

FCC Proposes to Roll Back Net Neutrality Regulations

Skadden

06 / 20 / 17

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

John M. Beahn

Counsel
Washington, D.C.
202.371.7392
john.beahn@skadden.com

Joshua F. Gruenspecht

Associate
Washington, D.C.
202.371.7316
joshua.gruenspecht@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

skadden.com

The Federal Communications Commission (FCC) recently commenced a highly contentious proceeding to begin the rollback of various aspects of its network neutrality regulations, which it adopted on a party-line vote under the Obama administration in March 2015. Those Obama-era regulations were themselves the third attempt by the commission to address open internet issues, with the first two sets of regulations being rejected at the U.S. Court of Appeals for the District of Columbia Circuit in 2010 and 2014, respectively.

The FCC's May 18, 2017, vote to begin the process of rolling back the 2015 regulations has again kicked off several months of fractious regulatory and political debate regarding the appropriate regulatory classification of broadband internet access services. FCC Chairman Ajit Pai has staked much of his legacy on eliminating the regulations, which he views as heavy-handed and overly burdensome. However, many technology companies and numerous public interest groups view the regulations as essential for controlling the conduct of internet service providers.

The FCC net neutrality regulations currently in effect include a number of bright-line rules governing providers of broadband internet access services. Among other restrictions, these rules prohibit broadband providers from blocking or degrading any lawful internet traffic, content or applications and forbid providers from receiving compensation for prioritizing the traffic of content and application owners. The regulations also impose a general conduct standard, which allows the commission to prohibit practices that it determines unreasonably interfere with or disadvantage consumers' ability to access internet content, services and applications or the ability of online content, applications and service providers to reach consumers.

One of the most contentious aspects of the regulations was the reclassification of broadband services under portions of the Communications Act of 1934, known as Title II. Classification of broadband under Title II provides the FCC with far-reaching authority to impose utility-like regulations on broadband providers and services. For instance, the FCC could theoretically use this authority to regulate the rates of broadband providers and their terms of service, although in the March 2015 order, it exercised its authority to forbear from enforcing certain aspects of Title II and disclaimed this right. The D.C. Circuit upheld the reclassification, the forbearance and the general conduct standard as well as all other aspects of the net neutrality regulations in a June 2016 opinion holding that the commission had the statutory authority to issue the regulations.

But Chairman Pai, who was designated by President Donald Trump to lead the FCC in January 2017, vigorously opposed adoption of the net neutrality regulations when he was a commissioner. He has asserted that eliminating aspects of the regulations, particularly the reclassification of broadband as a Title II service, would restore internet freedom and promote infrastructure investment. He also has indicated his preference for returning to the light-touch regulatory regime that applied to broadband internet access services prior to 2015.

The Notice of Proposed Rulemaking (Notice) was released by the commission on May 23, 2017, and seeks:

- to eliminate the Title II classification of broadband internet access services by reclassifying them under another section of the Communications Act. This reclassification effectively would reinstate the legal framework that previously applied to broadband services. The FCC would no longer have the explicit authority to review various aspects of those services, such as consumer complaints, access to services for the

FCC Proposes to Roll Back Net Neutrality Regulations

disabled and customer privacy. Those issues likely would be handled by the Federal Trade Commission;

- to eliminate the general conduct standard. The Notice claims that the conduct standard is unduly vague and its elimination would promote innovation and network investment by eliminating regulatory uncertainty; and
- comment on a number of other potential changes, including whether the commission should keep, modify or eliminate the bright-line rules and how it should enforce the revised rules going forward.

Advocates of the existing rules, including various public interest groups and Democratic congressional leaders, met the FCC's proposals with fierce resistance. Millions of comments have already been submitted to the FCC regarding the proposed revisions to the regulations. Given that Republican-appointed commissioners currently hold a 2-1 majority at the FCC, however, Chairman Pai's proposals are likely to be adopted. Once the commission releases its revised rules, which is anticipated later this year, opponents are expected to quickly challenge them in court. These challenges will focus on whether the commission acted arbitrarily and capriciously in rolling back the regulations.

The outcomes may depend heavily on which court reviews the FCC's action. The U.S. courts of appeals have exclusive jurisdiction to review FCC actions, with the D.C. Circuit handling many regulatory-related actions pursuant to specific authority granted to it. If multiple appeals are filed in different circuits, a lottery will be used to determine which appellate court will handle the case. In considering any appeal, a reviewing court will need to determine whether the FCC provided an adequate legal and factual basis for reversing its 2015 decision.

Any judicial decision could be subject to further review, including by the U.S. Supreme Court, and thus the ultimate fate of this latest revision on net neutrality rules will not be known until the litigation challenging the rules is resolved. Even if Chairman Pai's repeal successfully gets through the courts, a future Democrat-leaning FCC is likely to revisit the issue. Ultimately, congressional action may be required to establish a permanent set of open internet guidelines.