
UPDATE December 23, 2019

FCC Takes Action Against ISPs That Failed to Disclose Network Management Practices

All ISPs Should Ensure Their Transparency Disclosures are Updated and Accurate

Earlier this month, the FCC's Enforcement Bureau [cited or admonished over twenty](#) Internet service providers ("ISPs") of various sizes for failing to disclose information regarding their network management practices, performance, and commercial terms of their services in accordance with the FCC's transparency disclosure requirements. The citation or admonishment orders stemmed from online searches conducted by FCC staff in late 2018 to verify whether ISPs were fulfilling their obligations to provide transparency disclosures.

All providers cited or admonished must publicly disclose the required information via a publicly available, easily accessible website, or by transmittal to the FCC for posting in the FCC's database within 30 days after the date of the orders. The Enforcement Bureau further warned each ISP that failure to do so may result in substantial fines or forfeitures.

The Enforcement Bureau's action stems from the transparency requirements contained in the [Restoring Internet Freedom Order](#) ("RIF Order"), in which the FCC decided to return ISPs to Title I classification yet retained (with some modifications) the transparency rule requiring ISPs to disclose certain network management practices.

This is yet another reminder that 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.

To guide ISPs in this effort, we provide a brief overview below of the RIF Order and FCC's transparency disclosure requirements.

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 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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