



# Internet Law in a Trump Presidency

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January 2017

In a Democracy, transitions in leadership happen more frequently than in any other form of government. And with those transitions, some previous policies and orders are preserved and some are reversed. This approach to government is a constant reality for the United States and will not change under the incoming Trump Administration. Just as President Obama changed and reversed some of the policies and orders implemented under the Bush Administration between 2000 and 2008, we should expect to see policies and orders altered by President-elect Trump. Thus, the natural and normal questions we have on the eve of our country's presidential inauguration focus on which policies, regulations and orders will President-elect Trump keep in place; which ones will he change; and what new policies will be established.

I certainly anticipate changes in Internet law. For example, President-elect Trump is already being pressured to reverse President Obama's Open Internet Order (also known as "net neutrality") and take an aggressive stance against it. Complicating the issue, there is growing concern regarding how cyber space and the Internet are being used to conduct cyber-warfare, cyber-crime and cyber-terrorism. It remains to be seen how President-elect Trump will balance the call for privacy regulations amidst our country's vulnerability to cyber-attacks.

## Net Neutrality and the FCC

An "open Internet" based on net neutrality means users and consumers can go where they want, when they want. This principle is based on requiring Internet service providers (ISPs) to treat all Internet traffic equally for the purposes of keeping the Internet open and free. It also allows innovators to develop products and services without asking for permission. In essence, the FCC's Open Internet rules are intended to:

- Protect and maintain open, uninhibited access to legal online content;
- Prevent broadband internet access providers from blocking, impairing or establishing fast/slow lanes to lawful content; and
- Promote investment in the nation's broadband networks.

As a result, consumers have started demanding more and better broadband as they enjoy new lawful Internet services, applications and content because broadband providers cannot block, throttle or create special "fast lanes" for that content.

Adopted on Feb. 26, 2015, by a 3-2 vote, the FCC's current [Open Internet](#) rules are grounded in the legal foundation of Title II of the Communications Act and Section 706 of the Telecommunications Act of 1996. Specifically, under these rules, the FCC classified broadband as a more highly regulated service under Title II of the telecommunications law. The classification thus gives the FCC more authority over broadband providers and also opens the door for the agency to enact new privacy regulations. At the time of the 2015 vote, about four million people filed comments with the FCC when it was considering the net neutrality rules, with most asking for strong regulation. While the Republicans on the 2015 Commission didn't oppose the goals of net neutrality (prohibiting broadband companies from slowing Internet speeds for some content, selling faster lanes for delivering data or otherwise discriminating against any legal online material), they strongly objected to classifying broadband providers for the same type of regulatory oversight as conventional phone companies.

## FCC Assignment Is Key

President-elect Trump has not spoken extensively on this subject yet beyond a tweet on Nov. 12, 2014, where he stated: "Obama's

attack on the Internet is another top down power grab. Net neutrality is the Fairness Doctrine. Will target conservative media.” Thus, we will have to wait to really learn more when we see who President-elect Trump nominates as the Chairman of the Federal Communication Commission (FCC). Currently, the FCC is led by five commissioners, with three seats typically representing the party of the president in office. Setting the stage for new leadership at the FCC, the Senate recently failed to reconfirm Democratic Commissioner Jessica Rosenworcel. Without Commissioner Rosenworcel, the FCC is now staffed by four commissioners split on party lines, but that should change when President-elect Trump takes office and appoints a new chairman of the agency. A former ally of Vice President-elect Mike Pence, Brandt Hershan, a longtime Indiana state senator, seems to be at the top of President-elect Trump's list for this new position. While scarce is known about Hershan's specific stances on the FCC, he did author an Indiana law a decade ago to deregulate telecommunications by ending government regulation of phone rates, freeing cable companies from being required to have local licenses to offer service, and stopping cities and towns from setting up their own municipal broadband services.

At this time, two top advisers to President-elect Trump, Mark Jamison and Jeffrey Eisenach, are proposing to sharply reduce the FCC's role, concluding that there is little need for the agency to exist because of the following three reasons:

1. Most of the original motivations for having an FCC have gone away;
2. Telecommunications network providers and Internet service providers are rarely, if ever, monopolies; and
3. Large mergers in the media and telecommunication industries are best for the market.

One of the primary questions for the new chairman, in addition to how much power the FCC should retain, will be whether the FCC should try and reverse the current net neutrality order. If President-elect Trump's new FCC commissioner were to reopen this fight when Republicans take the FCC's majority, it could create a tidal-wave of response from many supporters in rural areas that are in need of access to high-speed Internet, which the new Open Internet rules help to provide. It also could mean years of legal and regulatory squabbles – energy that could be better spent taking up data sharing, broadcast spectrum and any number of other issues that are relevant to both economic growth in rural America and cybersecurity.

### Communications Act and Data Sharing Revisions

At the same time, it is important to remember that because Republicans control the Executive Branch and both houses of Congress, some have predicted that the debate could be revived for the purposes of passing a law amending Title II of the Communications Act and could also overturn the rules or replace them with weaker ones without fear of a presidential veto, while also recognizing that Rule 706 isn't a grant of authority. Versions of that bill have been circulated for some time, most recently as Thune-Opton ([see, http://bit.ly/2ifxhZE](http://bit.ly/2ifxhZE)). If this amendment succeeds, it would supersede everything FCC commissioners and courts have done thus far, including blocking future neutrality orders. However, as pivotal as Title II is for the Internet, it's still an afterthought for most of Congress after healthcare and immigration, and that may keep it at the bottom of the agenda.

In addition to the new Open Internet rules, the FCC's new rules on data-sharing could also become an important area that the new commissioner will be under pressure to reverse. Specifically, the FCC has laid out new restrictions for how providers such as Comcast, Verizon and AT&T collect data, requiring explicit user consent before any data is used for ad-targeting. The rules also institute new transparency and data security requirements. As those providers merge with content companies (NBCU, AOL and Time Warner, respectively), that ad-targeting data is increasingly valuable, and companies are eager to roll back the new rules created by President Obama's administration. With President-elect Trump in the White House, those rules are more vulnerable than ever.

### Eye on Deregulation and FCC Downsizing

If one were in the business of prediction, one should expect at this time for many of the responsibilities of the FCC to be replaced by a much smaller agency charged with distributing licenses for wireless airwaves, deregulating the industry and farming out many of the FCC's existing functions. For example, subsidies for phone and Internet services could be handled by state governments, while the Federal Trade Commission (FTC) could handle consumer complaints and take action against abuses by companies.

### Conclusion

Finally, with regard to President-elect Trump's general attitude about the Internet, one would be remiss to forget an important statement made by him on the campaign trail: “We're losing a lot of people because of the Internet,” he stated at a rally in South Carolina. “We have to talk ... about, maybe in certain areas, closing that Internet up in some way.” As when any President of the United States speaks, we need to take their statements seriously and try our best to understand what this means for our future.

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