

A preview of the FTC's role in monitoring broadband markets following the FCC's adoption of the Restoring Internet Freedom Order

Amid the ongoing discussion surrounding “net neutrality,” the FTC’s role in overseeing broadband Internet access service (BIAS) has received increasing scrutiny following the recent passage of the FCC’s *Restoring Internet Freedom Order* (“RIF Order”). Several recent developments indicate that, although the Federal Communications Commission (FCC) will continue to have a shared role in monitoring broadband markets, the Federal Trade Commission (FTC) will take the lead in investigating and bringing enforcement actions against Internet Service Providers (ISPs) for practices that raise anticompetitive concerns. Therefore, commercial stakeholders should pay careful attention to the potential for antitrust enforcement in broadband markets moving forward.

Background

In 2015, the FCC issued the *Open Internet Order*, which re-categorized BIAS providers as “common carriers” under Title II of the Communications Act. This development is relevant from an antitrust perspective because common carriers are exempt from the FTC’s purview under Section 5(a)(2) of the FTC Act. As a result, the *Open Internet Order* provided the FCC with singular authority to regulate ISPs’ practices related to last mile delivery and network management. In addition, the *Open Internet Order* instituted a series of preemptive conduct rules that explicitly prohibited ISPs from engaging in general categories of practices known as blocking, throttling, and paid prioritization, the latter of which describes a situation in which an ISP directly or indirectly favors certain online traffic in exchange for payment.

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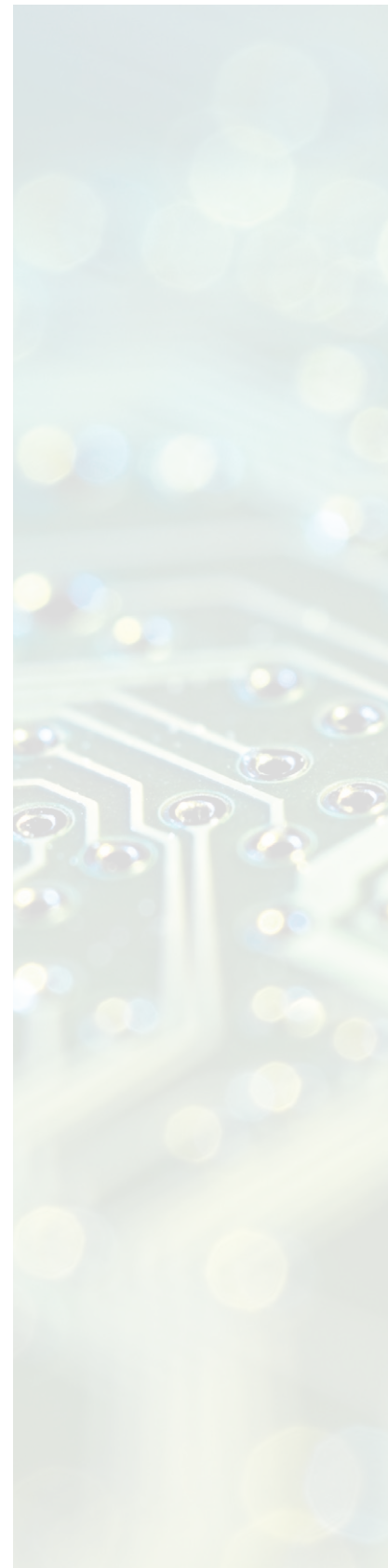
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Following the change in presidential administrations, the FCC's newly appointed Chairman, Ajit Pai, indicated that the FCC would seek to reclassify BIAS as an "information service" under Title I of the Communications Act, rather than as a "common carrier" service.

Discussion of the FTC's Enforcement Authority in the Restoring Internet Freedom Order

In support of the FCC's decision to reclassify BIAS as an "information service" and repeal the *Open Internet Order's* conduct rules, the *RIF Order* reinstated a modified version of the "Transparency Rule" adopted by the FCC in 2010.¹⁰ The Transparency Rule specified that BIAS providers must "publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband Internet access services".¹¹ The *RIF Order* noted that these disclosure requirements will enable the FCC and FTC "to observe the communications marketplace" while also providing "valuable information to other Internet ecosystem participants".¹² The *RIF Order* then goes on to explain that the Transparency Rule would allow the FTC to serve as an effective "backstop" given the FTC's "broad authority" to enforce antitrust and consumer protection law.¹³ The *RIF Order* thereby created a regulatory framework for BIAS that relies on a combination of mandatory disclosures and case-by-case antitrust enforcement.

While the *RIF Order* eliminated the 2015 conduct rules, it approvingly cited to comments submitted by FTC staff that explained that the agency need not demonstrate an ISP has "monopoly power" in a relevant market in order to challenge an ISP's network management practices.¹⁴ The *RIF Order* then explains that the FTC could continue to challenge practices that may be categorized as improper blocking and throttling, as well as certain forms of paid prioritization.¹⁵ With respect to blocking and throttling, the *RIF Order* noted that many of the largest ISPs have committed not to block or throttle legal content in a manner that is inconsistent with their network management practices, which are required to be disclosed under the Transparency Rule.¹⁶ The *RIF Order* indicated that "[t]hese commitments can be enforced by the FTC under Section 5 [of the FTC Act]".¹⁷ Regarding paid prioritization, the *RIF Order* stated that, in a variety of contexts, such arrangements can actually promote economic efficiency and innovation by enabling ISPs to better price services associated with content delivery and network management.¹⁸ However, the *RIF Order* also acknowledged that, under certain limited circumstances, specific forms of paid prioritization, such as an arrangement that favors affiliated content in a way that forecloses customers' access to non-affiliated content, could produce consumer harm and negatively impact competition in a relevant broadband market.¹⁹ For these reasons, the *RIF Order* takes the view that "it is difficult to determine on an *ex ante* basis [that] paid prioritization agreements



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are anticompetitive” and concludes that “antitrust law, in combination with the [T]ransparency [R]ule. . . is particularly well-suited to addressing any potential or actual anticompetitive harms that may arise from paid prioritization arrangements.”²⁰

The Allocation of Enforcement Responsibilities under the FTC-FCC Memorandum of Understanding

On December 14, 2017, the FTC and FCC officially signed and adopted a Memorandum of Understanding (“MOU”) that took effect upon the passage of the *RIF Order* that same day.²¹ The MOU outlines how the two agencies intend to coordinate their online consumer protection efforts, including oversight and enforcement efforts related to ISPs, and cooperate with each other in monitoring broadband markets.²²

The MOU generally divides the FCC’s and FTC’s jurisdiction over BIAS as follows:

- **FCC Role in Ensuring ISPs Comply with the Transparency Rule:** The MOU directs the FCC to review, among other things, informal protests submitted by consumers and, where appropriate, take enforcement actions against ISPs that fail to comply with their disclosure obligations or make their disclosures publicly available. The MOU also states that the FCC will monitor broadband markets in order to identify entry barriers.
- **FTC Role in Challenging ISPs for Unfair and Deceptive Practices and Inaccurate Disclosures:** The MOU states that the FTC will review and challenge ISPs for unfair and deceptive practices, including anticompetitive practices related to the provision of BIAS. This authority extends to investigating the accuracy of ISPs’ disclosures while also enabling the FTC to bring enforcement actions against ISPs for specific practices related to their marketing, advertising, and promotional activities that may be found to violate antitrust or consumer protection law.
- **Calls for more exchanges of information and inter-agency cooperation:** The *RIF Order* specifies that the agencies will securely share stakeholder complaints relating to BIAS. Information exchanges between the agencies are therefore subject to policies that require the agencies to protect confidential, personally-identifiable, and non-public information that complainants submit. The *RIF Order* also calls on the agencies to discuss potential investigations against ISPs that could arise under either agency’s jurisdiction, share best practices, and collaborate on consumer and industry outreach efforts.

Questions Surrounding the FTC's Enforcement Authority

The question of whether the FTC will have the authority to bring enforcement actions as envisioned by the *RIF Order* and the MOU remains open. In particular, on August 26, 2016, the Ninth Circuit dismissed an FTC case against AT&T Mobility for certain throttling practices taken in connection with wireless data services provided to AT&T customers with limited data plans. While the FTC argued that Section 5(a)(2) is “activity-based” and extends only to those activities that are themselves classified as “common carrier” services, the Ninth Circuit ruled that this exemption is “status-based” and extends to any and all activities engaged in by an entity that is classified as a “common carrier,” irrespective of whether the entity’s activities actually being challenged by the FTC under Section 5 are themselves classified as “common carrier” services.²³

The FTC subsequently filed for appeal and the Ninth Circuit granted rehearing *en banc*, effectively setting aside the panel decision pending review. While this case was pending at the time the *Restoring Internet Freedom Order* was passed, the FCC cited the FTC’s experience in bringing enforcement actions against ISPs (which dates back to 2000), explained that the FCC was not bound by the Ninth Circuit’s holding, and declined to wait for the pending litigation to be resolved in proceeding with the *RIF Order*.²⁷

Because an ISP (such as AT&T) may be classified as a “common carrier” with respect to their non-BIAS activities, strict application of the “status-based” test would appear to exempt an ISP’s activities related to BIAS from the FTC’s purview so long as the ISP remains classified as a “common carrier” with respect to their non-BIAS activities. Therefore, resolution of the FTC’s case against AT&T Mobility is likely to have a material effect on the FCC’s and FTC’s ability to carry out the terms of the MOU.

Conclusion

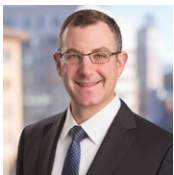
The *RIF Order* and MOU mark an important policy shift in the regulation of broadband markets. Important questions remain with respect to the specific practices the FTC might seek to address in consumer protection or antitrust cases brought under Section 5 as well as the scope of the FTC's legal authority in light of ongoing challenges to its jurisdiction over BIAS. Nevertheless, the terms of the MOU signal that the FTC is positioned to become the primary agency responsible for reviewing ISP conduct and would have broad discretion to challenge ISP practices related to the provision of BIAS that can result in consumer harm.



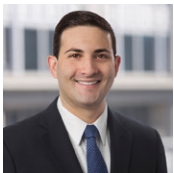
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