
UPDATE October 15, 2019

D.C. Circuit Upholds Most Net Neutrality Rules

All ISPs Should Ensure Their Transparency Disclosures are Updated and Accurate

On October 1, 2019, the U.S. Court of Appeals for the District of Columbia [upheld](#) most of the rule changes adopted by the [Restoring Internet Freedom Order](#) (“RIF Order”). In particular, the Court upheld the FCC’s decision to return Internet service providers (“ISPs”) to Title I classification and the FCC’s transparency rule, which requires ISPs to disclose certain network management practices.

At the same time, the Court vacated portions of the RIF Order that preempted any state or local regulation inconsistent with the RIF Order and remanded three separate parts of the RIF Order (dealing with pole attachments, public safety and the lifeline program) to the FCC for further consideration. Nonetheless, the takeaway for ISPs at this time is clear – **the transparency rules remain in effect and all ISPs should ensure that their required transparency disclosures are accessible through a website or through the [database](#) established by the FCC’s Consumer and Government Affairs Bureau.**

Overview. The RIF Order adopted sweeping changes rolling back the FCC’s prior [2015 Open Internet Order](#), which notably reversed a decades-old policy and reclassified broadband Internet access service (“BIAS”) as a “telecommunications service” under Title II of the Communications Act. Under the 2015 Open Internet Order, the FCC imposed three “bright line” rules on no-blocking, no-throttling and no-paid prioritization and adopted vague Internet General Conduct Standard. The RIF Order, conversely, returned BIAS to an “information service” classification. The RIF Order also revised the transparency rule, returning to a requirement similar to the one adopted in the Commission’s [2010 Open Internet Order](#), along with some important changes described below.

Reclassification. The RIF Order repealed the majority of the regulations imposed by the 2015 Open Internet Order, reclassifying BIAS as an “information service” and eliminating common carrier regulation of ISPs under Title II. Moreover, the RIF Order repealed the no-blocking, no-throttling, no-paid prioritization bright-line rules and the vague Internet General Conduct Standard, and eliminated regulation of BIAS providers’ Internet interconnection and traffic-exchange practices. Finally, the RIF Order broadly preempted state and local regulation of BIAS, including in the areas where the Commission has explicitly declined to regulate or vacated its regulatory role over BIAS. This last part of the RIF Order was vacated by the D.C. Circuit.

Transparency Rule. By repealing the 2015 “enhancements” to the transparency rule, the RIF Order returned to the rule as adopted in the 2010 Open Internet Order, along with a requirement for ISPs to disclose any blocking, throttling, affiliated prioritization or paid prioritization in which they engage. Moreover, ISPs must publicly disclose accurate information regarding their network management practices, performance, and commercial terms so that consumers may make informed choices when purchasing BIAS service.

The transparency rule requires the following information be disclosed:

Network Management Practices:

- Blocking. Any practice (other than reasonable network management elsewhere disclosed) that blocks or otherwise prevents end user access to lawful content, applications, service, or non-harmful devices, including a description of what is blocked.
- Throttling. Any practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device, including a description of what is throttled.
- Affiliated Prioritization. Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate.
- Paid Prioritization. Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, in exchange for consideration, monetary or otherwise.
- Congestion Management. Descriptions of congestion management practices, if any.
- Application-Specific Behavior. Whether and why the ISP blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications.
- Device Attachment Rules. Any restrictions on the types of devices and any approval procedures for devices to connect to the network.
- Security. Any practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked (but excluding information that could reasonably be used to circumvent network security).

Performance Characteristics:

- Service Description. A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.
- Impact of Non-BIAS Data Services. If applicable, what non-broadband Internet access service data services, if any, are offered to end users, and whether and how any non-broadband Internet access service data services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.

Commercial Terms:

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

- Privacy Policies. A complete and accurate disclosure about the ISP's privacy practices, if any.
- Redress Options. Practices for resolving complaints and questions from consumers, entrepreneurs, and other small businesses.

Making the Disclosures Publicly Available. ISPs must make their disclosures publicly available through an easily accessible website of its choosing or through the FCC's database. An ISP that does not submit its required disclosure to the FCC through the portal will be deemed as having elected to provide it on a publicly available, easily accessible website. An ISP that submits its required disclosure to the FCC and later elects to provide it on a publicly available, easily accessible website must inform the FCC of this change by filing via the FCC portal a clear statement of the change, including the website where consumers can find the required disclosure.

If you have any questions about the Restoring Internet Freedom Order, the D.C. Circuit decision or the transparency rule, please contact Bruce Beard at (314) 394-1535 or bbeard@cinnamonmueller.com, or Scott Friedman at (314) 462-9000 or sfriedman@cinnamonmueller.com.

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