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DECEMBER 22, 2016

SPECIAL BULLETIN

Open Internet Rules *Enhanced Transparency Requirements*

The FCC’s 2015 Open Internet Order ([link](#)) contained, among many other things, some “enhancements” to the disclosure rules that were already in place as a result of the 2010 Order. Contained in the 2015 order was an exemption for small businesses (those with less than 100,000 broadband subscribers) relating to compliance with the enhanced transparency rules, and which was extended in 2015 until December 15, 2016. Even though there is bipartisan FCC and congressional support for a further extension of the small business exemption, the *FCC failed to act prior to December 15, meaning that small businesses will soon be subject to the enhanced transparency rules.*

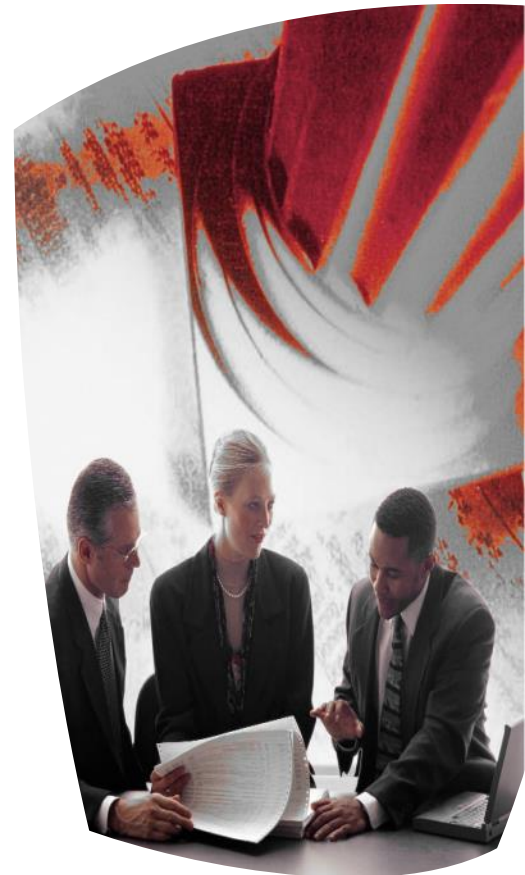
In addition, the FCC announced that the enhanced transparency requirements were approved by the OMB and are effective January 17, 2017. The one exception is the requirement relating to mobile carrier disclosure of packet loss, which has not yet been approved by the OMB.

What this means for small broadband internet access service (BIA) providers is that, absent action by the FCC and/or Congress prior to January 17, all companies must adhere to the enhanced transparency rules. Below is a summary of the enhancements adopted in the 2015 Open Internet Order, and which were recently approved by the OMB.

Enhanced Transparency Rules

Commercial Terms. The FCC added some specific required disclosures related to the price, other fees, and data caps and allowances related to BIAS.

Price – the full monthly service charge. Any promotional rates should be clearly noted as such, specify the duration of the promotional period, and note the full monthly service charge the consumer will incur after the expiration of the promotional period.



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Other Fees – all additional one time and/or recurring fees and/or surcharges the consumer may incur either to initiate, maintain, or discontinue service, including the name, definition, and cost of each additional fee. These may include modem rental fees, installation fees, service charges, and early termination fees, among others.

Data Caps and Allowances – any data caps or allowances that are a part of the plan the consumer is purchasing, as well as the consequences of exceeding the cap or allowance (e.g., additional charges, loss of service for the remainder of the billing cycle).

Network Performance. The FCC adopted the following enhancements to the network performance disclosures:

- The existing transparency rule requires disclosure of actual network performance. In adopting that requirement, the Commission mentioned speed and latency as two key measures. The enhancements require disclosure of packet loss as a necessary part of the network performance disclosure.
- Disclosures to consumers of actual network performance data should be reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing service
- Network performance should be measured in terms of average performance over a reasonable period of time and during times of peak usage.

Impact of Specialized/Non-BIAS Data Services. The enhanced transparency requirements require disclosure of the impact of any specialized or non-BIAS data services might have on the last-mile capacity for, and the performance of, BIAS.

Network Practices. The existing transparency rule requires disclosure of network practices, including specific disclosures related to congestion management, application-specific behavior, device attachment rules, and security. The enhanced requirements require that disclosure of network practices shall include practices that are applied to traffic associated with a particular user or user group, including any application-agnostic degradation of service to a particular end user. Disclosures of user-based or application-based practices should include the purpose of the practice, which users or data plans may be affected, the triggers that activate the use of the practice, the types of traffic that are subject to the practice, and the practice's likely effects on end users' experiences.

Safe Harbor Disclosures

Earlier this year, several FCC bureaus released Open Internet Broadband Consumer Labels ([Public Notice](#)), which serve as a safe harbor for the enhanced transparency rules. Carriers opting for the safe harbor must use the labels in the format and terms as contained in the Public Notice. These disclosures are to be made at the “point of sale” such as a prominent location on the BIAS provider’s website.



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Conclusion

In a highly disappointing development for small providers, the FCC was unable to forge an agreement regarding the extension of the small business exemption of the enhanced transparency rules (see [Pai/O’Rielly letter](#)). As a result, and due to the relatively sudden OMB approval of the requirements, small providers must now assume the need to comply with enhanced transparency requirements effective January 17, 2017. However, things could change as the administration changes and, as noted in the Pai/O’Rielly letter, it is possible that enforcement of the enhanced transparency rules as to small providers could be lax to non-existent.

We will issue further Special Bulletins as the process unfolds at both the FCC and in Congress.

Please let us know if you have any questions.



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