

FCC Chairman Releases Draft of New Net Neutrality Plan; Vote Scheduled for May 18

May 1, 2017

Communications and Media

In a widely anticipated step, FCC Chairman Ajit Pai on Thursday released the [text](#) of a draft Notice of Proposed Rulemaking (“NPRM”) proposing to change the legal framework that governs broadband providers, eliminate the “Internet conduct standard” for evaluating broadband provider practices on a case-by-case basis, and seek comment on whether to keep, modify, or eliminate other open Internet (also known as net neutrality) rules previously adopted by the FCC. Chairman Pai has circulated the draft NPRM to his fellow Commissioners for a vote at the Commission’s next monthly meeting, [scheduled](#) for May 18.

The release of the draft NPRM begins the next phase in the over 15 years-long debate as to how best promote a free and open Internet. While there has been bipartisan agreement on the importance of broadband networks to online investment and innovation, there has been sharp disagreement over the government’s role in promoting these networks or policing their openness. The NPRM will be of interest to a range of stakeholders, including programmers, who rely more than ever on the Internet to distribute content to consumers—either directly through the programmers’ own OTT products or through third-party streaming services.

In its current form, the draft NPRM would:

- Propose to classify broadband Internet access as an information service under Title I of the Communications Act—reversing the FCC’s 2015 finding that broadband is a Title II common carrier service, which itself reversed prior FCC decisions on the regulatory status of broadband. The NPRM also proposes to reverse FCC findings from 2015 about the regulatory status of mobile broadband services, which went hand in hand with the Title II classification.
- Seek comment on how the classification of broadband as an information service affects certain other areas of communications regulation. For example, the NPRM proposes that the Federal Trade Commission (“FTC”) should be responsible for overseeing the privacy practices of broadband providers and that the FCC should continue to support broadband for low-income households through the Lifeline program.

With respect to the open Internet rules currently in effect, the draft NPRM would:

- Propose to eliminate the so-called “Internet conduct standard,” which allowed the FCC to make case-by-case determinations of whether certain conduct harmed Internet openness. It was under this rule that the FCC, then under Chairman Wheeler’s leadership, reviewed the practices of mobile broadband providers to not count use of certain online applications towards customers’ monthly data allowances (known sometimes as “zero rating” or “free data” offerings).

- Seek comment on whether to keep, modify, or eliminate the bright-line open Internet rules adopted in 2015. Subject to certain exceptions, these rules make it unlawful for broadband providers to engage in blocking, throttling, or paid prioritization of lawful content, applications, or services.
- Seek comment on whether to keep, modify, or eliminate the transparency rule, which requires broadband providers to disclose accurate information about their commercial terms of service (including their privacy practices), network management practices, and performance. The FCC adopted the transparency rule in 2010 and made certain enhancements to it in 2015, and the NPRM seeks comment about both the original rule and the enhanced version.
- Seek comment on whether to treat mobile broadband different from fixed broadband services in any open Internet rules that are adopted.
- Seek comment on various questions of legal authority for any open Internet rules that are adopted.
- Seek comment on costs and benefits of open Internet regulations and the proposals in the NPRM.

In its current form, the NPRM would set deadlines of July 17 for initial comments and August 16 for reply comments. Until May 11, stakeholders and other members of the public will have the opportunity to suggest changes to the draft NPRM—at which point we would expect the one-week “sunshine” period to begin, during which time lobbying is generally prohibited. The Commission likely will then vote on whether to adopt the NPRM at its open meeting on May 18.

In other net neutrality news, today the full D.C. Circuit [denied](#) a petition for rehearing of last year’s decision upholding the FCC’s 2015 Open Internet Order. Today’s decision is a reminder that the draft NPRM represents only one piece of the puzzle as to the fate of open Internet rules and the regulatory structure governing broadband providers. Among the variables that could affect the outcome are possible legislative debates, a Ninth Circuit decision regarding the scope of the FTC’s authority over common carriers, current and possible future vacancies at the FCC (which currently has three commissioners but at full strength has five commissioners, including the Chairman), and the relative strength of support or opposition to the proposal in the court of public opinion. We will continue to monitor the full panoply of issues affecting the broadband landscape and are available to discuss at your convenience.

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