policy Institute (AIPI) found that 18% of indigenous, tribal residents lack broadband internet access and have the highest poverty rate (25.4%) among all communities of color.<sup>25</sup> Similar concerns abound among U.S. territories, including Puerto Rico where some residents still have limited or no internet access, especially those living in rural areas.<sup>26</sup> In Hawaii, roughly 13% of residents do not have a broadband internet subscription.<sup>27</sup> More data on broadband connections for communities of color is needed to provide a more accurate and wholistic examination of the inequities and opportunities for internet connectivity for these groups.

Research also shows that income is correlated to the availability and adoption of the internet.<sup>28</sup> Many low-income households are not connected to high-speed broadband because they cannot afford the service.<sup>29</sup> Four-in-ten adults with households earning less than \$30,000 do not have

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<sup>21</sup> New York University, “Telemedicine During COVID-19: Video vs. Phone Visits and the Digital Divide,” November 15, 2021, <https://www.nyu.edu/about/news-publications/news/2021/november/telemedicine-during-covid-19.html>.

<sup>22</sup> Nicol Turner Lee, Kaya Henderson, Marc Morial, Andre M. Perry, “Can we alleviate racism and systemic inequality by expanding broadband during COVID-19?” (panel, The Brookings Institution, Washington, DC, August 25, 2020), <https://www.brookings.edu/events/can-we-alleviate-racism-and-systemic-inequality-by-expanding-broadband-during-covid-19/>.

<sup>23</sup> Sara Atske and Andrew Perrin, “Home Broadband Adoption, Computer Ownership Vary By Race, Ethnicity In the U.S.,” July 16, 2021, <https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/>.

<sup>24</sup> National Telecommunications and Information Administration, “NTIA Data Reveal Shifts in Technology Use, Persistent Digital Divide,” June 10, 2020, <https://www.ntia.gov/blog/2020/ntia-data-reveal-shifts-technology-use-persistent-digital-divide>. See also, Emily Chi and Nicole Morgenstern, “Broadband: What Is The Digital Divide And What Does It Look Like?,” May 24, 2021, Medium, <https://medium.com/advancing-justice-aaic/broadband-what-is-the-digital-divide-and-what-does-it-look-like-6c414656361d>.

<sup>25</sup> Poverty USA, “The Population of Poverty USA,” <https://www.povertyusa.org/facts>.

<sup>26</sup> Next Century Cities, “Puerto Rico,” <https://nextcenturycities.org/wp-content/uploads/Puerto-Rico.pdf>.

<sup>27</sup> United States Census, “QuickFacts Hawaii: Computer and Internet Use,” July 1, 2021, <https://www.census.gov/quickfacts/fact/table/HI#>.

<sup>28</sup> Arizona State University American Indian Policy Institute, “Tribal Digital Divide Policy Brief and Recommendations,” April 3, 2020, [https://aiapi.asu.edu/sites/default/files/tribal\\_digital\\_divide\\_stimulus\\_bill\\_advocacy\\_04032020.pdf](https://aiapi.asu.edu/sites/default/files/tribal_digital_divide_stimulus_bill_advocacy_04032020.pdf).

<sup>29</sup> John Horrigan, “Focusing on Affordability: What Broadband Adoption Rates in Cities Tell Us About Getting More People Online,” Benton Institute for Broadband and Society, April 19, 2021, <https://www.benton.org/blog/focusing-affordability>. See also, Dominique Harrison, “Affordability & Availability:

broadband services (43%).<sup>30</sup> Beyond income disparities, geographic differences in broadband deployment across communities may also limit full participation in the digital economy. Some studies indicate that disparities are exacerbated by the combination of neighborhood and income effects.<sup>31</sup> For example, neighborhoods with high poverty rates are sometimes found to have slower download speeds.<sup>32</sup> At the same time, significant advancements in the delivery of high-speed broadband have been made.

The Congressional Research Service found that incentivizing sustained private-sector investment in more isolated and sparsely populated communities, including rural and urban areas, has been difficult.<sup>33</sup> The same report also concluded that broadband “[m]arkets tend to be highly localized. Those with favorable geography and demographic profiles often have higher demand, and thus present relatively attractive investment opportunities for broadband providers.”<sup>34</sup> While access to high-speed broadband has been increasing<sup>35</sup>, undoubtedly the intersection between income, race, geography, and broadband access needs to be better understood to provide more equitable deployment and access to the internet. Where the traditional conversations on discrimination tend to happen around the interconnection of networks and interoperability with devices, more discussion is needed that examines broadband deployment and the actual reach of the physical infrastructure itself in unserved and underserved communities.

Some members of Congress have also asserted the need to examine the practices, decisions, and outcomes facilitated by ISPs that may be related to the deployment and upgrade of broadband in medium and low-income communities. In July 2021, Representative Yvette D. Clarke, [D-NY-9] first introduced H.R.4875 - Anti Digital Redlining Act of 2021 to require the FCC to issue a notice of inquiry related to digital redlining, to prohibit digital redlining, and for other purposes, to evaluate decisions made by ISPs regarding deployment. Clarke’s bill, which did not pass, sought to:

“ensure...that all Americans, especially those in traditionally underserved or marginalized communities, have access to competing broadband networks at the same

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Expanding Broadband in the Black Rural South,” Joint Center for Political and Economic Studies, October 2021, <https://jointcenter.org/wp-content/uploads/2021/10/Affordability-Availability-Expanding-Broadband-in-the-Black-Rural-South.pdf>.

<sup>30</sup> Emily A Vogels, “Digital Divide Persists Even As Americans With Lower Incomes Make Gains in Tech Adoption,” Pew Research Center, June 21, 2022, <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

<sup>31</sup> Kendall Swenson and Robin Ghertner, “People in Low-Income Households Have Less Access to Internet Services,” Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, April 2020. [https://aspe.hhs.gov/sites/default/files/private/pdf/26301/Internet\\_Access\\_Among\\_Low\\_Income.pdf](https://aspe.hhs.gov/sites/default/files/private/pdf/26301/Internet_Access_Among_Low_Income.pdf).

<sup>32</sup> *Ibid.*

<sup>33</sup> Brian E. Humphreys, “Demand for Broadband in Rural Areas: Implications for Universal Access,” Congressional Research Service, December 9, 2019, <https://sgp.fas.org/crs/misc/R46108.pdf>;

<sup>34</sup> See Humphreys, 2019.

<sup>35</sup> Andrew, and Sara Ataske, “7% of Americans Don’t Use the Internet. Who Are They?” Pew Research Center, April 2, 2021. <https://pewrsr.ch/2GrhLUj>.

quality of service, at reasonable prices, as available in other similarly situated communities with higher median incomes or different demographic makeup...”<sup>36</sup>

The development of Clarke’s bill was in response to what some communities experienced in their neighborhoods.<sup>37</sup> In the last decade, there have been allegations of what some characterize as digital redlining<sup>38</sup> of broadband availability in various parts of the country.

In 2014, the then New York City Mayor accused an ISP of not fulfilling its commitments under a cable franchise agreement.<sup>39</sup> In Cleveland, Ohio in 2017, three Black residents accused an ISP serving the city of not bringing published broadband speeds to their individual households or surrounding communities.<sup>40</sup> While the complaint was dismissed by the FCC in response to a joint motion filed by both parties, it made allegations that the ISP did not equally invest in their wireline broadband infrastructure and did not provide comparable service between middle- and low-income neighborhoods in the city of Cleveland.<sup>41</sup>

While what constitutes digital redlining will require further exploration by the Commission, these allegations suggest the importance of addressing and prohibiting digital discrimination as part of the deployment of IJA resources. With digital technologies and services evolving, States and localities play a critical role in ensuring equitable broadband access in the U.S. and the FCC has been tasked under the IJA to develop guidance that can be adopted by States and localities to prevent digital discrimination by ISPs. That is why having a solid set of recommended model policies and best practices to prevent digital discrimination based on income level, race, ethnicity, color, religion, or national origin by ISPs can facilitate greater online engagement amongst all communities.

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<sup>36</sup> Congress.gov. "H.R.4875 - 117th Congress (2021-2022): Anti Digital Redlining Act of 2021." August 2, 2021, <https://www.congress.gov/bill/117th-congress/house-bill/4875/>. Rep Clarke’s bill was not adopted, but did help secure bipartisan support for the digital discrimination inquiry in the subsequent passing of the IJA.

<sup>37</sup> Stephen Babcock, "With help from Baltimore leaders, US Rep. Yvette Clarke is introducing the Anti-Digital Redlining Act of 2021," August 9, 2021, <https://technical.ly/civic-news/anti-digital-redlining-act/>

<sup>38</sup> The Committee did not define digital discrimination or digital redlining. Rather, the Committee asked the interviewees to share a definition if they chose. The Committee used the definitions to try to understand what digital discrimination and digital redlining are from various perspectives of the interviewees.

<sup>39</sup> The dispute arose under the cable franchise agreement for alleged failure to meet certain deployment commitments which would provide service to residents of varying demographics and income levels across the entire city of New York. See also, The Official Website of the City of New York, "De Blasio Administration Releases Audit Report of Verizon’s Citywide FiOS Implementation," June 18, 2015, <https://www1.nyc.gov/office-of-the-mayor/news/415-15/de-blasio-administration-releases-audit-report-verizon-s-citywide-fios-implementation>. The lawsuit filed by the City of New York in 2017 did not advance any claims of discrimination under the cable franchise agreement or otherwise. See Complaint, *City of New York v. Verizon New York et al.*, Index NO 45066-2-17 (filed Mar. 13, 2017).

<sup>40</sup> Federal Communications Commission, "In the matter of Joanne Elkins, Hattie Lanfair, Rachelle Lee Complainants, v. AT&T Corp. Defendant," August 24, 2017, <https://digitalinclusion.org/wp-content/uploads/2017/08/ATT-Final-Complaint.08.24.2017.pdf>.

<sup>41</sup> [Taylor, et al. v. AT&T | Federal Communications Commission \(fcc.gov\), www.fcc.gov/document.taylor-et-al-v-att.](https://www.fcc.gov/document/taylor-et-al-v-att)

## ***Digital Discrimination In The Infrastructure Investment And Jobs Act (IIJA)***

On November 15, 2021, President Biden signed Public Law No: 117-58, the Infrastructure Investment and Jobs Act – which includes the largest federal investment in universal broadband since the American Recovery and Reinvestment Act under the Obama administration. The IIJA instructed the investment of \$65 billion into the provision of reliably deployed, affordable, and widely available high-speed broadband for everyone in the U.S. by the end of the decade.<sup>42</sup> Coined the “Internet for All” program, the goals are to build affordable, reliable high-speed internet infrastructure, teach digital skills, and provide necessary technology (e.g., internet-enabled hardware) that enables full participation in today’s society and economy, especially for communities of color, rural residents, and older populations.<sup>43</sup>

Section 60506(d) of the IIJA<sup>44</sup> requires the FCC to “develop model policies and best practices that can be adopted by States and localities to ensure that broadband internet access service providers do not engage in digital discrimination.”<sup>45</sup> Section 60506 also appears to draw upon the language in the Anti-Digital Redlining Act of 2021 (H.R.4875) introduced by Representative Yvette Clarke. In contrast to the Clarke bill, the language of the IIJA requires that the FCC, the federal agency with oversight over the nation’s communications infrastructure, “take steps to ensure that all people of the United States benefit from equal access to broadband internet service. Not later than two years after the date of the enactment of this Act, the Commission shall adopt final rules to facilitate greater access to broadband internet access, considering the issues of technical and economic feasibility presented by that objective, including:

1. Preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin; and
2. Identifying necessary steps for the Commission to take to eliminate discrimination described in paragraph.”<sup>46</sup>

## ***The Charge of the DEI Working Group***

In December 2021, the DEI Working Group, one of three CEDC working groups, was charged with the task from FCC Chairwoman Jessica Rosenworcel to recommend model policies and

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<sup>42</sup> Congress.gov. “H.R.3684 - 117th Congress (2021-2022): Infrastructure Investment and Jobs Act,” Div. F, Pub. L. 117-58 (Nov. 15, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/3684/text>. See also, National Telecommunications and Information Administration, “NTIA’s Role in Implementing the Broadband Provisions of the 2021 Infrastructure Investment and Jobs Act,” <https://broadbandusa.ntia.doc.gov/news/latest-news/ntias-role-implementing-broadband-provisions-2021-infrastructure-investment-and>.

<sup>43</sup> Biden-Harris Administration Launches \$45 Billion ‘Internet for All’ Initiative to Bring Affordable, Reliable High-Speed Internet to Everyone in America.” May 13, 2022. <https://broadbandusa.ntia.doc.gov/news/latest-news/biden-harris-administration-launches-45-billion-internet-all-initiative-bring>.

<sup>44</sup> 47 U.S.C. § 1754(d).

<sup>45</sup> Federal Communications Commission, “Agenda Released for February 23, 2022, Virtual Meeting of the Communications Equity and Diversity Council,” Public Notice, DA 22-164 (WCB Feb. 16, 2022); 47 U.S.C. § 1754(d), <https://docs.fcc.gov/public/attachments/DA-22-164A1.pdf>.

<sup>46</sup> 47 U.S.C. § 1754(b)(1) - (2).

best practices that could be adopted by States and localities to prevent digital discrimination by ISPs. Members of the DEI Working Group worked alongside other CEDC working groups to identify and interview a diverse set of experts within the telecommunications and civil society sectors, including local government officials, non-profit leaders, internet service providers, economists, executive departments of the U.S. federal government, academics, and digital inclusion advocates.

Over 30 virtual interviews were conducted by the DEI Working Group, and the Working Group developed a questionnaire that explored several issues with respondents:

1. Proposed definitions of “digital discrimination” and “digital redlining,”
2. How States and localities have and can identify and address digital discrimination,
3. The business models and decisions of ISPs and how they can support or contribute to “digital discrimination,” and
4. Recommendations of best practices from the public and private sectors to prevent digital discrimination.

The DEI Working Group also relied upon data and research by scholars, organizations, and local governments that have driven digital equity and inclusion scholarship. In all, the Working Group learned during the interviews that ensuring equitable technology access is a very complex endeavor, and there is some variation in how stakeholders define digital discrimination. In the end, these interviews exposed that there may be little to no agreement on what constitutes digital discrimination.

## METHODOLOGY

The DEI Working Group engaged in multiple methodologies to meet the Commission's charge.

**Interviews.** The Working Group identified experts from government, industry, academia, and advocacy groups who could discuss digital equity challenges and propose solutions to help inform its recommendations. A full list of interviewees is included in Appendix A.

Sample questions included:

- How to define digital discrimination?
- How to define digital redlining?
- How are constituents experiencing and impacted by digital discrimination?
- What efforts they and their employers/organizations have undertaken to address digital discrimination?
- What equal access looks like?
- What would make the biggest difference in advancing equal access?
- What are the economic and regulatory considerations that incentivize private investment?
- What data or research should be considered?

Interviewees also had the option to provide a formal presentation in addition to the questions that were also shared with the DEI Working Group for further analysis.

**Research.** The DEI Working Group also reviewed research publications and other publicly available documents issued by a variety of government agencies, academics and think tanks, and advocacy organizations to help inform its development of best practices and model policies to prevent digital discrimination and to promote digital equity. Among other sources, Working Group members reviewed:

- Federal guidance and programs, including the Affordable Connectivity Program and its predecessor the Emergency Broadband Benefit Program.
- Prior reports and recommendations to the FCC, including from the Broadband Deployment Advisory Committee Increasing Broadband Investment in Low-Income Communities Working Group.
- Broadband adoption initiatives and digital skills programs, including partnerships between state and local governments and internet service providers in response to the COVID-19 pandemic.
- Advocacy group guidance and programs, including from the Electronic Frontier Foundation and the National Digital Inclusion Alliance.
- Academic and think tank publications, including from the and Pew Research Center.
- Civil Rights Organization publications, including from the National Urban League.

**Working Group Meetings.** The DEI Working Group also participated in weekly meetings to prepare before interviews, debrief post interviews, and write the report. Those meetings also enabled the entire group to be able to contribute to the writing of the report in a transparent manner.

## FINDINGS FROM INTERVIEWS

Several themes emerged from the interviews to advise the deliverables of the Working Group, particularly the recommendations for state and local leaders. The findings are organized into themes and summarized below. In accordance with the Chatham House rule<sup>47</sup>, the names of respondents are not attributed to their specific input, but their scope of work may be described.

### **1. *Tackling the digital divide is both urgent and imperative.***

The DEI Working Group learned from the interviews that while great progress has been made to connect each person to reliable broadband, there is a sense of the “fierce urgency” to accelerate the rate at which the United States accomplishes this goal. Some snippets from respondents on this topic align with the rationale for the Infrastructure Investment and Jobs Act, where Congress finds namely<sup>48</sup>:

- *“Access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States.”*
- *“The persistent ‘digital divide’ in the United States is a barrier to the economic competitiveness of the United States and equitable distribution of essential public services, including health care and education.”*
- *“The digital divide disproportionately affects communities of color, lower-income areas, and rural areas, and the benefits of broadband should be broadly enjoyed by all.”*
- *“In many communities across the country, increased competition among broadband providers has the potential to offer consumers more affordable, high-quality options for broadband service.”*
- *“The 2019 novel coronavirus pandemic has underscored the critical importance of affordable, high-speed broadband for individuals, families, and communities to be able to work, learn, and connect remotely while supporting social distancing.”*

### **2. *Digital discrimination can appear in multiple contexts.***

The DEI Working Group learned from respondents that digital discrimination continues to be defined based on communal experiences in different contexts that describes instances where discrimination occurs in various frameworks moderated through the deployment and use of computers, applications, algorithms, and computer networks. Forms of digital discrimination, for example, have been a point of enforcement by the U.S. Department of Justice in cases over the past decade when access to consumer-facing websites violated the American with Disabilities

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<sup>47</sup> Under the Chatham House Rule, anyone who comes to a meeting is free to use information from the discussion but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed. It is designed to increase openness of discussion. See also, <https://www.chathamhouse.org/about-us/chatham-house-rule>.

<sup>48</sup> Congress.gov. "H.R.3684 - 117th Congress (2021-2022): Infrastructure Investment and Jobs Act," Div. F, Tit. I, Sec. 60101, Pub. L. 117-58 (Nov. 15, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/3684/>.

Act.<sup>49</sup> In addition, advances in the use of digital technologies for financial services, Friedline and Chen find:

“poor black and brown communities experience a form of digital redlining by having the lowest fintech rates. Every percentage increase in a community's black population was associated with an 18% decrease in their rate of high-speed internet access, 1% decrease in smartphone ownership, 12% decrease in online banking, and 3% decrease in mobile banking. Relationships were opposite for communities with increasing white populations where whiteness attracts higher rates of fintech, even amidst high poverty.”<sup>50</sup>

Today, algorithms are also under scrutiny for their potential to contribute to discriminatory outcomes. In 2021, a Facebook user “filed a class-action lawsuit against nine companies that manage various apartment buildings in the D.C. area, alleging that they engaged in “digital housing discrimination” by excluding older people — like her — from viewing advertisements on Facebook”.<sup>51</sup>

The sense of urgency to confront systemic and structural discrimination is not new to U.S. society. But there has been very little consensus on what constitutes “digital discrimination.” Generally, discrimination can be described as the policies, practices, rules, or other systems that deny equal opportunity and outcomes for some groups of people. Legally, the term refers to:

“...the treatment or consideration of, or making a distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit. Discrimination can be the effect of some law or established practice that confers privileges on a certain class or denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap.”<sup>52</sup>

The meaning and impact of discrimination in the digital context are very complex and are being defined as our society lives increasingly in the ever-growing digital information ecosystem that is used for most parts of our lives. However, within the IIJA statute, the Commission is charged with adopting rules to facilitate equal access to high-speed broadband, considering issues of technical and economic feasibility presented by that objective, including preventing digital discrimination of access, and identifying necessary steps for the Commission to take to eliminate discrimination. This reflects the policy that “subscribers should benefit from equal access to broadband internet access service within the service area of a provider of such service...with

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<sup>49</sup> Jonathon Hensley, “The High Cost of Digital Discrimination: Why Companies Should Care about Web Accessibility”, *The Guardian*, December 31, 2015, <https://www.theguardian.com/sustainable-business/2015/dec/31/digital-discrimination-netflix-disney-target-web-accessibility-doj>.

<sup>50</sup> Terri Friedline and Zibe Chen, “Digital Redlining and the Fintech Marketplace: Evidence from US Zip Codes,” *Journal of Consumer Affairs* 55, no. 2 (June 1, 2021): 366–88, <https://doi.org/10.1111/joca.12297>.

<sup>51</sup> Christianna Silva, “Facebook Ads Have A Problem. It's Called Digital Redlining. How Legal Are The Ads On Facebook?” *Mashable*, May 3, 2022, <https://mashable.com/article/facebook-digital-redlining-ads-protected-traits-section-230>.

<sup>52</sup> USlegal.com, “Discrimination Law and Legal Definition,” accessed June 21, 2022, <https://definitions.uslegal.com/d/discrimination/#:~:text=Discrimination%20refers%20to%20the%20treatment,rather%20than%20on%20individual%20merit>.

equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions.”<sup>53</sup> It is within this specific context that the DEI Working Group focused its efforts and that the recommendations in this report are offered.

### ***3. Available definitions to understand digital discrimination and digital redlining.***

The Working Group also considered published definitions of digital redlining, which interviewed parties described as a form of digital discrimination. For example, former FCC Chairman, Ajit Pai used the term “digitally redlined” to describe the “under-investment in broadband networks—in the low-income communities in our cities, in rural areas, and on Tribal lands.”<sup>54</sup> In 2019, the previously chartered Advisory Committee on Diversity and Digital Empowerment (ACDDE) submitted to the FCC its own recommendation on digital redlining.<sup>55</sup> Further, the National Digital Inclusion Alliance (NDIA) has defined digital redlining as:

“...discrimination by internet service providers in the deployment, maintenance, or upgrade of infrastructure or delivery of services. The denial of services has disparate impacts on people in certain areas of cities or regions, most frequently on the basis of income, race, and ethnicity.”<sup>56</sup>

In the Working Group’s interviews, respondents shared how they define digital discrimination and related terms from their perspective. See Appendix B for respondents’ definitions of terms. Overall, widespread agreement among the interview participants suggested that getting to more equitable broadband must be handled with great care, and sufficient data – especially complete, or near complete broadband maps. Digital discrimination must also consider the presence of racialized and poverty differentiation of access to broadband internet services. Many respondents also shared that income and where one lives are connected to access to broadband services and the business decisions that companies make regarding deployment. In these instances, discussions on specific digital redlining cases were deliberated.

As many of the respondents observed, digital redlining as a term evolved from perspectives on redlining in housing and financial services. Interviewees also agreed that the term “redlining” is a part of housing discrimination and can be understood as the practices and decisions that excluded borrowers based on race from the mortgage lending market by denying or discouraging their use and purchase of physical property in specific communities across the United States.<sup>57</sup>

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<sup>53</sup> 47 U.S.C. § 1754(a)(2).

<sup>54</sup> Federal Communications Commission FCC 17-155, “Statement of Chairman Ajit Pai Re: *Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42; *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197,” <https://docs.fcc.gov/public/attachments/FCC-17-155A2.pdf>.

<sup>55</sup> Submission by the Advisory Committee on Diversity and Digital Empowerment, FCC, June 24, 2019, available at [acdde-06242019-access-subgroup-recommendation.docx \(live.com\)](https://www.fcc.gov/record/document/acdde-06242019-access-subgroup-recommendation.docx).

<sup>56</sup> Caitlin Kvammen, “NDIA Adds to Digital Inclusion Definitions!” National Digital Inclusion Alliance, July 23, 2021, <https://www.digitalinclusion.org/blog/2021/07/23/ndia-adds-to-digital-inclusion-definitions/>.

<sup>57</sup> Keeanga-Yamahtta Taylor, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership*, University of North Carolina Press, (2019).

Finally, interviewees commonly agreed that while redlining has its roots in housing and financial services, the results of this kind of discrimination have led to disparate outcomes and decisions for certain communities, including digital redlining which affects the availability and quality of broadband service in different parts of the country and among U.S. territories, the denial of equitable access to information services, and lack of access to broadband services.

**4. *Intent for digital discrimination should be further examined.***

Interviewees and DEI working group members offered diverging perspectives on the foundational matter of whether “discriminatory impact” as opposed to “discriminatory intent” should be the evaluation method by which digital discrimination can be ascertained. The report and the recommendations put forth do not adopt either framework. However, a definition of digital discrimination is critical to executing any best practices to prevent it. The recommendations offered in this Report are also intended to help inform the FCC as it explores the complex issue of digital discrimination, and this discussion must continue for the recommendations to be implemented.

Some interviewees focused on the concept of discrimination as related to intent. On the one hand, respondents indicated that intent can be somewhat difficult to define. One respondent, who was from an ISP, felt that impact should not be part of the conversations given the fact that focusing on impact could chill innovation, and thwart demand, cost, and technical feasibility. Conversely, respondents from the public interest community and others in the working group felt that intent is often hard to define and that focusing on intent preserves the status quo while undermining the experiences of those who are subject to discrimination. They also proposed that shifting the focus to outcomes appropriately centers the discussion on adversely affected communities. Interviewees also suggested greater transparency on technical and economic feasibility among ISPs to remove barriers to deployment in unserved and underserved communities.

**5. *Broadband adoption may drive outcome differences for vulnerable populations.***

Some respondents stated that digital discrimination may contribute to the disparities in broadband adoption and the use of digital technologies that drive the digital divide. However, one subject matter expert observed that it is not accurate to simply look at differences in broadband and computer adoption data and assume that the disparities based on race, gender, income, or other attributes are digital discrimination. The overriding concern among several interview participants was to not focus on the intent as much as the outcomes. That is, among some respondents, if individuals are impacted in a negative way, there is a need to address that and figure out how to avoid it.

**6. *Broadband deployment decisions may have unintended negative outcomes.***

The Working Group asked interview participants to share their insight into how business decisions and other factors may shape the extent to which it is economically and technically feasible to connect everyone to broadband. As noted in the IJA, “subscribers should benefit

from equal access to broadband internet access service within the service area of a provider of such service... with equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions.” Some interviewees shared that if issues of economic and technical feasibility have different outcomes for specific communities, there may be concerns about discrimination. Other interviewees mentioned that where economic and technical feasibility exists, ISPs should ensure that their services are also widely available, affordable, and have high bandwidth for all people within their service area, including investing in network upgrades. This has implications for both home use of internet services as well as local businesses.

From the beginning, the Working Group sought to understand how the business decisions of ISPs, if at all, connected to the digital divide that certain communities were experiencing. The Working Group wanted to know how ISPs decided where to deploy their services and what if any specific factors incentivized investment in specific communities. The Working Group learned that, in general, building a network includes steps to plan and design the network, construct the network, connect users, and to operate and maintain the network. The internet delivers service to consumers through a complex network of fiber, cable, copper wire technology, fixed-wireless or mobile, or satellite. ISPs configure the network in various ways to optimize the delivery of services on top of the network to offer voice and video in addition to upgrading to next generation of technologies for access to the Internet to consumers. This creates tradeoffs of meeting the basic access needs with prices that are affordable for consumers with bearing critical investment needs for innovation and market growth strategies for ISPs.

There is uncertainty about the economics of broadband investments based on multiple factors such as the geography and typology of the service area, market demand, and expectations to future-proof the network. Several interviewees identified that the predominant approach to building broadband networks in the U.S. uses a facilities-based approach. In this approach, the ISPs bear the costs to access certain public rights of way and assets such as telephone poles if it serves a subscriber using their own network facilities.

According to some interviewees, the central concern for States and localities should be to consider how to encourage expanded coverage to narrow the digital divide for access to next-generation networks to enable high-bandwidth data transfer using fiber-to-the-premises (FTTP), Data Over Cable Service Interface Specification (DOCSIS), or other technologies without discrimination in deployment and the delivery of broadband quality. The Working Group observed that the goal for ISPs is to build a network where the customer has a sufficient quality of service for their computing needs. Quality of service starts with having enough capacity to perform the functions that are needed such as running a business, completing homework online, or working remotely.

An interview with a broadband consulting firm shared some of the quality-of-service concerns in rural America that may lead to disparate outcomes. While most of the respondents saw equity and inclusion in the adoption of broadband as the main reason to address digital discrimination, some respondents addressed the delivery of broadband to the home. For example, one respondent stated:

“Latency and jitter are a second concern. Latency is the time it takes for a message to make the trip from one end of a channel to the other. Jitter describes variations in latency; it occurs when portions of a signal arrive out of sync from their expected schedule. Think of a video call over the internet. Latency is responsible for the constant small delay between you speaking and the other person registering your voice, while jitter is responsible for glitches, freezes, and other distortions in the stream. Jitter measures the variability of the broadband connection – is it steady from one second to the next. Latency matters a lot to gamers, folks making real time stock trades, and other highly time sensitive transactions.”

### ***7. The consideration of franchise agreements.***

Some of the respondents brought up the consideration of franchise agreements to reduce the potential of digital redlining. Franchise agreements generally are agreements that allow an entity to construct, maintain and operate facilities, such as utility and communications networks, in the publicly owned rights of way. The rights of way include the streets, sidewalks and often beyond the sidewalk, which have been dedicated for transportation and other purposes. Generally, ISPs must get permission to access rights of way from the State and/or locality that is responsible for managing the rights of way.

For example, the franchising model is the framework for cable networks under the federal Cable Act. The Cable Act requires cable companies to obtain franchise agreements from state or local franchising authorities, and franchising authorities have an obligation to make sure that “access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.”<sup>58</sup> Now that cable providers are also broadband providers, the build-out provisions included in cable franchises have impacted broadband deployment as well.<sup>59</sup>

During the Working Groups interviews, franchise agreements were seen to hold cable companies accountable for service quality, tracking of customer complaints, and build-out requirements to serve specific communities. A utility official stated that franchise agreements can require service in all communities and determine whether it is equal. One expert in the telecommunications sector stated that communities should ask: who is accessing their communities' rights of way and why and what are they doing when they get there? Are they deploying in an equitable fashion?

Another interviewee suggested the Working Group review California's non-discrimination provisions in the state's video franchising law. California's Public Utilities Commission (CPUC) Assembly Bill (AB) 2987, the Digital Infrastructure and Video Competition Act of 2006 (DIVCA) seeks to “[p]romote the widespread access to the most technologically advanced cable and video services to all California communities in a nondiscriminatory manner, regardless of

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<sup>58</sup> 47 U.S.C. § 541(a)(3).

<sup>59</sup> See, e.g., Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable TV Consumer Protection and Competition Act of 1992, Third Report and Order, 34 FCC Rcd 6844 (2019) (aff'd in relevant part by *City of Eugene v. FCC*, 998 F.3d 701, 706 (6th Cir. 2021)).

their socioeconomic status.”<sup>60</sup> California’s legislation is one example of how franchise agreements have been used to protect against discrimination.

The Working Group heard from some interviewees that franchising or other conditions on access to rights-of-way could delay broadband deployment and increase costs for consumers. While other interviewees mentioned that as franchise agreements have been utilized, States and localities can sometimes make trade-offs through negotiations to ensure that providers are offering service to all communities and/or addressing digital equity needs.

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<sup>60</sup> California Public Utilities Code, “General Order 169. Digital Infrastructure and Video Competition Act of 2006,” accessed July 11, 2022, [https://docs.cpuc.ca.gov/word\\_pdf/GENERAL\\_ORDER/85773.pdf](https://docs.cpuc.ca.gov/word_pdf/GENERAL_ORDER/85773.pdf).

## **MODEL POLICIES AND BEST PRACTICES TO PREVENT DIGITAL DISCRIMINATION BY ISPS**

The findings and summarized takeaways from the structured interviews provided the necessary input to construct how States and localities can prohibit digital discrimination by an ISP. More specifically, this Report outlines a series of recommended model policies and best practices that may be pertinent to States, localities, and Internet Service Providers (ISPs) working to promote equitable broadband deployment, while preventing explicit digital discrimination and potential digital redlining. States and localities should prevent “digital discrimination” based on income level, race, ethnicity, color, religion, or national origin. Where economic and technical feasibility exists, ISPs should ensure that their services are widely available to people within their service areas. To prevent any possible regression toward such goals, the DEI Working Group offers in the Report the following model policies and best practices for potential implementation by States and localities.

### **1. Develop, implement, and make publicly available periodic broadband equity assessments in partnership with ISPs, the community, and other local stakeholders.**

Through the assessment process, State and local leaders should seek to identify the current broadband needs of their community to ensure equitable deployment of broadband services by ISPs and routinely assess the availability of broadband. The broadband equity assessment could consider what broadband service is currently available, who has reliable and consistent high-speed broadband service at home (e.g., via ongoing review of publicly available data and updating of broadband maps), and the cost needs of broadband services for their community. State and local leaders can use broadband equity assessment data to help identify unserved, underserved, and served areas and effectively direct funds and infrastructure towards areas that need the most support for the deployment of broadband services. Recognizing that timely and accurate data is necessary to produce a useful broadband equity assessment, States and localities should identify key data inputs and consider mechanisms to facilitate reporting by ISPs.

Using broadband equity assessment data, State and local leaders should develop broadband action plans in a way that invites collaboration from relevant stakeholders, including ISPs to better assess and identify where deployment needs to occur, and better target districts and communities for which deployment is required. Such an approach will help ensure greater feedback by ISPs and other interviewees and lead to more participation in addressing the needs identified in the assessment, including considering these needs in infrastructure build-out and upgrade of plans. Further, local broadband action plans, specifically, should include local assessments of broadband deployment efforts and where challenges still exist. This assessment would also include a review of digital adoption programs available in a local community and whether gaps exist to adequately meet the needs of communities.

In addition, ISPs should partner with communities to assess the opportunity and challenges for ISPs to meet unmet needs. ISPs should make this assessment data publicly available which could help to prevent digital discrimination and ensure product and service delivery is not impacted or driven by such practices.

## **2. Facilitate greater awareness and information sharing among multi-dwelling unit owners regarding tenant choice and competition considering broadband service agreements.**

States and localities should raise awareness of FCC rules regarding access to Multiple Tenant Environments (MTEs) or Multiple Dwelling Units (MDUs) and consider new ways to facilitate information sharing with MTE property owners can help inform their decision-making process when considering entering into agreements with ISPs. The FCC has rules in place that prohibit cable and telecom providers from entering into exclusive property/building access agreements with landlords.<sup>61</sup> However, these regulations may leave room for other types of deals that can lead to lack of choice, slower speeds, higher prices, and low-quality services for communities.<sup>62</sup>

States and localities should consider laws or policies that are designed to eliminate these unintended consequences and ensure expanded access to MTEs. For example, some States, such as Illinois, New Jersey, and Nevada require MTE owners to give competing providers access to their properties. Additionally, localities, like San Francisco, California, have adopted policies that discourage property owners from unreasonably interfering with residents' ability to obtain service, which may be another tool to promote the availability and deployment of broadband to MTEs.<sup>63</sup> States and localities should make efforts to ensure that property owners, cable providers, and ISPs are aware of and comply with these new obligations.

## **3. Identify local opportunities that could be used to incentivize equitable deployment.**

State, and localities should, in collaboration with ISPs, community organizations, consumer advocates, and others, identify and pursue opportunities to incentivize collaborative approaches to deployment. Leaders should examine as necessary, how State and local rules, such as dig once policies, permitting requirements, among other activities, can facilitate equitable broadband deployment.

## **4. Engage, where permissible under state and federal law, in the management of public property, such as public rights-of-way, to avert discriminatory behaviors that result**

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<sup>61</sup> Recently, the FCC released an order that prohibits exclusive and graduated revenue sharing agreements with cable and telecom providers, requires the disclosure of exclusive marketing arrangements, and clarifies that its existing inside wiring rules prohibit sale-and-leaseback arrangements with cable providers. In adopting this order, the FCC noted that its actions “promote tenant choice and competition in the provision of communication services to the benefit of those who live and work in MTEs.” Federal Communications Commission, “FCC Acts to Increase Broadband Competition in Apartment Buildings,” February 15, 2022, <https://www.fcc.gov/document/fcc-acts-increase-broadband-competition-apartment-buildings>.

<sup>62</sup> Federal Communications Commission, “FCC Bans Exclusive Contracts For Telecommunications Services in Apartment Buildings,” March 19, 2008, <https://www.fcc.gov/document/fcc-bans-exclusive-contracts-telecommunications-services-apartment>. *See also*, Sydney Price, “Small, large broadband providers battle over access to multitenant buildings,” S&P Global Market Intelligence, October 6, 2021, <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/small-large-broadband-providers-battle-over-access-to-multitenant-buildings-66751037>.

<sup>63</sup> San Francisco Police Code § 5201. *See also*, Community Contributor, “San Francisco’s Communications Choice Ordinance is Working,” February 21, 2020 Updated June 16, 2022, accessed June 24, 2022, [https://www.sfexaminer.com/our\\_sections/forum/san-francisco-s-communications-choice-ordinance-is-working/article\\_d0d54312-9a69-53a7-b36c-988cf49c69cb.html](https://www.sfexaminer.com/our_sections/forum/san-francisco-s-communications-choice-ordinance-is-working/article_d0d54312-9a69-53a7-b36c-988cf49c69cb.html).

## **in or sustain digital discrimination and redlining.**

Agreements to use the rights-of-way should reflect that the privilege of using public assets comes with an obligation to provide a benefit to the public, which includes ensuring that all members of the community have equal access to broadband, subject to economic and technological feasibility. The appropriate public benefit(s) should be discussed by community organizations, consumer advocates, and others, and be determined by local governments based on the potential for digital discrimination in the community.

States should also consider whether statutes preempting or creating barriers to the deployment of broadband services or construction of broadband facilities by non-traditional providers such as electric service providers and municipalities are equally subjected to non-discrimination model policies and best practices. States should examine their statutes and policies to ensure broadband providers benefitting from public assets provide appropriate public benefits to address potential digital discrimination.

### **5. Convene regular meetings of broadband providers and other stakeholders, including community anchor institutions, public interest groups, community advocates, labor organizations, and faith-based institutions, to evaluate areas and households unserved or underserved with competitive and quality broadband options.**

Local organizations, including community anchor institutions, public interest groups, community advocates, labor organizations, and faith-based institutions can help States and localities evaluate areas and households that are unserved or underserved with competitive and quality broadband options, and work collaboratively to develop best practices and solutions for overcoming such barriers to equitable broadband deployment and adoption. State and local leaders should also seek to uncover and address areas experiencing digital redlining and strategies to prevent such discrimination.

### **6. Encourage fair competition and choice.**

States and localities should continue to explore the role of competition and choice in not only accelerating consumer options but also as a commitment to more regular, seamless engagement with online resources that improve the quality of life for community members through activities such as online education, telehealth, civic engagement, employment, among other activities. Competition among ISPs may lower costs for consumers and improve the quality of service by both new and incumbent ISPs.

## BEST PRACTICES TO ADVANCE DIGITAL EQUITY FOR STATE AND LOCALITIES

### 1. Make low-cost broadband available to low-income households through government benefit programs, in combination with internet service providers' low-income programs.

The FCC should continue to coordinate with State and localities to maximize the impact of programs to make low-cost broadband available. For example, the Emergency Broadband Benefit Program's (EBB) success ushered in the creation of the Affordable Connectivity Program (ACP) reflecting Congress's recognition that this targeted subsidy should not be limited to a short-term pandemic program.<sup>64</sup> EBB/ACP are available to a wide range of low-income households (including those receiving benefits from Medicaid, Federal Public Housing Assistance, and the National School Lunch Program) and the IIJA avoided requirements, such as the eligible telecommunications carrier requirement that could have limited service provider participation.<sup>65</sup>

As of July 2022, more than 1,500 service providers participate in ACP,<sup>66</sup> and more than 12 million low-income households participate in ACP.<sup>67</sup> Many internet service providers also offer low-cost broadband plans for low-income families. These service offerings can be free to consumers once the ACP benefit is applied.<sup>68</sup> While funding exists currently, the legislation does not provide long-term support. Also, additional guidelines are needed to set standards for quality of service as well as marketing and communication to reach the target audiences more effectively based on lessons learned from the implementation of EBB and ACP to date.

It is also essential for the FCC to improve the USF programs' ability to meet the goals of universal deployment, affordability, adoption, availability, and equitable access to broadband. While the Infrastructure Act provides critical investments, it does not eliminate the need for a robust Lifeline program, continued support for educational and rural healthcare connectivity, and, in all probability, some form of ongoing high-cost support. To ensure these vital programs

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<sup>64</sup> Federal Communications Commission, "Affordable Connectivity Program Providers, FCC," accessed May 9, 2022, [https://www.fcc.gov/sites/default/files/acp\\_provider\\_list.xlsx](https://www.fcc.gov/sites/default/files/acp_provider_list.xlsx).

<sup>65</sup> Universal Service Administrative Co., "ACP Enrollment and Claims Tracker," accessed July 11, 2022, <https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker/>; Affordable Connectivity Program Providers, FCC, accessed July 11, 2022, <https://www.fcc.gov/affordable-connectivity-program-providers> (providing participating providers by state and territory).

<sup>66</sup> Federal Communications Commission, "Affordable Connectivity Program Providers, FCC," accessed July 11, 2022, [https://www.fcc.gov/sites/default/files/acp\\_provider\\_list.xlsx](https://www.fcc.gov/sites/default/files/acp_provider_list.xlsx).

<sup>67</sup> ACP Enrollment and Claims Tracker; Affordable Connectivity Program Providers (providing participating providers by state and territory).

<sup>68</sup> T-Mobile, "T-Mobile Brings the Federal Affordable Connectivity Program to More Customers," January 26, 2022, <https://www.t-mobile.com/news/offers/t-mobile-brings-the-federal-affordable-connectivity-program-to-more-customers-with-free-wireless-service-at-metro-by-t-mobile>; Comcast, "Comcast Expands Affordable Connectivity Program Offers with Faster Internet Essentials Service and Xfinity Mobile," March 1, 2022, <https://corporate.comcast.com/press/releases/comcast-affordable-connectivity-program-internet-essentials-service-xfinity-mobile>; Verizon, "Verizon Program Helps Bridge Digital Divide," March 15, 2022, <https://www.verizon.com/about/news/verizon-program-helps-bridge-digital-divide>; Charter Communications, "Charter is Advancing Access to Affordable, Reliable High-Speed Internet Service," April 28, 2022, <https://policy.charter.com/advancing-access-to-affordable-reliable-internet>.

truly meet the Commission's mandate, it will be critical the Commission to carry out its plan to evaluate the scope of its authority under section 254(d), consider further actions on that basis, and for Congress to provide the Commission with any additional legislative tools needed to make changes to the contributions methodology, as the Commission recommended in its recent report to Congress on the future of the universal service fund.<sup>69</sup>

**2. Build on the success of existing benefit programs that allow low-income households to apply a credit to an internet service of their choice.**

States and localities should use available funds to supplement federal broadband benefits for low-income households. For example, Maryland's Emergency Broadband Benefit Subsidy Program offers those approved for EBB or ACP an additional \$15 a month on top of the federal discount for up to one year.<sup>70</sup> ISPs, States and localities, and community organizations should have intentional strategies to make sure broadband benefit programs are easily accessible and available to anyone that meets the criteria for the programs.

**3. Raise awareness about connectivity programs for programs among eligible households.**

States and localities administering low-income benefit programs (such as SNAP and Medicaid) should inform consumers about broadband benefits such as ACP and Lifeline while they are applying for the benefit qualifying program.<sup>71</sup> For example, during the COVID-19 pandemic, the National Association of Regulatory Utility Commissioners ("NARUC") and FCC partnered to increase awareness about Lifeline in this manner.<sup>72</sup>

**4. Strengthen marketing and communications about available federal and state connectivity programs and other programs that target low-income or other unconnected members of a community.**

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<sup>69</sup> Federal Communications Commission, "FCC Reports to Congress on Future of the Universal Service Fund," August 15, 2022, <https://www.fcc.gov/document/fcc-reports-congress-future-universal-service-fund>

<sup>70</sup> The Office of Governor Larry Hogan, "Governor Hogan Announces \$400 Million Initiative to Ensure Universal Broadband For Maryland," August 20, 2021, <https://governor.maryland.gov/2021/08/20/governor-hogan-announces-400-million-initiative-to-ensure-universal-broadband-for-maryland/>. See also, Montgomery County, "Maryland, Affordable Connectivity Program," accessed May 4, 2022, <https://montgomerycountymd.gov/obp/emergency-broadband-benefit.html>. (Highlighting that a household eligible for EBB/ACP can receive up to an additional \$15 per month toward their monthly internet service bill).

<sup>71</sup> Connect 313, "Bridging the Digital Divide in Detroit," accessed June 14, 2022, <https://connect313.org/about-us/>. In Detroit, Connect 313 brings together a coalition of companies and organizations seeking to ensure that all residents have internet connections, access to relevant devices, and digital resources/technical support by 2024. Connect 313 efforts have contributed to 67.5% of Detroit households becoming "digitally included," compared with only 30% who were digitally included three years ago. Connect 313 spearheaded an awareness campaign, "EBB 313," which included a call center where consumers could receive guidance about reduced cost internet and device options, information about EBB eligibility and plans, and connection with nonprofit partners to assist in applying. The campaign helped connect more than 82,500 such households.

<sup>72</sup> Brandon Presley, "Helping Low-Income Consumers Stay Connected During the COVID-19 Pandemic Through the Federal Lifeline Program," June 1, 2020, <https://bit.ly/LifelineFCCNARUC>. Among other recommendations, the FCC and NARUC urged state commissions to circulate a toolkit of Lifeline materials to state agency partners administering various government benefits programs.

Program materials should explain offerings or programs in clear, nontechnical language.<sup>73</sup> Program materials and support should be shared in multiple languages. State and local leaders should also explore providing translation services for consumers seeking to sign up for service. ISPs' customer service teams should be aware of available programs and be able to redirect a potential customer to the targeted support team. ISPs can also help by having call center teams that are assigned to sponsored-service programs and staffing them to ensure fast, reliable, and effective support with minimal hold times. About 40% of respondents to the national survey ranked “having someone walk me through the process step by step” as one of their top three suggestions for how to make applying easier.<sup>74</sup> Installation instructions could be made clearer with step-by-step illustrations of the installation process that are easy to follow for adults with limited technical experience. ISPs could offer options across their tiers of service offerings, and regularly evaluate ACP program to further increase internet adoption. ISPs should be transparent about any future fees or costs, explain them clearly, and ensure that enrollees consent to any future costs when signing up for a no-cost program.

**5. Streamline the application process for government benefit programs referred to above.**

Multiple steps requiring a consumer to coordinate with a community organization, school, and/or provider can confuse consumers and discourage signups. The complexity of State, localities, and ISP applications for low-income broadband programs—and the time it takes to complete them—often deter potential applicants. Also, programs could allow applicants to confirm their identity using their phone number or another form of official identification, rather than a Social Security Number (SSN), to minimize challenges and hesitancy around personal information sharing and to be more inclusive of those with differing documentation and employment statuses.

**6. Increase support and funding for organizations such as schools, nonprofits, and faith-based organizations to provide digital navigation assistance in communities they serve.**

It is not enough to establish broadband programs to close the digital divide. There is also a need for “boots on the ground” to help drive awareness about these programs, help potential program participants navigate the application and enrollment process, and work with participants to build the digital skills necessary to get the most out of their broadband service.<sup>75</sup> Research has shown that trusted voices in a community can play a pivotal role in these adoption efforts. Trusted voices can include high touch community-based organizations, volunteers or cross-trained staff

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<sup>73</sup> For example, Comcast has expanded the number of languages its Internet Essentials call center agents can speak to more than 240, plus American Sign Language, to help break down language barriers that can prevent people from applying or getting online.

<sup>74</sup> Chris Goodchild, Hannah Hill, Matt Kalmus, et al., “Boosting Broadband Adoption and Remote K-12 Education in Low-Income Households,” Boston Consulting Group, May 12, 2021.

<sup>75</sup> DigitalUS, Digital Navigators: Connect to Opportunity (last visited July 20, 2022), <https://digitalus.org/digital-navigator-playbook/>. See also, National Urban League, The Lewis Latimer Plan for Digital Equity and Inclusion at 53-68 (“Closing the Adoption Gap”) (Apr. 2021), [https://nul.org/sites/default/files/2021-04/NUL%20LL%20DEIA%20041421%20Latimer%20Plan\\_vFINAL\\_1136AM.pdf](https://nul.org/sites/default/files/2021-04/NUL%20LL%20DEIA%20041421%20Latimer%20Plan_vFINAL_1136AM.pdf).

that already work in education or other fields with close ties to the community and a familiarity with working one-on-one with residents.<sup>76</sup>

For example, one study conducted through a partnership with the Boston Consulting Group and Comcast, shows how local school districts can help boost broadband adoption among their students.<sup>77</sup> Arlington Public Schools in Virginia used school-based “connectivity teams,” comprised of teachers, counselors, and administrators, to make students and the adults in their household aware of the sponsored-service programs. The district also relied on the trusted relationship between parents and community leaders to disseminate information. These efforts helped connect more than 900 of the 1,000 students originally identified as lacking internet access at home. As a result of these efforts, the district had a 99% participation rate in distance learning.<sup>78</sup> There are numerous other examples of schools and other community-based organizations meeting the adoption needs of their residents.<sup>79</sup>

Communications should also explain a program in clear, nontechnical language. Trusted sources (such as educators, faith leaders, and community organizations) should share program information with students and others and encourage them to enroll. Program materials and support should be shared in multiple languages. Internet service providers should make sure consumers can contact them about questions or issues and speak with a representative in their preferred language and adopt accessibility best practices across providers.

In addition to schools, other trusted voices, including community partners, educators, and faith leaders, should be encouraged to assist in raising program awareness in historically underserved and marginalized communities.<sup>80</sup> Community anchor institutions including community organizations, faith-based institutions, and others can reinforce program marketing. Because they tend to be highly trusted, they can help recruit and support applicants, and help participants build their digital and technical skills. These organizations can also serve as the voice for applicants and households. For example, Black Churches 4 Digital Equity is training 25 national Black church leaders to support ACP sign-up and digital equity in Black communities in the US.

## **7. Fund, promote and leverage the use of digital navigators.<sup>81</sup>**

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<sup>76</sup> Nat'l Digital Inclusion Alliance, The Digital Navigator Model (last visited July 20, 2022), <https://www.digitalinclusion.org/digital-navigator-model/>.

<sup>77</sup> Goodchild, Chris, Hannah Hill, Matt Kalmus, Jean Lee, and David Webb. Boosting Broadband Adoption and Remote K–12 Education in Low-Income Households, Boston Consulting Group (May 21, 2021) (last visited July 20, 2022), <https://www.bcg.com/publications/2021/accelerating-broadband-adoption-for-remote-education-low-income-households>.

<sup>78</sup> *Id.*

<sup>79</sup> Philadelphia Office of Innovation & Tech., Digital Navigator Report at 7 (2021), <https://www.phila.gov/media/20211206155728/DigitalNavigatorReport.pdf>.

<sup>80</sup> *Ibid.*

<sup>81</sup> National Urban League, The Lewis Latimer Plan For Digital Equity and Inclusion, (Washington, D.C.: April 2021), 62-63, <https://nul.org/program/lewis-latimer-plan>; DEI Working Group Meeting, Interview with Zeke Cohen, Baltimore City Council, Mar. 28, 2022; The Digital Navigator Model, NDIA, accessed June 15, 2022, <https://www.digitalinclusion.org/digital-navigator-model/>.

Digital navigators are typically hired volunteers from libraries, social service agencies, community-based organizations, and philanthropies, who already have local knowledge and experience interacting with people of different backgrounds, including non-native English speakers. Given longstanding feelings of mistrust among those who have not adopted broadband, digital navigators can help bridge gaps that exist in communities.<sup>82</sup> Digital navigators can help address barriers to getting online through one-on-one interactions or in the classroom setting, both virtually and in person.<sup>83</sup>

- *Encourage Digital Empowerment*: They can emphasize and demonstrate the benefits of broadband, including access to government services, searching and applying for jobs, education, and telehealth. All stakeholders, including leaders in the business community, elected officials, school districts, and grassroots organizations should coordinate to address this barrier to adoption.
- *Affordability*: Navigators can provide information regarding low-cost options and help users select an option.
- *Application/Installation Process*: Navigators can walk consumers through the step-by-step sign-up process and send trained staff to help with using internet self-install kits.
- *Digital Uses and Skills*: Navigators can explain basic concepts, help build comfort with basic activities, and assist consumers in connecting to the Internet.

**8. Stakeholders should encourage Congress to create a digital public service and engagement program (e.g., digital navigators), which could conduct trainings and outreach in non-adopting communities.<sup>84</sup>**

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<sup>82</sup> Nicol Turner Lee, “Bridging digital divides between schools and communities,” The Brookings Institution, March 2, 2020, <https://www.brookings.edu/research/bridging-digital-divides-between-schools-and-communities/>.

<sup>83</sup> About Byte Back – Our Issues, Byte Back, accessed June 14, 2022, <https://byteback.org/about-us/our-issues/#digital-equality>; Byte Back, a D.C.-based nonprofit, empowers digital navigators as part of its digital equity work. Program Profiles, Digital US, accessed May 14, 2022, <https://digitalus.org/digital-navigator-playbook/program-profiles/>; Launching its Digital Navigator program in late 2020, students and alumni from Byte Back’s certification program assist new adopters with technical issues and software troubleshooting and provide digital literacy training for seniors. Digital Navigation, SEAMAAC, accessed June 14, 2022, <https://www.seamaac.org/digital-navigation/>; Southeast Asian Mutual Assistance Association Coalition (“SEAMAAC”), based in Philadelphia, has a Digital navigation program to help new immigrants and refugees, including assistance on how to get connected, use a device, use a phone as a hotspot, and use email, as well as assistance for parents register their kids for school and other essential services. NDIA Launches National Digital Navigator Corps, NDIA, accessed June 14, 2022, <https://www.digitalinclusion.org/digital-navigator-corps/>; The National Digital Inclusion Alliance (“NDIA”) is launching the National Digital Navigator Corps, which will involve partnership with 18 sites, including at least six sites in Tribal communities. Digital navigation services will include help with accessing affordable internet access, obtaining devices, acquiring technical skills, and getting application assistance.

<sup>84</sup> National Urban League, “The Lewis Latimer Plan For Digital Equity and Inclusion,” 62-63, [https://nul.org/sites/default/files/2021-04/NUL%20LL%20DEIA%20041421%20Latimer%20Plan\\_vFINAL\\_1136AM.pdf](https://nul.org/sites/default/files/2021-04/NUL%20LL%20DEIA%20041421%20Latimer%20Plan_vFINAL_1136AM.pdf). See also, Nicol Turner-Lee, “Why America Needs A “Tech New Deal” To Build Back Better,” January 12, 2021, <https://www.brookings.edu/blog/techtank/2021/01/12/why-america-needs-a-tech-new-deal-to-build-back-better/> and Nicol Turner Lee, Brookings TechTank Podcast. TechTank Podcast Episode 15: To build back better, the U.S. Needs a Digital Service Corp., <https://www.brookings.edu/blog/techtank/2021/03/22/techtank-podcast-episode-15-to-build-back-better-the-u-s-needs-a-digital-service-corps/>.

Allocate funding for digital navigators to ensure equity for those doing the high touch work of onboarding communities in most need. It is a time-consuming effort that should not be left to volunteers as that places an undue burden on community-based organizations already involved.<sup>85</sup>

### **9. Increase device access and participation.**

Concerns about the adoption of broadband service must also account for computer or tablet access and the fact that many consumers do not have regular access to a broadband enabled device beyond their smartphones. Evaluate the use of ACP benefit for devices to enable more federal investments to reach those in need through ACP and other federal programs.<sup>86</sup>

### **10. Use public-private partnerships to facilitate remote learning and close the homework gap.**

States and localities should consider public-private partnerships with schools, libraries, and higher education institutions to help spur broadband adoption, particularly among low-income students.<sup>87</sup> The American Rescue Plan Act (“ARPA”) created multiple sources of funding for broadband adoption initiatives, including to benefit students. For example, the FCC is administering a \$7.17 billion Emergency Connectivity Fund that allows eligible schools and libraries to purchase broadband service and connected devices for students and patrons to use for remote learning.<sup>88</sup> Such funding sources can be used to subsidize programs that seek to close the homework gap.

### **11. Ensure that members of the community have safe spaces to access the internet.**

A safe space for residents to get online can enable them to engage in remote learning, create resumes, apply for jobs, register for government services, and more.<sup>89</sup> Libraries and community

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<sup>85</sup> Nicol Turner Lee, Brookings TechTank Podcast. TechTank Podcast Episode 15: To build back better, the U.S. Needs a Digital Service Corp., <https://www.brookings.edu/blog/techtank/2021/03/22/techtank-podcast-episode-15-to-build-back-better-the-u-s-needs-a-digital-service-corp/>.

<sup>86</sup> PCs For People, “Get Computers & Low-Cost Internet,” accessed June 14, 2022, <https://www.pcsforpeople.org/get-technology/>. For example, PCs for People offers refurbished desktop and laptop computers to people enrolled in an income-based government assistance program, including Medicaid, Supplemental Security Income, National School Lunch Program, Federal Public Housing Assistance, or those who provide government-issued documentation that their income is below 200% of the federal poverty level based on their household size.

<sup>87</sup> EducationSuperHighway, “K-12 Bridge to Broadband – Leveraging Data to Identify Unconnected Households,” accessed June 14, 2022, <https://www.educationsuperhighway.org/bridge-to-broadband>. For example, NCTA and EducationSuperHighway partnered to create the K-12 Bridge to Broadband program, which enables cable broadband providers to work with school districts to confidentiality exchange information to identify students without home broadband access and enable the school districts to purchase internet service for low-income families through sponsored service agreements.

<sup>88</sup> See Federal Communications Commission, “Establishing Emergency Connectivity Fund to Close the Homework Gap,” May 11, 2021, <https://www.fcc.gov/document/fcc-launch-717-billion-connectivity-fund-program-0>.

<sup>89</sup> In partnership with nonprofit organizations and city leaders, Comcast has also created more than 1,000 Lift Zones in community centers nationwide to provide students and families access to free, high-capacity Wi-Fi along with educational and digital skills content to help families and site coordinators navigate online learning.

centers are integral institutions for addressing connectivity gaps, including the provision of free skills training.<sup>90</sup>

## **12. Strengthen digital skilling efforts in underserved communities.**

While cost can be a factor in broadband adoption, affordability is only one piece of the puzzle in facilitating equal access to broadband.<sup>91</sup> States and localities should work with nonprofits, community organizations, and the private sector to promote digital skilling—a lack of digital literacy and skills can be the greatest barrier to adoption.<sup>92</sup> Digital literacy efforts<sup>93</sup> should also focus on reaching and addressing the needs of older Americans.<sup>94</sup>

## **13. Encourage the creation of workforce development/training opportunities, focusing on historically underrepresented communities.**

Per Scholas, Reboot Representation, CodePath, Year UP, and NPower enable adults and students to develop marketable digital skills that can be leveraged for future careers in media and technology.<sup>95</sup> Broadband deployment and adoption investments can also create nontraditional

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<sup>90</sup> AT&T, “AT&T, Los Angeles Unified and AT&T Deliver High-Speed Internet to Students’ Homes to Bridge the Digital Divide,” Press Release, May 3, 2022, <https://about.att.com/story/2022/los-angeles-unified-digital-divide.html>; AT&T SCREENREADY, “Digital Literacy,” accessed May 5, 2022, <https://screenready.att.com/digital-literacy/> (highlighting AT&T’s offering of free digital literacy courses and workshops in collaboration with the Public Library Association).

<sup>91</sup> Doug Brake & Alexandra Bruer, “Broadband Myths: Are High Broadband Prices Holding Back Adoption?,” *ITIF*, February 8, 2021, <https://itif.org/publications/2021/02/08/broadband-myths-are-high-broadband-prices-holding-back-adoption>.

<sup>92</sup> Collective impact models such as the Town Link and Oakland Undivided are working to leverage local operations (device distribution, digital upskilling resources) in K-12, community colleges, and community-based organizations. Greenlining, “Oakland Digital Inclusion Program – The Greenlining Institute Launches ‘The Town Link,’” accessed June 14, 2022, <https://greenlining.org/oakland-digital-inclusion/>; OaklandUndivided, “#OaklandUndivided,” accessed June 14, 2022, <https://www.oaklandundivided.org>. See also, Tech Goes Home, “Our Impact,” accessed June 14, 2022, <https://www.techgoeshome.org/impact>. Tech Goes Home, a nonprofit that seeks to help individuals learn to navigate and use the internet, finds that adoption involves access to a (1) computer/tablet, (2) stable and affordable home internet connection, (3) enrollment in digital skills training courses, and (4) lasting access to the digital world and its available resources and opportunities. In 2021, with more than 100 partner sites, more than 360 courses, and more than 4,200 graduates, Tech Goes Home graduates demonstrated success in internet access and skills (2,277 graduates communicated via email and 1,569 graduates managed finances online); education and learning (1,973 graduates reported using their skills to help their children with school and 474 caregivers with school-aged children reported their children’s grades improved); and economic opportunity (1,720 graduates reported using their new skills to access job search resources and 1,265 graduates got a new job, a pay raise, entered a work training program, or started a business).

<sup>93</sup> For example, Older Adults Technology Services (“OATS”) develops digital skilling curricula for older adults. In addition to offering in-person programming at Senior Planet Centers in New York City, Plattsburgh, Denver, and Palo Alto, OATS offers educational programming online at Seniorplanet.org and through its online learning platform, Senior Planet U.

<sup>94</sup> Older Adults Technology Services, “Older Adults Technology Services,” accessed June 14, 2022, <https://oats.org/>.

<sup>95</sup> Per Scholas, “Mission: Tuition-Free IT Training - About Per Scholas,” accessed May 5, 2022, <https://perscholas.org/about-per-scholas/>; Reboot Representation, “Reboot Representation: Home,” accessed May 5, 2022, <https://www.rebootrepresentation.org/>; Codepath, “CodePath | Tech Excellence for All Computer Science Students,” accessed May 5, 2022, <https://www.codepath.org/>; Year Up, “About | Year Up,” accessed May 5, 2022, <https://www.yearup.org/about>; NPower, “NPower: Home,” accessed May 5, 2022, <https://www.npower.org/>.

paths into tech enabled careers. As an example, violence intervention job program models such as Blocpower's NY New York programs show upward economic mobility opportunities for populations at most risk<sup>96</sup>.

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<sup>96</sup>Bradley-Smith, Anna. "Climate Tech Startup Creates Hundreds of Jobs for Youth in Brownsville." *BKReader* (blog). Accessed July 18, 2022. <https://bkreader.com/2021/09/16/climate-tech-startup-creates-hundreds-of-jobs-for-youth-in-brownsville/>.

## Conclusion

The insights gleaned from the DEI Working Group interviews and research revealed invaluable insights that can lead to equal access to broadband service for all communities. The Working Group sought to focus on the lived experiences and inequities faced by specific communities across the U.S. This was paramount to the work that was undertaken.

The CEDC appreciates the opportunity to investigate, compile, and offer recommendations to the FCC to prevent digital discrimination and promote digital equity. Considering the unprecedented investment in broadband via the IJA and the urgency of the request from Chairwoman Rosenworcel, CEDC members were able to meet the challenge on a very aggressive schedule of four months with the diligence and focus that the process deserved. With the diverse membership – both as individuals and institutions represented – the Council is committed to ensuring equal access and digital equity for all people as the work of all three working groups indicate. The recommendations provided are indicative of an understanding that being intentional about addressing barriers to equal access to broadband is imperative for the success of IJA broadband programs. Therefore, it is critical that the FCC and other agencies ensure that States and localities are empowered to successfully plan, implement, and manage the equitable broadband programs funded via the IJA. Additionally, they should ensure that diverse stakeholders can participate in IJA-funded programs as business owners and trusted community partners.

In closing, while this Report represents a direct response to a request from the Chairwoman's office, the Council recognizes that there remains more work to be done by the Council over the next eleven months of its term. The CEDC was able to recognize other issues that require further attention and examination from the CEDC, FCC, and other relevant stakeholders. These include data transparency, addressing issues of intent and disparate impact, and the urgent issue of the Tribal Digital Divide. Thus, more work remains.

Thank you to Chairwoman Rosenworcel for trusting the CEDC with this important task.

## APPENDIX A – LIST OF DEI WORKING GROUP INTERVIEWS

Interviewees included:

- **Virginia Lam Abrams**, Co-Founder and SVP, Government Affairs and Strategic Advancement, Starry, Inc.
- **Donnel Baird**, CEO, BlocPower
- **Elizabeth Bowles**, President and CEO, Aristotle United Communications LLC
- **Bill Callahan**, Research and Policy Advisor, National Digital Inclusion Alliance, and President and Director, Connect Your Community
- **Zeke Cohen**, Councilman, Baltimore City Council
- **Doug Dawson**, Owner and President, CCG Consulting
- **Diana Eisner**, Vice President of Policy and Advocacy, USTelecom
- **Ernesto Falcon**, Senior Legislative Counsel, Electronic Frontier Foundation
- **Amina Fazlullah**, Senior Director of Equity Policy, Common Sense Media
- **Dr. Tyrone Grandison**, Director, Global Partner Technology Strategy – Public Sector, Microsoft
- **Dr. Tracie Hall**, CEO, American Library Association
- **JoAnne Hovis**, CEO, CTC Technologies
- **Broderick Johnson**, Executive Vice President of Public Policy and Digital Equity, Comcast Corporation
- **Rahman Khan**, Vice President of Community Impact, Charter Communications, Inc.
- **Blair Levin**, Nonresident Senior Fellow, Brookings Metro
- **Anthony Lewis**, Vice President, State Government Affairs and Public Policy, Verizon
- **Dr. Nishal Mohan**, Founder and President, mohuman
- **Dr. Tracy Morris**, Executive Director, American Indian Policy Institute at Arizona State University
- **Francella Ochillo**, Executive Director, Next Century Cities
- **Joe Paul**, CEO, Byte Back
- **Karen Charles Peterson**, Commissioner, Massachusetts Department of Telecommunications and Cable
- **Former FCC Chairman Michael K. Powell**, President and CEO, NCTA
- **Matthew Rantanen**, Co-Chair of Technology Task Force and Co-Chair of Technology and Telecom Subcommittee, National Congress of American Indians
- **Angela Siefer**, Executive Director, National Digital Inclusion Alliance
- **Deb Socia**, President and CEO, The Enterprise Center
- **Dr. Rikkin Thakker**, CTO, Wireless Infrastructure Association
- **S. Jenell Trigg**, Director of Diversity, Equity & Inclusion, Partner, Lerman Senter PLLC
- **Brenda Villanueva**, Managing Director and Lead Counsel, Telecom, The Utility Reform Network
- **Gino Villarini**, Founder and President, AeroNet
- **Joe Webster**, Chief Broadband Officer, Office of Broadband Programs, Montgomery County, Maryland Government

- **Nancy Werner**, General Counsel, National Association of Telecommunications Officers and Advisors
- **Christopher Yoo**, Founding Director, Center for Technology, Innovation and Competition, Professor, University of Pennsylvania Carey Law School
- **Erich Yost**, Senior Community Planning and Development Specialist, U.S. Department of Housing and Urban Development

*Note: A wider interviewee list was generated by the DEI Working Group; however, there were some interviewees on the wider list that were not able to make meetings based on scheduling by the time this document was finalized. At least one party declined the interview request and a few people recommended that the WG speak to someone else at their organization. The FCC team scheduled interviews based on availability and clearance procedures.*

## **APPENDIX B – SUMMARY OF DEFINITIONS OF DIGITAL DISCRIMINATION FROM INTERVIEWS**

### **Definition of Digital Discrimination (from interviews)**

- Split between Digital Discrimination and Redlining is political. The term is often used to reflect urban versus other areas. However, there are a number of different communities that are redlined. (non-profit leader)
- Assumptions that household in certain low-income brackets would not be able to afford the service or would not be interested in adopting broadband service. (entrepreneur)
- Unjust or prejudicial treatment, unequal digital opportunities and outcomes like other forms of discrimination (non-profit leader)
- Different quality of service in different parts of the territory (industry consultant).
- Lack of competition and choice in ISPs. (academic)
- Discrimination falls into multiple categories (telecom industry consultant/expert within the telecommunications sector):
  - Deployment Discrimination – ISPs installing where costs of deployment are lower
  - Maintenance/Upgrade Discrimination – maintenance and upgrade discrimination where cable service is not the same all-around town.
  - Greenfield Discrimination – every ISP builds in fiber in new places as they are being built. As a result, richer, new subdivisions get fiber and money is not poured into older neighborhoods.
  - Regional Discrimination – smaller cities are not upgraded and are stuck with older versions of technology (industry consultant)
- Form of discrimination where automated decisions treat digital users unfairly, unethically, and differently based on algorithms that can be found online. Both an indirect and direct form of discrimination. Decisions made more so by machines than individuals, but the machines are programmed by individuals. (government official)
- It's the fact that typically low-income people and people of color and rural residents do not have the same access to broadband structure and services that wealthier and non-poc people have access to. This cuts across all sorts of geographies and population densities. It is the result of underinvestment by broadband companies. (non-profit leader)
- Digital redlining is underinvestment by broadband companies that result in lower speeds and often less affordable service than in wealthier, whiter areas. (government official, citing Vinhcent Le, Greenlining Institute). The fact that typically low-income people, people of color, and rural residents do not have the same access to broadband structure and services that wealthier and non-people of color people have access to. This cuts across all sorts of geographies and population densities. (government official)
- The lack of access to high quality telecommunications service (used as a broad term) and/or have infrastructure that is not being upgraded on par with wealthier communities. (non-profit leader)
- Digital discrimination is any of the following: (expert within the telecommunications sector)
  - a place where there are no adequate networks that allows someone to do what the majority of people are using it for into the foreseeable future;
  - where the service is not affordable to all;
  - where everyone does not have tools to be on it;

- where using the tools doesn't provide equitable access to services – healthcare, education, etc.
- Examine who has 21<sup>st</sup> century access and who does not; who has fiber and who does not. (non-profit leader)
- Defines digital discrimination to include digital redlining and both terms are relatively new but based on analogies for historical dissemination in housing and financial services, such as banking and mortgage lending. (attorney)
- Digital discrimination hard to define; states do not have data about who does not have access. (government official)
- Digital redlining is a subset or form of digital discrimination. The definition of redlining adopted by the previous FCC DEI working group is suggested: “the term most commonly refers to activity consistent with the definition offered by the NDIA. The NDIA has defined “digital redlining” as “the denial, to certain communities or neighborhoods, of equal access to the terms, conditions and level of service of advanced information or telecommunications technologies, on the basis of race, ethnicity, income, or wealth.” (attorney, citing prior DEI Working Group Report.)
- “[E]conomic cherry picking” because return on investment is what animates companies’ economic planning. (industry consultant)

### **Intent vs. Disparate Treatment**

- Disparate treatment (intentional based on race, gender, ability, economic status) and disparate impact (not motivated intentionally). Communities use technology in different ways, so some discriminatory effects are artifacts of the different ways tech is used. (academic)
- Guiding principle is to focus on outcomes, not intent. If individuals are impacted in a negative way, there is a need to address that and figure out how to avoid it. (public interest)
- Intent and market forces do not matter if your community is disconnected. (attorney public interest)
- Policies are created that intentionally or unintentionally result in some people being underserved. When access is provided to resources and the ability to exploit those resources in a way that is not distributed across all groups. (public interest)
- Policies put together today that lead to disparate impacts. (non-profit leader)
- The original drafts of the Infrastructure Act appeared to adopt a disparate impact interpretation – if people of color have a different digital/broadband outcome, then its discrimination. If economics or the technology can determine the different outcomes for people of color, then its discrimination. Then the language shifted to a more de jure approach rather than a disparate impact approach. (expert within the telecommunications sector)

### **Workforce**

- Disparities in access to broadband resulting in the Inability of workforce to research available jobs, etc. (academic)
- Consideration of why digital discrimination is happening and for whom information access is considered essential and for whom nonessential. Digital discrimination occurs geographically and in terms of employee and economic hierarchy. (public interest)

## **Information Redlining**

- Redlining is intentional and unintentional “practice of arbitrarily denying or limiting financial services to specific neighborhoods, generally because its residents are people of color or are poor.” (public interest)
- Information redlining is the systemic denial of equitable access to information, information services, and information retrieval methods. (public interest)
- The role of information and digital access in closing the widening health and socioeconomic divide. (public interest)
- Information poverty is further defined by the lack of visible access points to critical information and the absence of well-coordinated and appropriately scaled information infrastructure. (public interest)
- A “situation in which individuals and communities within a given context, do not have the requisite skills, abilities, or material means to obtain efficient access to information, interpret it and apply it appropriately. (public interest)

## **PART TWO:**

### **Report and Recommendations from the Innovation and Access Working Group – IIJA Contracting and Grants for Small and Diverse Businesses**

#### **I. INTRODUCTION**

Diversity and Inclusion is a core principle and foundational to the telecommunication industry's obligation to break down long-standing and well-known barriers to entry for diverse suppliers in the supply chain ecosystem. Removing historical barriers to entry allows for the development and implementation of innovative and sustainable pathways to growing diverse businesses to scale and profitability. Mentoring, entrepreneurship training, clearinghouses, and corporate partnerships are examples of pathways that could lead to the codification of procurement best practices and industry acceptable standards.

Increasing federal spending on underserved businesses will help more Americans realize their entrepreneurial dreams and narrow persistent wealth disparities. According to new analysis from the White House Council of Economic Advisers, based on data provided by the U.S. Small Business Administration (SBA), by merely closing the gap in small business ownership rates, the average net worth of Hispanic/Latino or Black households could increase by 17-22 percent or \$138,800 or \$185,900 respectively.<sup>97</sup>

The Innovation and Access (I&A) Working Group is tasked with advancing these principles by:

- Recommending solutions to reduce entry barriers and encourage ownership and management of media, digital, communications services, and next-generation technology properties and start-ups to encourage viewpoint diversity by a broad range of voices, including people of color, women, LGBTQ+, and persons with disabilities, among others.
- Studying successful approaches to fostering diversity, equity, and non-discrimination in video, media, and technology ownership, management, and distribution; making recommendations on how to accelerate the entry of small businesses, including those owned by women and people of color, into the media, digital news and information, and audio and video programming industries, including as owners, suppliers, and employees.
- Examining issues surrounding access to capital, financing, and participation of small, diverse businesses in the media and technology sectors; and evaluating the impact of new technologies, including algorithms, on diverse consumers.

The FCC, therefore, tasked the I&A Working Group with providing recommendations to ensure inclusive practices for identifying and selecting participating entrepreneurs in IIJA contracting and grants processes. Specifically, the Working Group was directed to recommend a framework for federal and state grant administrators and procurement processes to promote access to

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<sup>97</sup> The White House, "The Benefits of Increased Equity in Federal Contracting," *The White House*. December 1, 2021, <https://www.whitehouse.gov/cea/written-materials/2021/12/01/the-benefits-of-increased-equity-in-federal-contracting/>; The White House, "FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners," *The White House*. December 2, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-biden-harris-administration-announces-reforms-to-increase-equity-and-level-the-playing-field-for-underserved-small-business-owners/>.

opportunities for small and diverse businesses. The Working Group goals for this immediate request were to:

1. increase the participation of small minority- and women-owned (SMW) businesses in state/local infrastructure grant and contract opportunities; and
2. provide best practices guidance to state/local officials on performing successful outreach to SMW businesses about funding and contract opportunities, and how such businesses can apply, partner as subcontractors, and assist in efforts to widely deploy and increase the take-up rate of broadband in diverse communities.<sup>98</sup>

The I&A Working Group offers these recommendations for best practices to increase the participation of SMW businesses in state and local infrastructure grant and contract opportunities:

1. **Adopt Definitions of Small Minority- and Women-Owned (SMW) Businesses that are inclusive of intersectional groups, such as LGBT+ and People With Disabilities.**
2. **Designate a Government-Wide Office to Oversee Supplier Diversity Initiatives, Including the Creation of an Annual Plan to Increase Supplier Diversity.**
3. **Strongly Encourage an Accountable Goal of No Less Than 30% Participation to the Maximum Extent Practicable of SMW Businesses in State and Local Infrastructure Grant and Contract Opportunities and Provide Incentives to First Tier Contractors to Partner with SMW Businesses.**
4. **Include Purposeful Auditing and In-Progress Reporting in the Contracts/Subgrants for Real-Time Accountability and Compliance as Committed that Ensures that SMW Goals Are Met.**
5. **The Grantees, Working in Conjunction with the Supplier Diversity Office, Should Proactively Identify Contracting and Procurement Forecasts and Needs.**
6. **Require Visible Leadership.**
7. **Streamline Procurement Processes for All Businesses.**

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<sup>98</sup> “Communications Equity and Diversity Council Meeting - February 2022,” *Federal Communications Commission*. February 23, 2022, <https://www.fcc.gov/news-events/events/2022/02/communications-equity-and-diversity-council-meeting-february-2022>.

8. **Ensure Diverse Participation in Task Forces or Committees that Advise Grantees on Their Broadband Plans, Including Broadband Supplier Diversity.**
9. **Promote Certifications Prior to Disbursement of Funds so that SMW Businesses are Prepared to Participate in the Funding Opportunities.**
10. **Grantees, Subgrantees, and Contractors Should be Required to Reach out to SMW Businesses.**
11. **Promote Local Business Opportunities.**
12. **NTIA Should Collect and Disseminate North Star Best Practices.**

## II. METHODOLOGY

The I&A Working Group followed two paths to identify best practices for increasing participation of small minority- and women-owned businesses in state and local infrastructure grant and contract opportunities—research and interviews.

**Research.** The Research Team reviewed:<sup>99</sup>

- Federal guidance and programs, including from White House Executive Orders and the President’s Management Agenda; the U.S. Department of Transportation’s and Environmental Protection Agency’s Disadvantaged Business Enterprise (DBE) Programs; the U.S. Department of Commerce’s Minority Business Development Agency, and its Office of Small and Disadvantaged Business Utilization; and the U.S. Small Business Administration.
- State guidance and programs, including from the California Department of Transportation, the Washington State Office of Minority and Women’s Business Enterprises, the Missouri Department of Transportation, the Florida Department of Management Services Office of Supplier Diversity, the Illinois Commission on Equity and Inclusion, and the Michigan Department of Technology, Management, & Budget.
- Local guidance and programs, including Broward County; Florida; City of Coconut Creek, Florida; Chicago, Illinois; and Detroit, Michigan.
- Academic and Think Tank publications, including the Harvard Kennedy School Government Performance Lab, the Milken Institute, and PolicyLink.
- Responses to an Innovation and Access Workstream Members’ Survey.<sup>100</sup> The survey requested feedback from organization representatives with various levels of involvement regarding supplier diversity. The inquiries centered around insights on best practices, model codes, and known initiatives that support supplier diversity initiatives that could potentially be used to support the diversity goals of the infrastructure Investment and Jobs Act (IIJA) Contracting and Grant Processes.

<sup>99</sup> See Appendix A to Part II for a full summary of the resources reviewed.

<sup>100</sup> See Appendix B to Part II for the survey sample.

- Prior FCC Advisory Committee on Diversity and Digital Empowerment Reports, including the Tech Diversity Best Practices Report (June 24, 2019),<sup>101</sup> the Diversity in the Tech Sector Working Group Report (June 24, 2021),<sup>102</sup> and the Digital Empowerment Subgroup Report (June 24, 2021).<sup>103</sup>
- Other Guidance and Programs, including from Disability:IN, LBGT Tech, Multicultural Media Telecommunications and Internet Council, National Center for American Indian Enterprise Development, National Minority Supplier Development Council, US Black Chambers, Inc./ByBlack.us, US Hispanic Chamber of Commerce, US Pan Asian American Chamber of Commerce Education Foundation, Women’s Business Enterprise National Council; and Asian Business Association Los Angeles, California Asian Pacific Chamber of Commerce, and District of Columbia Washington Metropolitan Area Transit Authority.

**Interviews.** The Working Group identified experts who could discuss procurement or grant administration policies or practices that promote access to opportunities for SMW businesses - and how providing opportunities to SMW businesses helps address digital discrimination. The interviews provided practical advice and guidance to the Working Group. Summaries of the interviews as well as a list of the experts interviewed were compiled.<sup>104</sup> The information the Working Group gleaned from its interviews, as well as its research, are the bases for the recommendations contained herein.

### **III. BEST PRACTICES ON INCREASING PARTICIPATION OF SMALL MINORITY- AND WOMEN-OWNED BUSINESSES IN STATE AND LOCAL INFRASTRUCTURE GRANT AND CONTRACT OPPORTUNITIES**

The IJJA’s \$65 billion investment into broadband deployment and equity presents a historic opportunity in the U.S. to close the digital divide, to eliminate historic inequities that have led to either a lack of meaningful access to high-speed broadband or to utilize broadband due to a lack of digital readiness, and to ensure that SMW businesses are able to tap into the opportunities presented by these funding programs.

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<sup>101</sup> FCC Advisory Committee on Diversity and Digital Empowerment, *Tech Diversity Best Practices Report*. (FCC, June 24, 2019), <https://www.fcc.gov/sites/default/files/acdde-tech-diversity-best-practices-report-06242019.pdf>.

<sup>102</sup> FCC Advisory Committee on Diversity and Digital Empowerment, *Diversity in the Tech Sector Working Group Report*. (FCC, June 24, 2021), <https://www.fcc.gov/sites/default/files/acdde-diversity-in-tech-wg-workforce-diversity-report-06242021.pdf>.

<sup>103</sup> FCC Advisory Committee on Diversity and Digital Empowerment, *Digital Empowerment Subgroup Report*. (FCC, June 24, 2021), <https://www.fcc.gov/sites/default/files/acdde-digital-empowerment-wg-digital-empowerment-report-06242021.pdf>.

<sup>104</sup> See Appendix C of Part II for the list of experts and interview summaries.

Therefore, the FCC should adopt and forward the below best practice recommendations to the National Telecommunications and Information Administration (NTIA)<sup>105</sup> to utilize in its review of State Equity plans and to develop its technical assistance for grantees.<sup>106</sup>

### **1. Adopt Definitions of Small Minority- and Women-Owned (SMW) Businesses that are Inclusive of Intersectional Groups, such as LGBT+ and People with Disabilities.**

The grantee should adopt definitions of SMW businesses, as follows:<sup>107</sup>

**Minority-Owned Business:** The Small Business Administration defines a minority-owned business as a business that meets the small business size standard for primary NAISC code which includes the majority (at least 51%) of the company is owned, controlled, and run on a daily basis by a member (or collection of members) of four ethnic or racial groups: African American, Asian American,<sup>108</sup> Hispanic American, and Native American.<sup>109</sup>

**Women-Owned Business:** A women-owned business is a small business according to SBA size standards, has at least 51% owned and controlled by one or more women who are U.S. citizens, and has women manage day-to-day operations who also make long-term decisions.<sup>110</sup>

Factors to determine whether a business qualifies as SMW include: ownership, control, and day-to-day management. Although it is important to be clear about what qualifies as an SMW business, grantees should not assume that minority- and women-owned businesses are only small and disadvantaged for outreach purposes. Rather, they should include large minority- and women-owned businesses, which could help SMW businesses, in outreach activities. Although the majority of SMW businesses are small, they could grow into larger businesses. Large minority- and women-owned businesses tend to contract with members of their own communities and could also help provide technical assistance to SMW businesses.

### **2. Designate a Government-Wide Office to Oversee Supplier Diversity Initiatives, Including the Creation of an Annual Plan to Increase Supplier Diversity.**

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<sup>105</sup> These recommended best practices can also be provided to other U.S. agencies that provide broadband funding, such as the U.S. Department of Treasury.

<sup>106</sup> Although the Council does not have a recommendation in this regard, the Commission should consider whether *Adarand* studies are necessary to support any race-based recommendations to NTIA. See FCC Advisory Committee on Diversity for Communications in the Digital Age Constitutional Issues Subcommittee, *Recommendation for Renewed Adarand Studies* (Washington D.C., United States: September 11, 2009), <https://transition.fcc.gov/DiversityFAC/adopted-recommendations/constitutional-sub-rec-adarand.pdf>.

<sup>107</sup> This recommendation is not meant to alter prior Committee recommendations and Commission decisions as expressed in other contexts dealing with minority and female ownership.

<sup>108</sup> “Asian American” includes Native Hawaiian and Pacific Islanders.

<sup>109</sup> See generally 13 CFR Part 124 – 8(a), Subparts A and B, specifically § 124.105 nuanced ownership requirements, and specifically § 124.105 for Small Disadvantaged Businesses; see also “8(a) Business Development Program - Federal Contracting,” U.S. Small Business Administration, n.d., accessed July 8, 2022, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program>.

<sup>110</sup> See generally 13 CFR Part 127, specifically § 127.201 for Women-owned small business (WOSB) and Economically Disadvantaged WSOB; see also “Women-Owned Small Business Federal Contracting Program,” U.S. Small Business Administration, n.d., accessed July 8, 2022, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program>.

State and local grantees should establish a government-wide office in charge of supplier diversity (hereinafter referred to as “Supplier Diversity Office” or “Office”), which should be involved from the beginning of the grant process. The Office should be separate from a civil rights division. It should have broader responsibilities and be at the same level as the Grants or Procurement Office. Furthermore, the Office should work hand-in-hand with the Grants or Procurement Office.<sup>111</sup>

The Office staff should participate in and sponsor supplier diversity training, as well as review all procurement practices on a government-wide basis.<sup>112</sup> For example, grantees should be required to route for review the grant publication or formal solicitation through an employee of its internal Supplier Diversity Office before advertising it to the public. Any selection/awarding panel should have meaningful diverse representation or should have at least one (1) member of the panel representing the Supplier Diversity Office.

The Office should avoid an overly lax<sup>113</sup> approach because SMW businesses and other supplier diversity issues could “be overlooked or marginalized when the Supplier Diversity Office is not involved from project inception.”<sup>114</sup> Thus, smaller issues could quickly turn into bigger issues.<sup>115</sup>

The Office should include dedicated staff for outreach and technical assistance.<sup>116</sup> The staff members should build strong relationships with SMW businesses and Chambers of Commerce throughout the areas/region/state it serves, to ensure that they are properly invited to participate as potential sources for suppliers information and connection to the suppliers’ community, and to help and encourage them to participate in the grant’s opportunities.<sup>117</sup> The staff members should also maintain a regularly updated list of SMW businesses, Chambers of Commerce, and other supporting community-based, business, and educational organizations throughout the area/region/state it serves.<sup>118</sup> In addition, proof of the manner of solicitation should be provided to show compliance with NTIA’s<sup>119</sup> requirements that grantees use the resources of organizations such as the Small Business Administration, and the Minority Business Development Agency at

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<sup>111</sup> U.S. Department of Transportation, *Disadvantaged Business Enterprise Program* (Washington D.C., United States: U.S. Department of Transportation, Federal Highway Administration, August 20, 2018), [https://www.fhwa.dot.gov/civilrights/programs/dbe\\_acm\\_handbook\\_20180820.pdf](https://www.fhwa.dot.gov/civilrights/programs/dbe_acm_handbook_20180820.pdf).

<sup>112</sup> *Supplier Diversity Best Practices Tools for Equity in Public Spending - Internal Processes* (Washington, United States: Washington State Office of Minority Women’s Business Enterprises, n.d.), accessed July 8, 2022, <https://omwbe.wa.gov/sites/default/files/public/tools-for-equity/Supplier-Diversity-Best-Practices.pdf>, p. 1.

<sup>113</sup> U.S. Department of Transportation, *Disadvantaged Business Enterprise Program*, p. 43.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> Improving Government Vendor Diversity, Harvard Kennedy School, Government Performance Lab, September 2017, [https://hwpi.harvard.edu/files/govlabs/files/strategies\\_for\\_improving\\_vendor\\_diversity\\_brief.pdf](https://hwpi.harvard.edu/files/govlabs/files/strategies_for_improving_vendor_diversity_brief.pdf), p. 3.

<sup>117</sup> NTIA, *Broadband Equity Access and Deployment Program, Notice Of Funding Opportunity (“BEAD NOFO”)*, p. 88 (Washington D.C., United States: DOC, May 2022), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf> (requiring that grantees ensure that “small and minority businesses, and women’s business enterprises are solicited whenever there are potential sources.”).

<sup>118</sup> NTIA, *BEAD NOFO*, p. 88.

<sup>119</sup> These recommendations reference NTIA because as noted, *infra*, the Working recommends that the FCC forward these recommendations to NTIA.

the U.S. Department of Commerce, in addition to diverse, minority, and women business organizations, etc.<sup>120</sup>

For example, the City of Boston's Department of Neighborhood Development and Office of Small Business Development builds strong relationships with SMW suppliers and supports their participation in the City's business opportunities. Throughout the procurement process, they provide outreach and technical assistance to small businesses, which are disproportionately SMWs.<sup>121</sup>

The Office should follow up on initial solicitations by contacting SMWs to determine if they are interested or need technical assistance.<sup>122</sup> Ultimately, the staff should use all reasonable and available means to effectively solicit and assist interested SMWs.<sup>123</sup> For example, the Office should be tasked with helping SMW businesses recruit employees capable of executing the contract tasks.

### **3. Strongly Encourage an Accountable Goal of No Less Than 30% Participation to the Maximum Extent Practicable of SMW Businesses in State and Local Infrastructure Grant and Contract Opportunities and Provide Incentives to First Tier Contractors to Partner with SMW Businesses.**

Consistent with applicable State and local government regulations, the Office should develop and aim for a documented commitment to achieve a goal of no less than 30% SMW business participation.<sup>124</sup> The goal however, should consider economic factors, such as SMW businesses' ability to meet requirements in a timely and cost-efficient manner. Efforts should be publicly announced at the highest leadership level, i.e., the Governor of a state or the Mayor of a county, city, or town.<sup>125</sup> Making a public commitment to the goal elevates the priority of the effort internally and promotes the program to potential SMW businesses, thereby encouraging them to participate.<sup>126</sup> For example, the White House recently announced that its goal for government-wide spending is 11% SMW business participation, which is, up from the statutory goal of 5%, with the ultimate goal of 15% by 2025.<sup>127</sup> And in 2016, Boston Mayor Marty Walsh signed an

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<sup>120</sup> *Ibid.*, p. 89.

<sup>121</sup> *Improving Government Vendor Diversity*, p. 3. Assistance includes one-on-one support and guidance, certification, bidding, contracting, and payment processes; conducting workshops in predominantly low-income or minority neighborhoods; partnering with nongovernmental organizations to increase access to capital and pro bono legal services for smaller vendors; attending community group meetings; and contacting publicly listed businesses to inform them of new bidding opportunities.

<sup>122</sup> Illinois Commission on Equity & Inclusion, *Guidance for Documenting Good Faith Efforts to Meet BEP Participation Goals* (Illinois, United States: Business Enterprise Program (BEP), n.d.), accessed July 8, 2022, [https://cei.illinois.gov/content/dam/soi/en/web/cei/documents/GOOD\\_FAITH\\_EFFORTS\\_GUIDANCE.pdf](https://cei.illinois.gov/content/dam/soi/en/web/cei/documents/GOOD_FAITH_EFFORTS_GUIDANCE.pdf), p. 3.

<sup>123</sup> Illinois Commission on Equity & Inclusion, *Guidance for Documenting Good Faith Efforts to Meet BEP Participation Goals*.

<sup>124</sup> U.S. Department of Transportation, *Disadvantaged Business Enterprise Program*, p. 44.

<sup>125</sup> See, e.g., participation goal of 30%, Illinois General Assembly, Public Act 101-0657 SB1608, <https://www.ilga.gov/legislation/publicacts/101/101-0657.htm>; participation goal of 35%, OCC, City of Atlanta's Small Business Opportunity Program, <https://www.atlantaga.gov/home/showpublisheddocument/53769/637774047143000000>.

<sup>126</sup> *Improving Government Vendor Diversity*.

<sup>127</sup> The White House, "FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity."

Executive Order that sets targets for utilizing SMW businesses in City contracts, as part of Boston’s Economic Inclusion and Equity Agenda to address racial and economic disparities.<sup>128</sup>

The participation goal should not only quantify the dollar amount of awards alone. Where possible, it should also quantify the number of minority-, women-owned businesses, and/or diverse supplier organizations. For example, the NTIA BEAD and Middle Mile Notices of Funding Opportunities (NOFOs) require that grantees, where feasible, permit the maximum participation by SMWs by dividing total requirements into smaller tasks.<sup>129</sup> Additionally, the number of businesses signed up for a database should not be the main measure of success, but rather, how many of these businesses received contracts and how many were approved.

Incentives for first tier grantees or contractors could be helpful and when proven successful, they could include awards, recognition, and score cards to ensure that SMWs “pay it forward.” If the grantee or contractor exceeds the 30% SMW businesses participation goal, they might be incentivized with access to additional funds. One example discussed during the interviews included a pension program that helped minority broker dealers enter the industry of international trade by requiring financial firms to use minority managers in order to keep the pension account.

#### **4. Include Purposeful Auditing and In-Progress Reporting in the Contracts/Subgrants for Real-Time Accountability and Compliance as Committed that Ensures that SMW Goals Are Met.**

The Supplier Diversity Office should report directly to senior leadership, who should ultimately be held responsible for meeting SMW contracting/subcontracting goals. The Supplier Diversity Office should evaluate progress towards the goal. The Office should make publicly available its methods of review, data collection, and documentation.

The Office should check supplier certifications to ensure the accuracy of SMW business status and participation. That could help to inform the Supplier Diversity Office of the absence of certified SMW businesses and/or their potential participation.<sup>130</sup> In addition, the Office should collect and report its data by specific minority and diverse group (e.g., African American, Asian American, Hispanic American, Native American, LGBT+, or people with disabilities). In its revisions to the federal procurement process to increase the share of federal contracts to small, disadvantaged businesses, the White House included federal contracting spending data by the race or ethnic origin of the business owner.<sup>131</sup> These data points will allow comparison at the community level, such as by county or zip code, rather than at a broad level, such as statewide or nationwide. They include data on the contract dollar amount and diversity status of

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<sup>128</sup> Mayor’s Office, “Mayor Walsh Signs Executive Order to Expand Opportunities for Women and Minority Owned Businesses,” City of Boston. July 13, 2016, <https://www.boston.gov/news/mayor-walsh-signs-executive-order-expand-opportunities-women-and-minority-owned-businesses>.

<sup>129</sup> NTIA, *BEAD NOFO*, p. 89.

<sup>130</sup> U.S. Department of Transportation, *Obtaining [DBE] Certification*, Disadvantaged Business Enterprise. February 3, 2020, <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/obtaining-certification>.

<sup>131</sup> The White House, “FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity.”

subcontractors.<sup>132</sup> These grassroots data comparisons are invaluable for assessing the success of Supplier Diversity initiatives at the community level, and for determining whether there is an imbalance unfavorable to particular SMW businesses, such as African or Asian or Hispanic or Native American or women-owned businesses.<sup>133</sup> In addition, these data should help the Office and grantee to make sure there is no double-counting of SMW businesses hired or awarded contracts. For example, an African American woman-owned business should only be counted once, not twice, as a minority- and a woman-owned business.

The grantee should be specific regarding the scope of work to be performed pursuant to the grant. The Supplier Diversity Office should ensure the SMW business participation goal is met only through direct and meaningful participation, and not incidental or ad hoc or de minimis participation. For example, for a SMW subcontractor that caters a worksite on a sporadic basis, or does irregular office trash collection, although the nature of work may be within the scope of work under a grant, these sporadic and small jobs standing alone should not be considered as within the scope of work of a grant and should not be used to count for meeting SMW business participation goals.

The NTIA BEAD and Middle Mile NOFOs require grantees to apply the same supplier diversity requirements in the NOFO to their subgrantees and their subcontractors.<sup>134</sup> Therefore, subgrantees or subcontractors should also report to their grantee or contractor and be held accountable for their own hiring of SMW businesses.

To achieve the necessary accountability, the Office should have a simple, universal form that can be used for all reporting. Grantees, subgrantees, or contractors should include this report in their quarterly performance and financial reports, and contractors should provide the same reports when they request payment. The grantees or contractors' report should be kept in a public file, such as on their website, and their Chief Procurement Officers should receive and review this information to ascertain compliance. This information could be used to determine whether grantees are meeting their goals on a progressive and timely basis.

A universal form allows the Supplier diversity Office to cross-analyze data. It also reduces incentives for individual grantees or contractors to report the data that would put them in the best light.<sup>135</sup> Making the reporting process simple will make it easier for grantees or contractors to submit their information. These processes will likewise ease the auditing process.

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<sup>132</sup> See *Improving Government Vendor Diversity*.

<sup>133</sup> Denise Fairchild, Kalima Rose, *Inclusive Procurement And Contracting: Building a Field of Policy and Practice* eds. Brian Tell, p.32 (PolicyLink, March 5, 2018), available at [https://www.policylink.org/sites/default/files/InclusiveProcurement\\_final-3-5-18.pdf](https://www.policylink.org/sites/default/files/InclusiveProcurement_final-3-5-18.pdf); Supporting Economic Inclusion in Disadvantaged Communities: A Case for Inclusive Procurement Policies (2018), available at [https://www.lisc.org/media/filer\\_public/64/16/64165a54-93d5-47fc-9011-74c8873d2d7b/a\\_case\\_for\\_inclusive\\_public\\_procurement\\_practices.pdf](https://www.lisc.org/media/filer_public/64/16/64165a54-93d5-47fc-9011-74c8873d2d7b/a_case_for_inclusive_public_procurement_practices.pdf); Nutua Thrash-Ntuk, *Supporting Economic Inclusion in Disadvantaged Communities*. (LISC, 2018), [https://www.lisc.org/media/filer\\_public/64/16/64165a54-93d5-47fc-9011-74c8873d2d7b/a\\_case\\_for\\_inclusive\\_public\\_procurement\\_practices.pdf](https://www.lisc.org/media/filer_public/64/16/64165a54-93d5-47fc-9011-74c8873d2d7b/a_case_for_inclusive_public_procurement_practices.pdf).

<sup>134</sup> NTIA, *BEAD NOFO*, p. 88.

<sup>135</sup> See, e.g., State of California Department of Transportation, *DBE Business Enterprises Utilization report*, <https://app.box.com/file/947850163254>.

In sum, a successful supplier diversity program should have a well-defined scope of work and real-time accountability by the grantee or contractor for their commitment to their supplier diversity goals. To that end, the diversity goal commitment must be included in the contract between the federal government and the grantee, accompanied by compliance oversight and audit procedures. If compliance fails, taking into account reasons for non-compliance, measures could be considered to address non-compliance. For example, cancellation of options to renew the contract, financial penalty, or – if appropriate – the loss of opportunity to bid on future opportunities for a period of time.

#### **5. The Grantees, Working in Conjunction with the Supplier Diversity Office, Should Proactively Identify Contracting and Procurement Forecasts and Needs.**

The EPA has found that, “[e]arly planning and advanced notice support supplier diversity.”<sup>136</sup> The grantees therefore should work with the Supplier Diversity Office to identify all contracting and procurement forecasts. A lot could be achieved by focusing on the following objectives: (1) make information on forthcoming opportunities available to SMWs businesses early, (2) arrange time frames for specific deliverables on specific delivery schedules on contracts, and (3) wherever possible, describe the scope of work in a manner that facilitates participation by SMWs in the competitive process. This includes, whenever possible, posting solicitations for bids or proposals for a minimum of 30-calendar days before the bid or proposal closing date.<sup>137</sup>

#### **6. Require Visible Leadership.**

As noted above, the supplier diversity goals should be adopted by the highest level of leadership of the grantee’s organization, i.e., a Governor or a Mayor. Similarly, subgrantees and contractors’ highest level of leadership should certify their own compliance with supplier diversity requirements and make transparent their goals, objectives, and achievements. This could be attained by requiring social media campaigns that highlight the goals and achievements, as well as publishing commitments on the official website of the grantees and subgrantees.

#### **7. Streamline Procurement Processes for All Businesses.**

Grantees should streamline their procurement processes. For example, the Supplier Diversity Office should limit administrative burdens for suppliers by creating a single website with program information and resources, including certification and reciprocity, contract opportunities, and bidding information. It is insufficient just to point companies to the program authorization language, application processes, and acquisition regulations.<sup>138</sup> Administrative burdens may also be reduced by eliminating paper filing requirements and by writing solicitations and contracts in plain language, which helps all bidders and makes contract opportunities more readily accessible.<sup>139</sup> In addition, grantees, subgrantees, and contractors should ensure prompt payment upon receipt of a properly issued invoice for work completed

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<sup>136</sup> *Supplier Diversity Best Practices Tools for Equity in Public Spending - Internal Processes*, p. 1.

<sup>137</sup> “Frequently Asked Questions for Disadvantaged Business Enterprises,” EPA. April 29, 2022, <https://www.epa.gov/grants/frequently-asked-questions-disadvantaged-business-enterprises>.

<sup>138</sup> *Improving Government Vendor Diversity*, p. 4.

<sup>139</sup> *Supplier Diversity Best Practices Tools for Equity in Public Spending - Internal Processes*, p. 1.

according to agreement and goods delivered. Finally, grantees and subgrantees should provide constructive feedback to SMWs and all businesses that are not selected, to help them strengthen future applications.

#### **8. Ensure Diverse Participation in Task Forces or Committees that Advise Grantees on Their Broadband Plans, Including Broadband Supplier Diversity.**

NTIA specifically underscores the importance of stakeholder engagement in its NOFO: “NTIA envisions and welcomes extensive coordination and cooperation with all relevant interviewees. . . . Localities and groups representing historically excluded communities can and must make their voices heard to ensure that longstanding equity gaps are finally closed. Existing broadband providers and new entrants must communicate well with Federal, State, Territorial, Local, and Tribal partners to ensure that deployments proceed as expected and that non-deployment activities are designed and implemented in ways that most benefit the communities they are designed to serve.”<sup>140</sup>

The grantees should take full use of the knowledge and connections of people in the community who are familiar with the social and economic interests and concerns of the stakeholders in their areas/regions/states. As a diverse Task Force or Advisory Committee for grantees, they could serve as the grantee’s goodwill ambassadors, and interpreters of the plans, hopes, aspirations, anxiety, and disappointment that the grantees’ broadband plan may bring. They could help to ensure that the grantee’s plan and deployment activities will be carried out to bring the most benefits, including supplier diversity, to the communities that the IJA intended to serve. The grantees should ensure they specifically seek feedback from the Task Force, Advisory Committee, or similar bodies on how to embed supplier diversity in their broadband plans.

#### **9. Promote Certifications Prior to Disbursement of Funds so that SMW Businesses are Prepared to Participate in the Funding Opportunities.**

Transparency and regular review require a means to identify bona fide SMW businesses to ensure the accuracy of data on the SMW businesses reached and utilized under the IJA. To be qualified as an SMW business, the entity must be at least 51% owned, controlled, and operated on a day-to-day basis by one or more minorities (African American, Asian American, Hispanic American, and Native American) or by women who are U.S. citizens. The Certification will give SMW businesses access to opportunities to grow revenue, build capacity, and enhance credentials. Certification services are provided for free by governmental entities such as the U.S. Small Business Administration, or for a fee in the private sector. There are numerous federal, state, and local entities that provide free certification services for SMW and disadvantaged businesses owned by U.S. citizens. Eight (8) national nonprofit organizations provide certification services for a fee for SMW, people with disabilities, veteran, and LGBT+ businesses located in the United States. Their requirements are substantially the same, i.e., 51% ownership, control, and day-to-day management of the business.

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<sup>140</sup> NTIA, *BEAD NOFO*, p. 8.

In order to make it easy for SMW businesses to be certified in various areas/regions/states of the country, we recommend reciprocity of certification among the public and private certification entities.<sup>141</sup> Organizations with cultural and linguistic competence could provide for communities with particular cultural sensitivities. The Supplier Diversity Office should be thoughtful of the SMW businesses' desire for choice of association with whom personal, proprietary and financial information would be divulged during the certification process. Grantees could either adopt existing certification programs or create their own certification programs. However, reciprocity is key to avoiding duplication of efforts and expenses to the SMW businesses, as long as the existing certification organizations and programs have an established track record of operating a bona fide certification program. Grantees should not adopt one certification program over another, which could create confusion and the appearance of preferential treatment. Additionally, supplier diversity officers should make available toolkits and educational opportunities to ensure SMW businesses are prepared to participate in the certification process.

If a grantee creates its own certification program, it should be streamlined, and the grantee should provide toolkits and training on completing the application form and submitting the required documentation, as well as guidelines for site visits which is an important final step in the certification process. Regardless, however, the grantee should accept reciprocity of certifications issued by similar certification organizations.

Recognizing SMW certifications granted by other entities with similar missions, a bona fide certification program, and a proven track record of integrity, is one way to improve supplier diversity data. The benefit of reciprocity is streamlining certification requirements – if an entity is already certified through one program, it should not have to jump through duplicate or multiple efforts and expense hoops, to get the same certification. There are national trade associations with a track record of certifying minority- and women-owned businesses. The Supplier Diversity Office should consider credentialing these trade associations as certification clearing houses. The more bona fide certification organizations there are, the more minority- and women-owned businesses could be certified, thereby increasing the number of SMW businesses available in the marketplace to access and bid for the opportunities the IJA provides. To the best of our estimation, IJA offers more opportunities than ever and there is no better time than now for SMW businesses to get certified. This will further fulfill the intent of the law.

#### **10. Grantees, Subgrantees, and Contractors Should be Required to Reach out to SMW Businesses.**

Outreach and education are key to increasing SMW business participation on projects such as under the IJA. The grantees or contractors therefore should require their subgrantees and subcontractors to engage in meaningful outreach to and education of SMW businesses. These efforts should be documented so that SMW businesses can better tailor their supporting program activities to meet the opportunities.<sup>142</sup> The grantees should not condone “window-dressing outreach” designed solely to establish or document good faith implementation.<sup>143</sup> Rather, the grantee should encourage partnership and collaboration. For example, the grantee should

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<sup>141</sup> See *Improving Government Vendor Diversity*.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

encourage subgrantees or contractors to contract with an SMW business consortium when a contract is too large for smaller firms to handle on their own.

In addition, a subgrantee or contractor should make reasonable efforts to assist interested SMW businesses in obtaining bonding, lines of credit, or insurance required by the procuring agency or the bidder/offeror;<sup>144</sup> and necessary equipment, supplies, materials, or related assistance or services.<sup>145</sup>

### **11. Promote Local Business Opportunities.**

To ensure that SMW businesses are more likely to participate, grantees and subgrantees should promote local business opportunities early, continuously, and aggressively.<sup>146</sup> Furthermore, grantees and subgrantees should publicize contract awards to promote partnerships as early as such opportunities are made known.<sup>147</sup>

### **12. NTIA Should Collect and Disseminate North Star Best Practices.**

As NTIA continues its federal, state, and local broadband coordination efforts, it should develop and maintain a *North Star*<sup>148</sup> of best practices across federal agencies and state and local governments for collaboration among each other to serve the best interests of the SMW businesses, close the digital divide, eliminate historic inequities, and open access to meaningful highspeed broadband service and equipment so that SMW businesses could tap with ease into the opportunities presented by the IJA.

NTIA should disseminate *North Star* guidance among grantees through its powerful oversight and technical assistance programs. Top-down guidance will be the critical starting point for grantees to dial into sharp focus the goals at hand--to ensure that SMW businesses are included, welcomed, encouraged, and able to participate individually or in collaboration with all Americans in the unprecedented funding and contracting opportunities flowing out of the IJA.

## **IV. CONCLUSION**

The Commission tasked the I&A Working Group with recommending ways to increase the participation of SMW businesses in State/local infrastructure grant and contract opportunities, and to provide insightful guidance on successful outreach to SMW businesses regarding funding and contract opportunities, including how to apply directly or partner as subcontractors, to

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<sup>144</sup> Illinois Commission on Equity & Inclusion, *Guidance for Documenting Good Faith Efforts to Meet BEP Participation Goals*, p.3.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> The North Star is the star that lies above the Earth's Northern Pole. See NASA, "What is the North Star and How Do You Find It?" July 28, 2021, available at <https://solarsystem.nasa.gov/news/1944/what-is-the-north-star-and-how-do-you-find-it/>. Metaphorically speaking, North Star refers to an overall strategy to reach a named goal. See Maximilian Schroeck, Jon Kawamura, and Anne Kwan, "Setting the North Star: Staying Focused and On Track" (2019), available at [https://www2.deloitte.com/content/dam/insights/us/articles/5186\\_setting-the-north-star/DI\\_setting-the-north-star.pdf](https://www2.deloitte.com/content/dam/insights/us/articles/5186_setting-the-north-star/DI_setting-the-north-star.pdf).

increase deployment of broadband in diverse communities. The Working Group recommends that the Commission adopt and forward the above best practice recommendations to NTIA to utilize in its review of State Equity plans and to develop its technical assistance for grantees.

## APPENDIX A

### Summary of Resources for Best Practices to Promote Supplier Diversity

#### I. FEDERAL GUIDANCE & PROGRAMS

##### A. The White House<sup>149</sup>

- i. In December 2021, the White House released “Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners.”  
Background: On June 1, 2021, President Biden announced a goal to increase the share of contracts going to small, disadvantaged businesses by 50% by 2025. The announcement built on the President’s [Day One Executive Order 13985](#), which directed agencies to work to make contracting opportunities more readily available to all eligible firms and to remove barriers faced by underserved individuals and communities.
- ii. Prior to that, on November 18, 2021, the White House launched its [President’s Management Agenda](#) vision. The third PMA priority—*managing the business of government to build back better*—recognizes that fostering lasting improvements in the Federal acquisition system can create opportunities for underserved communities.
- iii. Reforms to the federal procurement process to increase the share of federal contracts to SDBs include:
  1. Asking agencies to increase their goals so that government-wide spending results in 11% of contracting dollars being awarded to small, disadvantaged businesses, up from the current statutory goal of 5%.
  2. Releasing disaggregated data on federal contracting spending by race/ethnicity of business owners, a powerful transparency and management tool.
  3. Implementing changes to the federal government’s use of “category management” to boost contracting opportunities for underserved small businesses.
  4. Adopting management practices to drive accountability and institutionalize the achievement of small business contracting goals, with key takeaways such as: holding leaders accountable for meeting small business contracting goals; ensuring agency small business contracting offices have direct reporting lines to senior leadership; increasing the number of new entrants to the federal

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<sup>149</sup> The White House, “FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners,” *The White House*. December 2, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-biden-harris-administration-announces-reforms-to-increase-equity-and-level-the-playing-field-for-underserved-small-business-owners/>.

marketplace; and reversing declines in the small business supplier base.

## **B. United States Department of Transportation<sup>150</sup>**

- i. Created a DBE program to remedy ongoing discrimination and the continuing effects of past discrimination in federally assisted highway, transit, airport, and highway safety financial assistance transportation contracting markets nationwide. The goal is to provide small businesses owned and controlled by socially and economically disadvantaged individuals a fair opportunity to compete for federally funded transportation contracts. Background: The original Congressional Mandate that started the DBE Program focused on minority/women’s business enterprises in the 1980s by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs. Since then, Congress has codified and repeatedly reauthorized the program—most recently in Section 1101(b) of the “Fixing America’s Surface Transportation Act” or “FAST-ACT” (P.L. 114-94). The statute provides that, “Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10% of the amounts made available for any program under [this Act and Section 403, Title 23 of the U.S. Code] shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals.” FAST-Act, § 1101(b)(3) (emphasis added).
- ii. Implementing Regulations: The DOT’s implementing rules are available at 49 C.F.R. Part 26 (and, for airport concessionaires, at 49 CFR Part 23). Definitions include:
  1. “Disadvantaged business enterprise” or “DBE” means “a for-profit small business concern – (1) That is at least 51% owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51% of the stock is owned by one or more such individuals; and (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.” 49 C.F.R. § 26.5.
  2. “African Americans, Hispanics, Native Americans, Asian-Pacific and Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. Other individuals can

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<sup>150</sup> U.S. Department of Transportation, “Disadvantaged Business Enterprise (DBE) Program,” accessed July 12, 2022, <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>; U.S. Department of Transportation, “DBE Laws, Policy, and Guidance,” accessed July 12, 2022, <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-laws-policy-and-guidance>; U.S. Department of Transportation, “DBE Program Best Practices,” accessed July 12, 2022, <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-program-best-practices>.

also qualify as socially and economically disadvantaged on a case-by-case basis.”

3. Others that may qualify as economically disadvantaged include an individual who has “a personal net worth that does not exceed \$1.32 million. To be seen as a small business, a firm must meet SBA size criteria and have average annual gross receipts not to exceed \$23.98 million. Size limits for the airport concessions DBE program are higher.”
- iii. Program Overview: DOT DBE regulations require state and local transportation agencies that receive DOT financial assistance to establish annual goals as well as contract-specific goals for the participation of DBEs. State and local recipients also certify the eligibility of DBE firms to participate in DOT-assisted projects. To participate in the DBE program, a small business owned and controlled by socially and economically disadvantaged individuals must receive DBE certification from the relevant State, which is generally obtained through the state Uniform Certification Program (“UCP”). Certifiers make determinations based upon on-site visits, personal interviews, reviews of licenses, stock ownership, equipment, bonding capacity, work completed, resume of principal owners, and financial capacity.
  - iv. State and Local Transportation Agency Responsibilities (\*State and local agencies are not penalized for falling short of their overall goal unless they fail to administer their program in good faith. See 49 C.F.R. § 26.47):
    1. Certify the eligibility of DBE firms to participate in their DOT-assisted contracts;
    2. Establish narrowly tailored goals for the participation of disadvantaged entrepreneurs; and
    3. Evaluate their DOT-assisted contracts throughout the year and establish contract-specific DBE subcontracting goals as necessary to achieve the overall goal of the agency.
  - v. U.S. Dept. of Transportation Responsibilities:
    1. Developing the rules and regulations for the national DBE Program;
    2. Providing guidance and conducting oversight to make sure that these rules and regulations are followed by the recipients of DOT funds; and
    3. Considering appeals from state/local certification decisions.
    4. DBE Certification Appeals: Entities that have applied for and were denied DBE certification may file an administrative appeal with DOT’s Departmental Office of Civil Rights (DOCR) within 90 days from the date of denial. Appeals may be submitted via email and must state why the recipient’s decision should be reversed and other essentials. A decision to reverse, affirm, or remand will be

made within 180 days upon receipt of the appeal. All DOCR decisions are administratively final.

- vi. Fraud: If fraud or any other criminal violation is suspected, the case will be referred to DOT's Office of the Inspector General for investigation.

### **C. United States Environmental Protection Agency<sup>151</sup>**

- i. The two relevant statutes are known as the EPA's 8% Statute (Public Law 102-389, 42 U.S.C. 4370d) and the EPA's 10% Statute (Title X of the Clean Air Act Amendments of 1990, 42 U.S.C. 7601 note), which require an entity to establish that it is owned and controlled by socially and economically disadvantaged individuals who are of good character and citizens of the United States. Entities that meet the certification criteria under either authorizing statute qualify for the EPA's DBE program. The 8% Statute presumes women to be socially and economically disadvantaged individuals and the 10% Statute presumes Historically Black Colleges and Universities, Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women, and Disabled Americans are socially and economically disadvantaged individuals.
- ii. Requirement: Six Good Faith Efforts. Funding recipients are required to make the following good faith efforts whenever procuring construction, equipment, services, and supplies under an EPA financial assistance agreement:
  - 1. Ensure DBEs are made aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities. For Indian Tribal, State, and Local Government recipients, this will include placing DBEs on solicitation lists and soliciting them whenever they are potential sources.
  - 2. Make information on forthcoming opportunities available to DBEs, arrange time frames for contracts, and establish delivery schedules, where the requirements permit, in a way that encourages and facilitates participation by DBEs in the competitive process. This includes, whenever possible, posting solicitations for bids or proposals for a minimum of 30 calendar days before the bid or proposal closing date.
  - 3. Consider in the contracting process whether firms competing for large contracts could subcontract with DBEs. For Indian Tribal, State, and Local Government recipients, this will include dividing total requirements when economically feasible into smaller tasks or quantities to permit maximum participation by DBEs in the competitive process.

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<sup>151</sup> U.S. Environmental Protection Agency, "Frequently Asked Questions for Disadvantaged Business Enterprises," accessed July 12, 2022, <https://www.epa.gov/grants/frequently-asked-questions-disadvantaged-business-enterprises>.

4. Encourage contracting with a consortium of DBEs when a contract is too large for one of these firms to handle individually.
5. Use the services and assistance of the SBA and the Minority Business Development Agency of the Department of Commerce.
6. If the prime contractor awards subcontracts, require the prime contractor to take the steps in items 1 through 5.

#### D. United States Department of Commerce

i. **Minority Business Development Agency (MBDA).**<sup>152</sup> The MBDA is the federal agency dedicated to the growth and global competitiveness of minority business enterprises. In 2016, it issued “[Contracting Barriers and Factors Affecting Minority Businesses Enterprises](#),” and the MBDA underscores the most frequently cited contracting barriers:

1. Prime level discriminatory barriers: timely bid notification, explicit discrimination (stereotypes, higher and double standards), MBE/DBE stigma;
2. Prime level non-discriminatory barriers: large project sizes, bonding/insurance, bid requirements, timely payment;
3. Subcontractor level discriminatory barriers: timely bid notification, bid shopping, held bid, lack of good faith effort, only using an MBE if required, explicit discrimination (stereotypes, higher and double standards), MBE/DBE stigma; and
4. Pervasive barriers: access to capital, network access, marketplace discrimination

The Report suggests several areas to explore and research with respect to lessening barriers faced by MBEs in public contracting. Most relevant here include:

1. To reduce informational asymmetries resulting from established and often exclusive networks, governments can create a centralized bidding notification hub for all city/related agencies where bid posting is mandatory. This will ensure equal access to information as well as timely and equal notification.
2. The federal government should be a model for state and local governments in

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<sup>152</sup> U.S. Department of Commerce Minority Business Development Agency, “Minority Business Development Agency,” accessed July 12, 2022, <https://www.mbda.gov/>; Noteworthy items include U.S. Department of Commerce Minority Business Development Agency, *Contracting Barriers and Factors Affecting Minority Business Enterprises- A Review of Existing Disparity Studies*, (Orlando, Florida, Premier Quantitative Consulting, Inc.), [https://www.mbda.gov/sites/default/files/migrated/files-attachments/ContractingBarriers\\_AReviewofExistingDisparityStudies.pdf](https://www.mbda.gov/sites/default/files/migrated/files-attachments/ContractingBarriers_AReviewofExistingDisparityStudies.pdf).

addressing and understanding the public contracting process. New technology or innovative tools may be used to educate and inform government contracting officers with respect to barriers faced by MBEs. Identify tools that are transferable to local contracting agencies. By standardizing tools at the federal level, it may help standardize and assist all agencies in the collection and management of procurement data at the prime and subcontractor level. Organizations like the MBDA can push for ways to standardize data collection procedures and elements.

3. Agencies can generate disparity study fact sheets and distribute them to buyers and office staff. This allows staff to see exactly what issues the disparity study identified with respect to discrimination and should advance the discussion towards finding solutions. An ongoing education process could focus on understanding specific problems and using teamwork to solve them. It could also encourage buy-in across the organization by starting with a thorough understanding of the problem.
4. Contractors who did not win a bid require objective and accurate feedback to improve in subsequent bidding opportunities. Although not cited as a major barrier, multiple minority business owners reported that they lack feedback on failed proposals.
5. States and municipalities should evaluate the feasibility and implementation of completely anonymous incident reporting systems. Staff members involved in issues should be apprised of the situation and if found that they contributed to the problem, should face monitored corrective action or other sanctions.

**ii. Office of Small and Disadvantaged Business Utilization (OSDBU).<sup>153</sup>**

This Office features Commerce Small Business Program Manual (CSBPM), which includes a chapter on Procurement Mechanisms. The CSBPM provides guidance to procurement offices to ensure that consistent Small Business Program management procedures and practices conform to the Small Business Act (SBA), Federal Acquisition Regulation (FAR), and DOC Small Business Program policies, which require agencies to ensure that a fair proportion of contracts are awarded to small businesses, including socioeconomic small businesses. The manual is very detailed, and topics addressed include:

1. When planning an acquisition, the contracting officer shall first consider socioeconomic small business concerns for award of a prime contract before small business concerns and consider small business for award prior to seeking alternative suppliers. Socioeconomic and small business concerns must also be given first consideration as a member of a team arrangement, including joint ventures and prime contractor/subcontractor relationships.
2. A focus on maximizing small business utilization by encouraging a set-aside for small businesses including socioeconomic set-asides, the Small Business 8(A) Program, multiple award contracts, the North American industry classification system, similarly situated entities and limitations on subcontracting, the non-manufacturer rule, trade agreements, bundled, consolidation, in-sourcing small business contract requirements, undue restriction, unsolicited proposals, rejecting SBA recommendations, the Small Business Subcontracting Program, small business payment assistances, and administrative responsibilities.

**E. United States Small Business Administration<sup>154</sup>**

- i. Regulations dealing with government contracting programs for small businesses are outlined in Title 13 Part 125 of the Code of Federal Regulations (CFR). The government's purchasing process is governed by the Federal Acquisition Regulation (FAR). Some government agencies are authorized to have their own supplement to the FAR. As a government contractor, you also must comply with labor standards statutes (Service Contract Act, Contract Work Hours, Safety Standards Act, and more), as well as other statutes, unless the contract states that a particular statute

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<sup>153</sup> U.S. Department of Commerce, "Department of Commerce Office of Small and Disadvantaged Business Utilization (OSDBU)," accessed July 12, 2022, <https://www.osec.doc.gov/osdbu/>; U.S. Department of Commerce, "U.S. Department of Commerce Small Business Program Manual, Procurement Mechanisms, Chapter One," <https://www.osec.doc.gov/osdbu/CSBPM-Chpt%201%20Nov%2001%202018.pdf>.

<sup>154</sup> U.S. Small Business Administration, "Governing rules and responsibilities," accessed July 12, 2022, <https://www.sba.gov/federal-contracting/contracting-guide/governing-rules-responsibilities>; U.S. Small Business Administration, "Small Disadvantaged Business," accessed July 12, 2022, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/small-disadvantaged-business>.

isn't applicable. There are mandatory contract provisions that protect the integrity of the government procurement process. These provisions include the "officials not to benefit" clause, the "anti-kickback" provisions, organizational conflict of interest provisions, the "gratuities" clause, and more.

## II. STATE AND LOCAL GUIDANCE & PROGRAMS

### A. California Department of Transportation (Caltrans)<sup>155</sup>

- i. Within Caltrans, there is an Office of Business and Economic Opportunity (OBEO) that tracks DBE contract goals, as well as reviews and approves subrecipient DBE contract goals for Caltrans' Division of Local Assistance (DLA). Per DLA-OB 14-06, subrecipients submit their DBE contract goals for construction contracts over \$2 million and consultant contracts over \$500,000 for Caltrans' review. Caltrans will either approve the DBE goal or recommend an adjustment. Generally, California State Law mandates public contract provisions for M/WBEs and creates definitions for minority, minority business enterprise, women business enterprise, and adopts "disadvantaged business enterprise: as used in Section 23.62 of Title 49 of the CFRs. Caltrans requires specific reporting form utilization and boilerplate language in every contract as follows:  
*"Contractor shall maintain records of all subcontracts entered into with certified DBE Subcontractor(s) and records of materiel purchased from certified DBE supplier(s). The records shall show the name and business address of each DBE Subcontractor or vendor and the total dollar amount actually paid to each DBE Subcontractor or vendor, regardless of tier. The records shall show the date of payment and the total dollar figure paid to all firms. DBE (prime) Contractor shall also show the date of work performed by its own forces along with the corresponding dollar value of the work. Contractor shall prepare and submit the Disadvantaged Business Enterprises Utilization Report (ADM-3069) form (Attachment \_\_\_) to the Contract Manager with every invoice (refer to Exhibit B, Budget Detail and Payment Provisions)."*

1. The only critique of this program is the manner of certifying as Small Business Enterprise (SBE) or a Disadvantaged Business Enterprise (DBE). The entity seeking certification must apply with the individual reviewing entities for the specific region where they are located; and can only certify through those "Unified Certifying Partners." Firms must certify their location as either: Imperial, Riverside & San Diego Area, Los Angeles Area, Central Valley/Bay Area, or Northern California Area. It is not clear how a

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<sup>155</sup> California Department of Transportation, "Disadvantaged Business Enterprises," accessed July 12, 2022, <https://dot.ca.gov/programs/civil-rights/dbe>; California Department of Transportation, "Procurement and Contracts (DPAC)," accessed July 12, 2022, <https://dot.ca.gov/programs/procurement-and-contracts>.

certification issued by one area is recognized in the other areas. In addition, several different toolkits are offered for each area. It would be more streamlined to have one centralized clearinghouse for certification administration state-wide.

## **B. Washington State Office of Minority and Women’s Business Enterprises<sup>156</sup>**

- i. This Office offer Tools for Equity in Public Spending (e.g., toolkit workshops, outreach, inclusion plan guides, templates, and more), and Supplier Diversity Best Practices. Key Recommendations include:
  1. Proactively identify contracting and procurement needs. Early planning and advanced notice support supplier diversity. Biannually assess needs or review past spending data to identify general categories of goods and services regularly purchased. Also, examine the procurement type: Master contracts using the master contract sales database, Internal contracts, Direct buy purchases, etc.
  2. Review your procurement practices by identifying how purchases are bundled/consolidated and whether unbundling these contracts will create more inclusion opportunities. Understand direct buy purchasing authority and delegated procurement authority. If it is likely that bidders will subcontract some of the work, consider requiring bidders to submit an inclusion plan as part of their bid package where the contractor sets goals, identifies small and diverse vendors, and reports on subcontractor spending with diverse vendors. Make solicitations and contracts simple, written in plain talk, which assists all bidders and makes the contract more accessible. Reevaluate standard contract language and any requirements that may be barriers for small and diverse businesses. This includes providing ample advanced notice and directed publication to encouraging small and diverse businesses’ participation.
  3. Identify diverse options for each category of spending. The State provides a search tool on its website to identify master contracts with small and diverse vendors. There is a centralized portal for this with a tutorial on how to use it. includes all certified veteran owned businesses and self-registered small businesses
  4. Conduct other market research and outreach. In addition, to direct contact with certified small and diverse businesses to make them aware of bid opportunities, the State Offices can be contacted

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<sup>156</sup> Washington State Office of Minority & Women’s Business Enterprises, “Supplier Diversity Best Practices,” accessed July 12, 2022, <https://omwbe.wa.gov/state-supplier-diversity-reporting/supplier-diversity-best-practices>; Washington State Office of Minority and Women’s Business Enterprises, “Tools for Equity in Public Spending,” accessed July 12, 2022, <https://omwbe.wa.gov/state-supplier-diversity-reporting/tools-equity-public-spending>.

directly to identify currently certified, as well as provide options for utilization of small and diverse businesses that are not currently certified. By developing a communication strategy to engage with small and diverse businesses, more effective outreach may be achieved.

5. Monitor spending with small and diverse businesses throughout the year. Determine what is working and adjust strategies as needed. The State provides access to several government agencies' current small and diverse business spending data reported via the State's Enterprise Reporting Guidelines.

### **C. Missouri Department of Transportation (MoDOT)<sup>157</sup>**

- i. MoDOT submits its a DBE Program to the U.S. Department of Transportation that documents the specific policies and adopts its general definitions for classifications. The State has a unified certification process, known as Missouri Regional Certification Committee, which was approved by USDOT in January 2005. Overall administration goals and statewide goals are updated every three (3) years. Emphasis is placed on data collection with the following in place:
  1. All contractors, subcontractors, suppliers, and truckers will be required to be registered and obtain a vendor number prior to authorization to commence work on a project.
  2. The registration form will gather the name, address, DBE/non-DBE status, age of firm, annual gross receipts, geographical preference, and type of work performed, for each firm.
  3. The registration will be mailed to all contractors, subcontractors, DBE firms, material suppliers, and any other firm contained in MoDOT records. The firms will receive a vendor number and the information will be entered into a database. The firms will be required to update their filing on a yearly basis.
  4. MoDOT will compile a listing of all registered firms and forms will be mailed at least semiannually to all firms, requesting that they provide the names of any firms they received quotes from that may not be listed. The listing will be available on the MoDOT internet site. Project office personnel will check all subcontractors, suppliers, and haulers on a project to verify they have been registered. If a firm is not registered, it must do so prior to commencement of work.

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<sup>157</sup> Missouri Department of Transportation, "DBE Program," accessed July 12, 2022, <https://www.modot.org/dbe-program>; Missouri Department of Transportation, "Disadvantaged Business Enterprise Program Submittal," August 1, 2020, <https://www.modot.org/sites/default/files/documents/DBE%20Program%20Submittal%20FFY20.pdf>.

## D. Florida Department of Management Services Office of Supplier Diversity<sup>158</sup>

i. Like many of the states already summarized, this State Office hosts a website that includes an Agency Resources page with documents, presentations, and templates that Florida agencies and universities can use to demonstrate compliance with supplier diversity requirements. It also offers Sample State Agency Small Business Participation Plans and assistance with applicable state certification and recertification. All forms are readily available. There is also a comprehensive vendor database and interactive calendar for current bidding opportunities. A unique aspect of this State Office is its work with The Florida Advisory Council on Small and Minority Business Development (Council). The Council was established in Section 287.0947, Fla. Stat. The State Office works with the Council to keep citizens of the State of Florida and various stakeholder groups informed on issues relating to minority enterprise procurement and other diversity issues. Membership of the Council includes practitioners, laypersons, financiers, and others with business development experience who can provide invaluable insight and expertise for this state in the diversification of its markets and networking of business opportunities. Responsibilities of the Council include:

1. Research and review the roles of small and minority businesses in the state's economy.
2. Review the issues and emerging topics relating to small and minority business economic development.
3. Study and understand financial markets' and institutions' abilities to meet small business credit needs and determine the impact of government demands on credit for small businesses.
4. Evaluate the execution of Section 287.09451, Fla. Stat., requiring a state economic development comprehensive plan, as it relates to small and minority businesses.
5. Assess the efforts by any state agency or by all state agencies collectively, to assist minority business enterprises.
6. Advise the Florida Governor, the Secretary of the Department of Management Services and the Legislature on matters relating to small and minority business development that are important to the international strategic planning and activities of this state.

a. **Broward County, Florida** – Also has a similar advisory board and other requirements within its Code of Ordinances and Administrative Code that advance supplier diversity

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<sup>158</sup> Florida Department of Management Services, "Office of Supplier Diversity," accessed July 12, 2022, [https://www.dms.myflorida.com/agency\\_administration/office\\_of\\_supplier\\_diversity\\_osd](https://www.dms.myflorida.com/agency_administration/office_of_supplier_diversity_osd).

and public procurement opportunities to small and minority businesses.<sup>159</sup>

- b. **City of Coconut Creek, Florida** – Also, recently created a grant offering targeted toward small local businesses having 25 or fewer employees: Butterfly Small Business Relief Program.<sup>160</sup>

#### E. Illinois Commission on Equity and Inclusion<sup>161</sup>

- i. The Commission on Equity and Inclusion (CEI) was created through the passage of 30 ILCS 574/40-10. CEI was created to expand access to state contracts for minorities, women, persons with disabilities, and veterans, and assist the state in enhancing the equity and inclusion throughout its workforce. Among several programs, the CEI created the Business Enterprise Program (BEP) for businesses owned by minorities, women, and persons with disabilities. The program is committed to fostering an inclusive, equitable and competitive business environment that will support underrepresented businesses and enhance their increase their capacity, grow revenue, and enhance credentials. Generally, the CEI focuses on:
  - 1. All State and university procurement;
  - 2. Standardizing scoring evaluations for State agency directors, public university presidents and chancellors, and public community college presidents that shall be based on the following three principles: (i) increasing capacity; (ii) growing revenue; and (iii) enhancing credentials;
  - 3. Fulfill duties provided to it under the Illinois Procurement Code 30 ILCS 500/5-7 and 500/45-57;
  - 4. Work with State agencies to provide support for diversity in State hiring and oversee the implementation of diversity training of the State workforce;
  - 5. Propose and submit to the Governor and the General Assembly legislative changes to increase inclusion and diversity in State government;

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<sup>159</sup> Broward County Government, “Broward County, FL, Administrative Code, Part VII. – Certification of Small Disadvantaged Business Enterprises,” [https://library.municode.com/fl/broward\\_county/codes/administrative\\_code?nodeId=CH19OPPOCOADGE\\_PTVII\\_CESMDIBUEN](https://library.municode.com/fl/broward_county/codes/administrative_code?nodeId=CH19OPPOCOADGE_PTVII_CESMDIBUEN); Broward County Government, “Broward County, FL, Administrative Code, Part XXIII. – Small Business Development Advisory Board,” [https://library.municode.com/fl/broward\\_county/codes/administrative\\_code?nodeId=CH12ORCOBOCO\\_PTVIII\\_MBUDEADBO](https://library.municode.com/fl/broward_county/codes/administrative_code?nodeId=CH12ORCOBOCO_PTVIII_MBUDEADBO).

<sup>160</sup> Coconut Creek News, “City Establishes Unprecedented Business Relief Fund,” April 14, 2022, <https://coconutcreeknews.net/city-establishes-unprecedented-business-relief-fund-p1986-186.htm>.

<sup>161</sup> State of Illinois Commission on Equity and Inclusion, “Welcome to the Business Enterprise Program Website,” accessed July 12, 2022, <https://www2.illinois.gov/cms/business/sell2/bep/Pages/default.aspx>; see also <https://cei.illinois.gov/about-the-commission.html>.

6. Exercise oversight over several other entities and adopt rules necessary for the implementation and administration of the requirements of the Commission on Equity and Inclusion Act.

- a. **City of Chicago, Illinois**<sup>162</sup> - Chicago has a specific Minority and Women-owned Business (M/WBE) Procurement Program. Through hosting quarterly Workshops and other outreach efforts, the City promotes contracting opportunities to M/WBEs. The City has established its own certification process, and the Official City of Chicago certification is accepted by other government agencies and some private agencies.

#### **F. Michigan Department of Technology, Management, & Budget**<sup>163</sup>

- i. The Michigan Supplier Community (MiSC) was established in 2019 to encourage expanded business opportunities within low-income communities and underutilized business areas. To be eligible for certification under MiSC, the vendor must have its principal place of business in Michigan; be a small business with less than 500 employees and annual revenues equal to or less than \$25 million; be classified as a Michigan Geographically Disadvantaged Business Enterprise; and meet one of the following criteria as defined in Executive Directive 2019-08:
  1. Certified HUBZone Small Business Concern by the United States Small Business Administration; or
  2. Have a majority of their employees maintain a Principal Residence within a Qualified Opportunity Zone; or
  3. Michigan-based Business with its Principal Place of Business within a Qualified Opportunity Zone; or
  4. Community Rehabilitation Organization (CRO); or
  5. Veteran-Owned or Service-Disabled Veteran-Owned (SDVOB) business.

- a. **City of Detroit, Michigan**<sup>164</sup> - Detroit has The Detroit Business Opportunity Program (DBOP), which processes

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<sup>162</sup> City of Chicago, “MBE/ WBE/ DBE,” accessed July 12, 2022, <https://www.chicago.gov/city/en/ofinterest/bus/mwdbe.html>.

<sup>163</sup> Michigan.gov, “Michigan Supplier Community (MiSC),” accessed July 12, 2022, <https://www.michigan.gov/dtmb/procurement/contractconnect/programs-and-policies/programs/misc>; State of Michigan, “State of Michigan Procurement,” February 2020, <https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Procurement/training/contracting101.pdf?rev=8e139d9ed3464c649d15ee3d5250b16e&hash=D0D3F7246C5170C97515E01536164549>.

<sup>164</sup> City of Detroit, “Detroit Business Opportunity Program,” accessed July 12, 2022, <https://detroitmi.gov/departments/civil-rights-inclusion-opportunity-department/detroit-business-opportunity-program>; Mayor Michael E. Duggan, “Executive Order No. 2014-3,” City of Detroit Mayor’s Office, <https://detroitmi.gov/sites/detroitmi.localhost/files/2018-02/EO%202014-3%20Certification%20of%20Businesses%20-%20Mayor%20Duggan.pdf>.

applications and maintains an online register of annually certified and recertifies Detroit Based Businesses (DBB), Detroit Headquartered Businesses (DHB), Detroit Resident Businesses (DRB), Detroit Small Businesses (DSB), Detroit Based Micro Businesses (DBMB), Detroit Start-Ups (DSU), Minority-Owned Business Enterprises (MBE), and Woman-Owned Business Enterprises (WBE). The Program offers appreciation events, networking and capacity building opportunities, equalization credits and visibility on the City’s register.

### III. EDUCATIONAL AND THINK TANK GUIDANCE & PROGRAMS

- A. Harvard University, Kennedy School, Government Performance Lab – 2017 Publication: *Improving Government Vendor Diversity*,” (2017).<sup>165</sup>
- B. Milken Institute, Local Initiatives Support Corporation (LISC) Publications:
  - i. *Supporting Economic Inclusion in Disadvantaged Communities: A Case for Inclusive Procurement Policies* (2018)<sup>166</sup>
  - ii. *Tactical Guide Tactical Guide: Inclusive Small Business Support* (2020)<sup>167</sup>
- C. PolicyLink Publication: *Inclusive Procurement and Contracting: Building a Field of Policy and Practice* (2018)<sup>168</sup>
- D. Key Points (synthesized from all of the above publications) include:
  - i. *Publicly establish* concrete goals, and hold departments and vendors accountable for meeting them by tracking performance;
  - ii. *Develop* specific goals and performance targets for vendor diversity.
  - iii. Senior executive (*e.g.* Secretary-level) should *make a public commitment* to those goals, which elevates the priority for staff and helps reach potential vendors.
  - iv. *Evaluate progress* towards the goals—collect data and use it to improve the program.
  - v. Check vendor certifications to ensure accuracy and identify potential missing vendors or groups.
  - vi. Data should enable comparisons at a granular level such as by county or zip code—not just nationwide or statewide.

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<sup>165</sup> [Improving Government Vendor Diversity](#).

<sup>166</sup> Milken Institute, *Supporting Economic Inclusion in Disadvantaged Communities, A Case for Inclusive Public Procurement Policies*, (Santa Monica, CA, 2018), [https://www.lisc.org/media/filer\\_public/64/16/64165a54-93d5-47fc-9011-74c8873d2d7b/a\\_case\\_for\\_inclusive\\_public\\_procurement\\_practices.pdf](https://www.lisc.org/media/filer_public/64/16/64165a54-93d5-47fc-9011-74c8873d2d7b/a_case_for_inclusive_public_procurement_practices.pdf).

<sup>167</sup> Bloomberg Philanthropies COVID-19 Response, Bloomberg Associates, Local Initiatives Support Corporation (LISC), *Tactical Guide: Inclusive Small Business Support* (2020), [https://www.lisc.org/media/filer\\_public/7b/a6/7ba61381-119d-4452-abfb-5c7c4b767eed/12082020\\_resource\\_ba-inclusive-small-business-support.pdf](https://www.lisc.org/media/filer_public/7b/a6/7ba61381-119d-4452-abfb-5c7c4b767eed/12082020_resource_ba-inclusive-small-business-support.pdf).

<sup>168</sup> Denise Fairchild and Kalima Rose, *Inclusive Procurement and Contracting: Building a Field of Policy and Practice* (Oakland, CA, 2018), [https://www.policylink.org/sites/default/files/InclusiveProcurement\\_final-3-5-18.pdf](https://www.policylink.org/sites/default/files/InclusiveProcurement_final-3-5-18.pdf).

- vii. Data should include outputs: for example, contractors should report out subcontracts, and the dollar amount and diversity status of subcontractors
- viii. Where programs use prime contractors with subcontractor diversity goals, track and *hold primes accountable* for meeting the goals.
- ix. *Dedicate staff resources* for outreach and technical assistance to small businesses.
- x. Use the data collected for goal tracking to help target technical assistance and outreach.
- xi. Support businesses that do not have the resources or experience to navigate the federal procurement process.
- xii. *Streamline procurement processes* for all businesses.
- xiii. *Develop and maintain a community* of practice across Federal agencies, and state and local governments to collaborate on guidance, best practices, and simplifying processes for businesses.
- xiv. *Limit administrative burdens* for vendors, such as:
  1. Single website with program information and resources, including certification, contract opportunities, and bidding; it is not enough to just point companies to the program authorization language, application process, and the FAR.
  2. Enable certifications to work across multiple programs, agencies within the department, and federal departments where possible.
  3. Eliminate paper filing requirements, if any;
  4. *Publicize RFI responses* and winners to promote partnerships.
  5. *Provide feedback* to contractors who did not win to help them strengthen future applications.
  6. *Make prompt payments* to vendors.

#### **IV. OTHER GUIDANCE & PROGRAMS**

- A.** Asian Business Association Los Angeles
- B.** District of Columbia; Washington Metropolitan Area Transit Authority (WMATA)152
- C.** Multicultural Media Telecommunications and Internet Council
- D.** National Center for American Indian Enterprise Development
- E.** National Minority Supplier Development Council153
- F.** US Black Chambers, Inc. / ByBlack.us
- G.** US Hispanic Chamber of Commerce
- H.** US Pan Asian American Chamber of Commerce Education Foundation
- I.** Women’s Business Enterprise National Council

## Appendix B

### INNOVATION AND ACCESS WORKING GROUP

#### Workstream #1

#### Survey for Workstream #1 Members in April 2022

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For Recommendations to Ensure Inclusive Practices in Identifying and Selecting Entrepreneurs to Participate in Infrastructure Investment and Jobs Act (IIJA).

#### Contracting and Grants Processes

1. Identify your organization:
  - a. Media -- Audio/Video/News/Information – Including start-ups
  - b. Digital Communications Services – Including start-ups
  - c. Technology Development – Including start-ups
  - d. Other – please list: \_\_\_\_\_.
  
3. Is your organization a:
  - a. Small business – Yes or No.
  - b. Minority-owned business– Yes or No.
  - c. Woman/Women-Owned – Yes or No.
  - d. Start-up– Yes or No.
  - e. Other– Please list: \_\_\_\_\_.
  
4. What policies or practices does your organization use specifically in the context of procurement (goods/services) and/or grant administration to promote access to opportunities for small minority- and women-owned (SMW) businesses?
  
5. What policies or practices does your organization use to foster diversity, equity and non-discrimination in procurement of goods/services and/or grant administration?
  
6. What procurement or grant administration policies or practices does your organization use to accelerate the entry of SMW businesses?
  
7. Are you aware of any best practices or model codes on increasing grant/contract opportunities for SMW businesses?

## APPENDIX C

### **Innovation and Access Working Group, Workstream #1 Conducted 10 Interviews with the Following Experts**

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- Robert Branson, President and CEO  
Multicultural Media Telecommunications and Internet Council
  
- Ron Busby, President and CEO  
US Black Chambers, Inc. / Buy Black.us
  
- Ramiro Cavazos, President and CEO  
US Hispanic Chamber of Commerce
  
- James Clayborne (Former Illinois State Senator), Founding Partner  
Clayborne & Wagner, LLP
  
- Dennis Huang, Executive Director and CEO  
Asian Business Association
  
- Ronald Johnson, Ph.D., Senior Advisor and Chief Strategist for Diversity, Equity and Inclusion  
Wireless Infrastructure Association
  
- Chris James, President and CEO  
National Center for American Indian Enterprise Development
  
- Pat Fong Kushida, President and CEO, Founder  
California Asian Pacific Chamber of Commerce
  
- Leticia Latino-Van Spluteren, CEO  
Neptuno USA
  
- Ralph Moore, President  
Ralph G. Moore & Associates

Below is a summary of the interviewees' responses to the Working Group's questions.

2. **What procurement or grant administration policies or practices promote access to opportunities for small, minority- and women-owned (SMW) businesses?**

The procurement or grant administration policies or practices that promote access and accelerate opportunities for small minority-, and women-owned (SMW) businesses should consider:

- The FCC Cable Procurement rules, Business Enterprise Program (BEP) in the State of Illinois, and the Disadvantaged Business Enterprise (DBE) Program at the US Department of Transportation.
- Embedding supplier diversity policy as to how States will access this money through infrastructure funding.
- Create a scorecard to track infrastructure spending to ensure SMW businesses are included.
- *See Public Policy Rule 955507.*
- SBA 8A - Personal Net Worth Analysis and increasing 8A Certification caps.
- Corporation commitments to SMW firms.

Important actions for continued access and accelerations of Contracts include goal-setting for grantor and grantee, accountability for providing accurate spend on SMW businesses, transparency of published data, stakeholder input from SMW businesses, and creation of a small business utilization department/division at the federal level that assists with truthful feedback on gaps and pitfalls, training preparation, access to accurate databases, clear methods of communication about opportunities, and relationship-building support.

**3. What procurement or grant administration policies or practices can accelerate the entry of SMW businesses?**

See responses to Question 1. above.

**4. What procurement incentives and penalties do you recommend to the federal grantor and local government grantee as it relates to federal contracts and grants received by grantee?**

The incentives and penalties recommendations to the federal government should include:

- Internal Audit Controls with due diligence reporting with incentives tied to supplier diversity goals. For example, adopt an incentive-driven scorecard process that tracks agency/prime and subcontractor progress; the percentage of diverse board of directors; the percentage of total contracts spent with diverse suppliers; and the percentage of total number diverse suppliers and employees. An example of an incentive is to have a utility company's annual rate increase granted when the utility meets or exceeds its committed supplier diversity goal.
- Transparency, accountability, and publicized misconduct for not meeting SMW requirements. In terms of penalties, the State of Illinois Investment Act provides for felony charges for certain illegitimate or other actions that violate the law. Hold federal, state, and local governments and the business sector accountable for meeting agreed-upon targets and goals works. Recipients of major government contracts need to be held accountable for including SMW subcontractors in their projects. It is also important to conduct due diligence to verify that companies are utilizing SMW

businesses, are not just putting up a front and/or that opportunities do not just go to White women business owners.

**5. What methods would you recommend grantees implement and execute to retain SMW businesses that ensure compliance with model codes/best practices?**

Methods for grantees to implement and execute to ensure SMW compliance with model codes/best practices include intentionality, transparency, accountability, and enforcement. More specifically,

- **Intentionality** of the inclusion of SMW businesses: Require SMW Certification and identify qualified SMW businesses (More consistent reviews) - Make sure SMW firms are certified as truly minority-owned and/or woman-owned firms. They shouldn't just be White women. Need a procedure that eliminates the possibility of using minority firms as “fronts,” such as by conducting monthly or quarterly meetings with prime contractors. This eliminates the risk of not finding SMW firms. Solidify partnerships with minority chambers across the country and with the SBA. Conduct stakeholder engagement, including Black churches and other faith organizations, Minority Serving Institutions, and other community-based groups, to prepare and train diverse community representatives to work with local and state governments in the distribution of the federal funding. Provide **capital and technical training** to ensure vendor success. For example, banks partner with diverse firms at the front end so access to capital is not a problem in the middle of the process.
  - a. Provide training and technical assistance for present and future workforce talents. Marketing, business development and equipment investments are areas where diverse businesses often lack the necessary resources to compete effectively for the plethora of procurement opportunities that fall within their core competencies and business growth strategies. This problem is exacerbated by the payment terms offered in second and third tier procurements, where most diverse companies are relegated to in the communications supply chain. Most often, sixty-to-ninety-day payment terms are deleterious to the cashflow of diverse companies and thus create the need to acquire additional funding at higher interest rates for capital projects.
  - b. Ensure **transparency** of SMW business data reported by and to the government and other agencies/organizations.
  - c. Ensure **accountability** of grantees or recipients of major contracts, such as via score card tracking.
  - d. **Adopt enforcement** procedures. Have a policy to incentivize and/or penalize grantees or recipients for the proper or improper use of funds from grantors.

**6. What steps should state, and local grantees take to monitor and assess these practices?**

The steps that state and local grantees should take to monitor and access practices include:

- **Intentionality**
  - a. Undertake a business strategy analysis
  - b. Provide consistent reviews on a monthly or quarterly basis to assist firms
  - c. Engage with interviewees
  
- **Accountability and Transparency**
  - a. Require certifications
  - b. Track progress via a scorecard
  - c. Create timely guidelines for inclusion of SMW businesses
  - d. Federal government must adopt policies to manage the expectations of state administrators.

Change and leadership occur top down, and engaging SMW businesses should be a top priority for funding and contracting. Some companies call working with minority firms a diversity tax, saying they have to pay more and get less. It requires a shift in the mindset because SMW businesses and CEOs can deliver if given the opportunity. The narrative is around partnership and collaboration as opposed to only compliance and mandates. Examples of implementation and best practices by other companies, organizations, and governing bodies include:

- Disadvantaged Business Enterprise Program at the Department of Transportation.
  - i. The Wireless Infrastructure Association (WIA) is an organization of 127 wireless carriers, infrastructure providers, and professional services firms, WIA encourages its members to understand the importance of diversity in their procurement practices and workforces. Its annual conference invites participation by SMW women- and minority-owned businesses to build partnerships between WIA members and diverse businesses. WIA also sponsors an apprenticeship program with the Department of Labor that creates pathways for disadvantaged and underrepresented communities to access employment opportunities within the wireless industry.
  - ii. The Tollway Contract monitors the contract from start to finish, reviews invoices, reports, on-site inspections, and takes enforcement action if the firm does not meet the benchmarks. Remedies upon discovery of non-compliance include to suspend payment, call them in for correction, or terminate the contract.
  - iii. The California Public Utility Commission requires that any public utility seeking a rate increase must demonstrate that they have met their supplier diversity goal, and that supplier diversity is 25% of their total spend.

**7. How do you define a successful procurement program for small, minority- and women-based (SMW) business inclusion and how do you measure its success?**

A successful diverse supplier procurement program should include:

- Capital Access. SMW businesses cannot assume carrying costs. Grantees or contractors should partner with firms at front end so there are no complications during the process.
- Require certification of the SMW business. Include reciprocity with other certification programs.
- Accountability and Equity. Agencies should ensure opportunities are for SMW businesses. In addition, grantees and contractors should track and meet targets and goals for bids, including through scorecard measurements and compliance review.
  - Furthermore, grantees should publish accurate, current data on the recipients of federal contracts including race, sex/gender, ethnicity, type of contract (competing or sole source). For example, while there is a goal to appoint 20% Hispanic Americans to the current Administration, only 10% of positions are currently held by Hispanic Americans. In addition, the U.S. Government currently awards 1.67% of contracts to Black-owned companies; the US Black Chamber goal is to increase this number to 4%.
- Stakeholder Awareness. Share information and access for SMW businesses. Include partnerships with minority organizations, such as the National Black Broadcasters, US Black Chambers, Inc./ByBlack.us, Hispanic American organizations, and Asian Pacific American organizations. Ensure database accuracy and clear communication for measurement and access to information.

Measurement defines success. Ensure accountability and transparency through scorecards and compliance review by the Federal Government for assessment and methodology to reach success goals. If the scorecards are not being assessed accurately, then equity and opportunities for SMW business goals will not be achieved. The Federal Government could provide a blueprint plan to the states. Achievement of contract goals includes educating the parties controlling the grant and contract opportunities. For example, contract administrators must understand the scope of work and how to provide opportunities to SMW businesses.

**8. What policies or practices specific to federal dollars distributed to state and local government foster diversity, equity, and non-discrimination in procurement of goods/services and/or grant administration?**

The policies or practices specific to federal dollars distributed to state and local government that foster diversity, equity, and non-discrimination in procurement of goods/services and/or grant administration should include those listed in response to questions 1. above. The President

signed an Executive Order to increase the goal from 5% to 11%, but a champion is needed to open those opportunities to get to the 15% goal.

**9. How can state and local grantees (the service providers and other applicants for the infrastructure funds) ensure that SMW businesses have meaningful and robust opportunities to partner and compete for funding under grant programs?**

State and local grantees should consider:

- A process similar to the FCC's cable procurement rule.
- Requesting that the FCC issue a fast-track Notice of Proposed Rulemaking to adopt a ubiquitous equal procurement opportunity rule.
- Requiring agencies to communicate with unsuccessful bidders/contractors to explain why and how they can improve their bids.
- Ensuring that information and data sharing methods are clear and accessible.
- Ensuring that businesses are receiving invitations for opportunities.
- Tracking progress, such as by requiring contractors to meet quarterly with reviewers to ensure they are delivering on the targets and goals in their bids, providing consistent reviews, adopting a methodology for accurate and current tracking model, and auditing and identifying granular details in management of opportunities.
- Maintaining a directory of SMW contractors and SMW organizations and communities.
- Including the goals in meetings, policy-setting, and discussions.
- Provide training for SMW businesses to navigate complex Federal contracting.

The Federal government must set out the expectations for the State administrators, and the State must sign-off on what is expected. For example, in the State of Illinois:

- The RFP sets out prime contractor goals.
- A Letter of Intent lists the scope of work and pricing accompanied by a utilization plan (describing how the contractor would meet the goals of utilizing SMW businesses). The Letter of Intent becomes part of the contract, and the prime and subcontractors will enter into a contract with those terms included.
- The Legislature is considering modifying its scoring for evaluating SMW contracting.

The State should be required to enter into a contract with the Federal government. The State should create a utilization Plan, which is sent to the Federal Government for incorporation into the Federal and State contract. The Federal government should conduct an evaluation, utilizing a scoring procedure, of how the State implemented the program and met its goals. The higher the State's score, the more likely that state will be eligible for more federal dollars. Senators and Congresspersons may have to answer to constituents on why that state is not eligible for federal funding. Conversely, each contractor's score will dictate eligibility.

It needs to come from the top that SMW businesses are top priorities for this funding and contracting. The Working Group and the CEDC needs to develop guidelines in a timely manner to ensure all communities are including diverse community organizations and SMW businesses in their processes.

**10. Are you aware of any best practices or model codes (i.e., rules or regulations) on increasing grant/contract opportunities for SMW businesses?**

See responses to Question 1. above. In addition, the grantees should partner with SMW Chambers and continue conversations with the Office of Diversity and Economic Development at the U.S. Department of Treasury.

**11. Do you have examples of successful programs for ensuring robust participation by SMW businesses at federal, state, and local levels and what characteristics do they have to make them successful?**

See responses to question 6. above. In addition:

- San Antonio created a Small Business Department for minority businesses and increased accepted opportunities by 40%.
- ABC Telecom provides all telecom services to the government entity. It is important to understand the scope of work for any particular contract and how to separate the various components for SMW companies to participate. ABC Telecom uses an Application Programming Interface that allows access to internal purchasing, rather than the company making those orders, so that subcontractors can fill those orders.
- Contract caps negatively impact SMW businesses. Caps typically are set at \$4 million for black-owned firms, which can participate in the Small Business Administration's 8A Certification program for minority-owned businesses for no more than 9 years. Those caps disallow black-owned contractors from participating in major sole-source contracts and from building intergenerational wealth. USBC is asking for a \$20 million cap on contracts and 20 years on 8A Certification. There should be reciprocity between the certification programs of the USBC and the SBA; all programs should be held accountable for ensuring opportunities for all SMW businesses.

- Provide examples of programs that have established contractors work with SMW businesses and help develop their business plans. Have collective reports by the center of excellence and have information synthesized for review and accountability.

**12. Are there examples in the private sector and what characteristics make them successful?**

Examples in the private sector include:

- The City of Atlanta ensured that SMW businesses benefited from public dollars for the Atlanta Airport.
- Corporations committed to spending \$6 billion with Black firms after the murder of George Floyd, although less than \$250 million has been spent.
- The Wireless Infrastructure Association (see above).
- Replevin, which oversaw a three-year contract to replace utility meters with smart meters. The company was able to hire three more workers to monitor this contract. It met with utility companies to create sustainability and to provide ongoing work based upon the current relationship, which gives opportunities to SMW businesses.

**13. Any other recommendations or thoughts for us?**

- Sole sourcing and the general nine-year time limit for contracts is a problem for minority firms. Generally, those inhibit the opportunity for Black firms to create generational wealth.
- The processes for contracting need more transparency. It is not straightforward if minority firms are participating with prime contractors and there is no accountability.
- Having reasonable conditions is important, which may require a revision on how things are currently approached.
- Providers of telecommunication services often bundle procurements into multi-million dollar bid opportunities, which mostly puts these procurement opportunities out of the reach of diverse prime and second tier suppliers. Ironically, prime company winners of these large grants and contracts subsequently unbundle the procurements and subcontract to second tier companies, and they often outsource to third tier diverse suppliers. The economic disadvantages of this practice to second and particularly third tier diverse contractors are obvious and must be addressed.
  - a. With respect to broadband funding to grantees under present federal programs, this type of bundling procurement process is a serious

impediment to extending broadband to underserved and rural minority communities. Additionally, it could slow down the development of a well-trained telecommunications workforce that this broadband funding is mandated to reach. And most certainly, it will not enhance the utilization level of diverse suppliers.

## **PART THREE:**

### **Report and Recommendations from the Diversity and Equity Working Group – Digital Discrimination and Inclusive Populations**

**Introduction:** While the Commission requested the CEDC offer recommendations to the Commission on model policies and best practices for States and localities to prevent digital discrimination by Internet Service Providers (ISPs), the Diversity and Equity (D&E) Working Group was specifically charged with exploring the issue of digital discrimination from a broad and complex perspective that impacts marginalized communities across the country. The Working Group delved into interviewing a diverse group of subject matter experts to determine what populations are most affected by the lack of sufficient and widely available online access. Given the D&E Working Group’s mission to affirmatively advance equity, civil rights, racial justice and equal opportunity in the telecommunications industry, the Working Group concluded that the CEDC’s efforts to respond to the request from the Commission, and subsequently the Infrastructure Investment and Jobs Act (IIJA),<sup>169</sup> may not truly cover all potential marginalized communities.

The Working Group found through interviews with subject matter experts that the Commission should view the concept of “digital discrimination” more broadly and with guidance from the Communications Act of 1934 and the Telecommunications Act of 1996, which clearly states that the agency is charged with creating and encouraging access for all residents of the United States.

Under this framework for advancing equity and inclusion, populations that extend beyond normal and prescribed federally protected categories will be covered by any statutory suggestion of the reverse of “digital discrimination,” including those bound by age, economic limitations, access to local digital upskilling tools, language proficiency, sexual orientation, gender, gender-identification, and disability, among other potentially intersectional categories.

Thus, the Working Group offers both broad and specific recommendations that assist the Commission to promote greater inclusivity of populations who experience singular, multiple, and other vulnerabilities not necessarily defined or clear in the limited language of the IIJA statute around what constitutes discrimination in broadband service, adoption, and use.

Furthermore, the current charge by the Commission to the CEDC to define “digital discrimination” -pursuant to the effort to recommend model policies and best practices for ISPs to avoid it - may lead to a definition that may conflict with other congressional and previously substantiated definitions of the problem. While not addressed in Part One of this report, the D & E Working Group found in its research a definition of digital discrimination that is unrelated to deployment by ISPs. Karen Yeung and Martin Lodge, co-authors of Algorithmic Regulation in 2019 define digital discrimination as unfair, unethical, or just differential treatment based on access to personal data that is automatically processed by an algorithm. They further underscore that instances of discrimination often found in digital formats are often reproductions of discrimination in the offline world, either inheriting the biases of prior decision-makers, or

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<sup>169</sup> Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 429, 117th Cong. (2021), <https://www.govinfo.gov/content/pkg/BILLS-117hr3684enr/pdf/BILLS-117hr3684enr.pdf> (“Infrastructure Act”).

simply reflecting widespread prejudices in society.<sup>170</sup> While the specific IIIA charge is not directly related to how emerging technologies facilitate greater precision of structural discrimination, it is worth pointing to the inferences that are extracted that contribute to multiple layers of the types of inequalities imposed on vulnerable populations.

Key conclusions of the D&E Working Group's efforts are that:

### **Equal access may not necessarily result in equal treatment and outcomes**

Having equal access to connectivity does not guarantee all demographic groups can adopt or fully utilize broadband and technology services available to them. The main reasons for lack of uptake include affordability, lack of education, lack of digital skills, lack of accommodations for accessibility, lack of meaningful language access, and usability needs, lack of role models, and lack of trust. Such findings were gleaned from a series of interviews conducted with various subject matter experts and local stakeholders. Select findings from some of the interviews are presented below:

### **Equal access does not result in equality**

- *Broadband Research Firm* - In a survey of 10,000 consumers from one ISP's footprint, the firm found that 22% of respondents said that their broadband service was too expensive, 8% of respondents were not interested in using the service, and 3% were concerned about data collection efforts and thought higher speeds made them more susceptible to hackers. The survey also found that promotions about affordability programs like the Emergency Broadband Benefit (EBB) were less likely to reach older populations.
- *Advocacy Organization for the hearing-impaired* - When there is equal access to communications, access alone is not enough to close the digital divide. Fortunately, there are a wide variety of digital solutions available to support the total life experience of deaf and hard of hearing people. Currently, hearing-impaired communities rely heavily on video-based communication, but the cost of high-speed broadband services necessary to support video is a barrier for some people. A lack of accommodations in the workplace also can prevent deaf and hard of hearing people from taking full advantage of employment opportunities. It's imperative for workplaces to identify a person's communications preferences (Do they sign? Do they wear a hearing aid? Are they reliant on captioning?) and implement best practices to accommodate those preferences.
- *Smart city initiative in major metropolitan area* - Affordability and digital literacy are major barriers to adoption of broadband services for many residents of this large metropolitan area. While many of the large metropolitan residents are aware of subsidies available to them, their lack of trust in institutions and the lack of educational programs prevent them from taking advantage of affordable options as we see an example of in the

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<sup>170</sup> Natalia Criado and Jose M Such. "Digital Discrimination." In Algorithmic Regulation, edited by Karen Yeung, and Martin Lodge. Oxford: Oxford University Press, 2019. Oxford Scholarship Online, 2019. doi: 10.1093/oso/9780198838494.003.0004.

report *Achieving Digital Equity in Baltimore*.<sup>171</sup> This study by the Johns Hopkins 21<sup>st</sup> Century Cities Initiative found that affordability and digital literacy are major barriers to adoption of broadband services.

- *Foundation* - The leader of a distinguished foundation focused on leveling the playing field when it comes to technology investments among diverse start-ups shared that “Very few people understand the algorithms of technology – even within the companies creating them – and the impact they have on communities of color and employment. Artificial intelligence can filter out applicants and can impact the entire application process. This can impact access to high wage and growth jobs for marginalized communities.” A recent study found that 80% of Black loan applicants were denied based on algorithms. Furthermore, online platforms are also associated with the increase in misinformation and disinformation, disproportionately impacting vulnerable populations who cannot decipher through the accelerated sophistication of emerging technologies. The inability to decipher misinformation decipher misinformation, which can lead to confusion, can create a chilling effect preventing marginalized communities from accessing resources, applying for jobs, and developing digital literacy.
- *Veterans Association* - Digital discrimination is compounded by a range of other social and economic challenges, especially among veterans and military families. On average, 200,000 individuals transition out of service into civilian life annually with most going directly into the civilian workforce or higher education. Twenty five percent of veterans live in rural communities, compared to 17% of non-veterans meaning our veterans might have less access online and face higher rates of digital discrimination just because of their geographic location.

These snippets from a wide range of stakeholders suggest that when defining and developing solutions around digital discrimination, it is imperative to first identify the various populations explicitly and implicitly impacted by the lack of sufficient, equal access and opportunity to connect to high-speed broadband, and to recognize that these populations may not cohesively show up or be covered by the statutory aspirations of the IJA when it comes to protections against “digital discrimination.”

As it stands, the Working Group believes how the IJA defines equal access in Section 60506 does not fully align with prior statutory language that clearly states that clearly states, “the Commission should take steps to ensure that all people in the United States benefit from equal access to broadband internet access service;” and the provisions of the Communications Act of 1934 and the Telecommunications Act of 1996 that clearly charge the Commission with ensuring ALL citizens have equal access. The IJA excludes discrimination around age, sexual orientation, gender, gender identity, geographic location, or disabilities.

Thus, we strongly urge the commission to expand the definition under which they approach digital discrimination to comply with the original Communications Act of 1934. The D&E

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<sup>171</sup> Mary Miller and Mac McCormas, *Achieving Digital Equity in Baltimore* (Baltimore, MD, Johns Hopkins University’s 21<sup>st</sup> Century Cities Initiative, January 2021), <https://21cc.jhu.edu/research/current-baltimore-research/achieving-digital-equity-in-baltimore/>.

Working Group also finds that definitions around who is impacted by “digital discrimination” needs to be further explored, and the intersectionality of singular, and multiple circumstances and identities be further incorporated into the IJJA’s statutory goals.

## RECOMMENDATIONS

To proactively address these perceived discrepancies among covered populations by the statute, the D&E Working Group proposes the following recommendations:

- 1. The Commission needs to examine and expand the definition of “equal access” to facilitate greater adoption and use of high-speed broadband, especially among populations experiencing a range of inequalities resulting from a protected characteristic, or an intersection of various attributes or social determinants that limit their full digital engagement.**

Based upon the feedback heard during interviews, there is not a one-size fits-all approach to ensuring equal access since diverse groups have different needs and confront different barriers. In addition to equal access broadband infrastructure, we must also ensure access to resources such as digital skills training programs and the promotion of affordability programs. Technology should be made accessible and useable for individuals with disabilities, the aging population, people who are limited in language capacity, and made available to fit the needs of all individuals and communities.

- 2. The Commission should play a more active role in promoting the relevance of high-speed broadband among populations where broadband can improve quality of lives and increase consumer demand for more equitably deployed broadband services.**

Here, the D&E Working Group espouses that as a complement to efforts to define "digital discrimination," the Commission also encourages the following best practices among States and localities to make their work more inclusive and equitable:

- A. Increase outreach and awareness about existing affordability programs that address broadband access among various populations, including veterans, the limited English-proficient LGBTQ+, the disabled, and older populations.*

States and localities should leverage existing affordability programs like the Affordable Connectivity Program (ACP) to increase broadband adoption rates. They also should encourage local organizations to promote affordability options and digital skills programs to their communities. Partnerships between these local organizations and industry stakeholders can help ensure a viable pathway toward hiring and retention among underrepresented groups.

- B. Encourage community engagement in digital skilling and adoption activities.*

Partnerships between community organizations and industry stakeholders also can help highlight the unique ways connectivity can provide workforce development opportunities and workplace accommodations to marginalized groups. Some examples of these levels of engagement include:

- Comcast’s Lift Zones are centers throughout the nation developed in partnership with local community-based organizations to help connect low-income families to the internet so that they can fully participate in educational opportunities and the digital economy. Lift Zones are designed to supplement the Internet Essentials program to help students as well as older people get online.<sup>172</sup>
- AT&T is building 20 AT&T Connected Learning Centers in under-resourced communities across the U.S. to provide students and families free access to AT&T Fiber internet, Wi-Fi, and computers, as well as education, tutoring and mentoring resources.<sup>173</sup>
- CompTIA partnered with Dallas-based Girls Embracing Mothers to provide a 12-week training course, vouchers for the CompTIA A+ certification exam, and a financial stipend to 10 formerly incarcerated mothers in the fall of 2021. None of the program participants had any experience or background in technology but were given the opportunity to learn new skills to further their professional development through this pilot training program.<sup>174</sup>
- Microsoft launched an initiative to help more people acquire digital skills<sup>175</sup> as well as its AI for Accessibility Initiative<sup>176</sup> in partnership with Georgia Tech to accelerate the development of accessible AI solutions for people with disabilities.
  - Verizon Innovative Learning supports Verizon’s digital inclusion goal to help provide ten million youths with digital skills training by 2030, providing students free technology, access, and a next generation, tech-infused curriculum. In addition, Verizon has programs that provide digital skills training to adults in rural communities with a specific focus on people of color and partnerships with 11 historically black colleges and universities to provide 15,000 adults with basic digital skills.<sup>177</sup>

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<sup>172</sup> Comcast, “Lift Zones,” accessed July 12, 2022, <https://corporate.comcast.com/impact/digital-equity/lift-zones>.

<sup>173</sup> AT&T, “AT&T Connected Learning,” accessed May 18, 2022, <https://about.att.com/csr/home/society/education.html>.

<sup>174</sup> CompTIA, “New Hopes, New Opportunities: Girls Embracing Mothers and CompTIA Helping Dallas Area Women Build Futures for Themselves and Their Children”, accessed July 15, 2022. <https://www.comptia.org/newsroom/2021/10/27/new-hopes-new-opportunities-girls-embracing-mothers-and-comptia-helping-dallas-area-women-build-futures-for-themselves-and-their-children#:~:text=CompTIA%20Press%20Releases&text=DALLAS%20%E2%80%93%20Ten%20Dallas%20area%20mothers,based%20Girls%20Embracing%20Mothers%2C%20Inc>.

<sup>175</sup> Microsoft, “Microsoft launches initiative to help 25 million people worldwide acquire the digital skills needed in a COVID-19 economy”, accessed May 18, 2022, <https://blogs.microsoft.com/blog/2020/06/30/microsoft-launches-initiative-to-help-25-million-people-worldwide-acquire-the-digital-skills-needed-in-a-covid-19-economy/>

<sup>176</sup> Microsoft, “AI for Accessibility,” accessed May 18, 2022, <https://www.microsoft.com/en-us/ai/ai-for-accessibility>.

<sup>177</sup> Verizon, “Verizon Innovative Learning,” accessed May 18, 2022, <https://www.verizon.com/about/responsibility/digital-inclusion/verizon-innovativelearning>.

- Charter offers support to community organizations through Spectrum Digital Education grants, which provide computers, digital education classes, and technology labs for thousands across the country.<sup>178</sup> In 2021, Charter launched Spectrum Community Assist (“SCA”), a \$30 million, 5-year commitment to improve community centers and enhance jobs skills for communities across Charter’s footprint. Through SCA, Charter is revitalizing community centers with physical improvements, gig internet service, and job skills training across underserved, rural, and urban communities.<sup>179</sup>

### *C. Promote digital skilling in K-12 education*

To advance equal access to job opportunities in the tech sectors, broadband infrastructure and technology education must be available to all communities from an early age. States and localities should support starting digital education as early as Kindergarten to empower students to become deeply engaged digital citizens with fundamental digital literacy skills. In addition to expanding access to home broadband, states should look at how they are investing in teachers and school resources to provide connectivity and the education needed around that connectivity in K-12 education.

### *D. Support for training programs for groups transitioning into civilian life, especially among veterans and ex-offenders.*

During structured interviews, some experts described the technology and workforce challenges people face when re-entering civilian life. While veterans are educated about how to attain a job or healthcare benefits upon leaving the military, they typically are not made aware of options for gaining access to connectivity. States and localities can help by promoting connectivity options to the veteran community. Formerly incarcerated citizens are also further marginalized upon re-entering society due to lack of digital skills. This problem can be addressed by providing justice-impacted populations with access to technology and digital literacy courses while they are incarcerated. Access to technology must also expand to halfway houses and other institutions that house and assist justice-impacted individuals while they transition out of the prison system.

### *E. Removal of technical and economic barriers to accelerate broadband deployment, including regulatory overreach.*

While the IJJA’s \$65 billion commitment to broadband deployment is a landmark investment in the goal of universal connectivity, States and localities can take further steps to prepare their communities to receive broadband service. In addition to promoting funding programs, policies should aim to remove technical and economic barriers that slow down deployment. Broadband providers and community partners can face several delays and obstacles along the deployment journey. This can include supply chain issues, topographical challenges, acquiring access rights for infrastructure (railroad tracks, highways, bridges) and private property (landlord permissions, HOA rules, wiring inside buildings), negotiating utility pole attachments, and navigating rules

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<sup>178</sup> Charter, Spectrum Digital Education, <https://corporate.charter.com/digital-education/grants>.

<sup>179</sup> Charter, Spectrum Community Assist, <https://corporate.charter.com/community-assist>.

that seek to protect and preserve historic districts.<sup>180</sup> States and localities should take the necessary actions to remove these regulatory barriers to accelerate and encourage continued investment in broadband infrastructure deployment.

*F. Develop, fund, and promote digital skilling programs and access to technology for mature workers and the aging population*

*a. Support for Mature Workers*

According to the Indeed Hiring Lab, “unretirement” is on the rise in the United States as older workers are returning to the labor market. Analysis suggests an estimated 1.5 million retirees have returned over the past year, citing rising cost of living against their fixed incomes. Over the course of the past 50 years, mature workers have significantly increased and played an important role in the labor market. However, mature workers are being left behind from digital skilling programs and opportunities.

*b. Support for the Aging Population*

The digital divide is worsening for the aging population and not enough resources exist to help older adults overcome barriers to digital access. Information and communication technologies can enable an older adult to access healthcare safely and can often be the key to overcoming isolation. An investment to bridge the digital divide experienced by older people should be made to develop programs to help them not only learn but gain access to the technology is needed now more than ever.

The proposed resolution from the D&E Working Group to expand the covered entities under the IJJA’s charge to the Commission around the definition of “digital discrimination” should be further explored, and States and localities can support such inclusivity by advancing policies and engaging in collaborative outreach that encompass the wide range of historically disadvantaged and other marginalized populations.

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<sup>180</sup> Diana Eisner, “Broadband Deployment: Smoothing the Nation’s Path to 100 Percent Connectivity,” USTelecom, May 12, 2022, <https://ustelecom.org/broadband-deployment-smoothing-the-nations-path-to-100-percent-connectivity/>.

## **APPENDIX A – LIST OF DIVERSITY AND EQUITY WORKING GROUP INTERVIEWEES AND SURVEY RESPONDENTS**

### **Interviewees**

- **Michael Adams**, CEO, Sage
- **Brittany Barnett, Founder**, Girls Embracing Mothers; Founder, Buried Alive Project
- **Faith Bautista**, CEO, National Diversity Coalition
- **Paula Boyd**, Senior Director, Government and Regulatory Affairs, Microsoft
- **Dr. Iva Carruthers**, General Secretary, Samuel DeWitt Proctor Conference
- **Jonathan Chaplin**, Wall Street Analyst
- **Shelbi Doyeto**, Operations Manager, United Keetoowah Bank (UKB) of Cherokee Indians, Oklahoma
- **Charles Eaton**, CEO, Creating IT Futures
- **Roger Entner**, Founder, Recon Analytics
- **J. Michael Haney**, Ph.D., Vice Chancellor for Strategic Initiatives and Innovation, IVMF Founder and Executive Director, Institute for Veterans and Military Families, Syracuse University
- **Victoria Holland**, Esq., Devol Law
- **Dr. Nicol Howard**, University of the Redlands
- **Dr. Nicol Pinkard**, Founder, Digital Youth Network
- **Mac McComas**, Senior Program Manager, 21<sup>st</sup> Century Cities Initiative
- Johns Hopkins University
- **Travis Noland**, Government Relations, Cherokee Nation
- **Dr. Allison Scott**, CEO, Kapor Foundation
- **Chris Soukup**, CEO, Communications Services for the Deaf

### **Survey Respondents**

- **Joon Bang**, CEO, Iona Senior Services

- **Karyne Jones**, CEO, National Council on Black Aging
- **Christopher Wood**, Executive Director, LGBT Technology Partnership & Institute