Updates
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Three Ways President Biden’s Executive Order Affects the Telecom and Tech Sector

President Biden's recent "Executive Order on Promoting Competition in the American Economy" (Order) promotes fair competition regulations across a diverse group of key U.S. industries, including telecom, technology, banking and finance, and agriculture. The Order includes 72 separate initiatives involving more than a dozen federal agencies.

This update discusses three provisions of the Order likely to have significant effects on the telecom and related tech industry. *First*, the Order calls for the Federal Communications Commission (FCC) to reinstate the Obama-era net neutrality rules repealed during the Trump administration. If reinstated, these rules would prohibit Broadband Internet Access Service (BIAS) providers from impairing internet service by throttling speeds or blocking access to online services or websites. *Second*, the Order encourages the FCC to initiate a rulemaking to require BIAS providers to regularly report broadband price and subscription rates to the FCC, which will then be disseminated to consumers. *Third*, the Order encourages the Federal Trade Commission (FTC) to initiate a rulemaking to provide consumers and third-parties a "right to repair" their devices without going through the device manufacturer. While the right to repair directive is reasonably broad, its primary focus appears to be mobile and other connected consumer devices. Of note, none of these directives is self-executing; instead, the Order encourages the FCC and FTC to initiate rulemaking proceedings to achieve the Order's objectives.

Reinstating Net Neutrality

As we noted in a previous update, Democrats have long-signaled that re-implementing net neutrality would be an early priority of the Biden administration, whether through federal legislation or an FCC rulemaking. Another rulemaking would mark the fourth effort by the FCC to implement net neutrality. Birthed in 2005 as a set of voluntary policy guidelines under the administration of President George W. Bush, net neutrality has been thrice implemented and once denied. Efforts to enforce the policy guidelines against a cable operator were overturned by the U.S. Court of Appeals for the District of Columbia Circuit in 2010, after which the FCC, through rulemaking, passed new rules under Title 1 of the Communications Act. But these rules, too, failed again upon review by the DC Circuit. This time, however, the court laid down a roadmap for the FCC to follow in its next (and third) attempt. Following this roadmap, in 2015 the FCC first reclassified BIAS as a Title II telecommunications service and then relied on this reclassification for its rules precluding throttling, blocking, and other behaviors. The court awarded the FCC for being a good student by affirming the new rules in 2016 (the U.S. Supreme Court denied certiorari).

The 2015 rules were in force only a little more than two years, however. The Trump administration prioritized their repeal, relying on the same administrative law doctrine that the FCC has reasonable discretion to reinterpret its own organic act. The DC Circuit allowed the FCC to "re-reclassify" BIAS from an unregulated Title I information service to a regulated Title II telecommunications service under the Communications Act. The FCC's 2018 repeal largely restored the field to its pre-net neutrality state, with the minor exception of some reporting requirements.

Under the Order, President Biden has called upon Acting FCC Chairwoman Jessica Rosenworcel "to promote competition, lower prices, and a vibrant and innovative telecommunications ecosystem" through a new FCC rulemaking that will establish net neutrality rules "similar to those previously adopted" in 2015. According to the White House fact sheet published alongside the Executive Order, the Biden administration's objectives are relatively straightforward: prohibit companies from "discriminatorily slowing down internet access" and "restore the net neutrality rules undone by the prior administration."

If past is prologue, incumbent BIAS providers will challenge any effort to reinstall the net neutrality rules. But first a rulemaking has to begin, progress, and conclude. As of today, President Biden has yet to appoint a fifth FCC commissioner or a permanent chairperson, leaving the FCC deadlocked with two Republican and two Democratic members. In the absence of a Democratic majority, the FCC is unlikely to reclassify BIAS providers as Title II telecommunications service providers. But with President Biden's vocal support of net neutrality and a recent letter signed by more than 50 advocacy groups calling for a fifth commissioner appointee, a new nomination to the FCC seems only a matter of time. Acting Chairwoman Rosenworcel has also expressed strong support for net neutrality in the past, so we expect swift action once a fifth member is nominated and confirmed.

The FCC will need to confront a few practical considerations as it goes down this path. First, any rulemaking will take at least a year to complete and is almost guaranteed to be challenged in the courts. Even if the DC Circuit affirms the reinstatement of net neutrality, the more ideologically conservative Supreme Court may give the FCC's effort a chilly reception. Second, as a general matter, the BIAS industry has wisely avoided any high-profile controversies involving throttling or blocking since the 2018 repeal. Even states with their own net neutrality rules, like Washington and California, have yet to pursue any high-profile enforcement. Without an enthusiastic public record in support of reinstating net neutrality, the FCC may find it difficult to establish an adequate record in support of new regulations. Ultimately, the most legally sustainable path for net neutrality would be by federal legislation, but in the current partisan environment, the path encouraged by the Order appears better positioned to succeed.

Reporting Broadband Rates and Eliminating Early Termination Fees

The Order also calls for the FCC to promote price transparency by requiring BIAS providers to report subscription rates and charges, and to eliminate early termination fees. In a statement on the Order, President Biden opined that restoring healthy competition is part-and-parcel of the very heart of capitalism. If "health" and "heart" are thematic of the Order's restorative intent, then it is little surprise that the Biden administration also encourages the FCC to revive its Broadband Nutrition Label program to help ensure that consumers do not unintentionally consume hidden fees and add-ons. Acting Chairwoman Rosenworcel agreed, stating: "Our economy thrives on competition. It is the reason the United States is home to some of the most dynamic companies in the world. I welcome this effort by the President to enhance competition in the American economy and in the nation's communications sector."

The White House fact sheet also notes that "if a consumer does find a better internet service deal, they may be unable to actually switch because of high early termination fees—on average nearly $200—charged by internet providers." Therefore, the Order sees greater transparency on rates to work in tandem with the elimination of early termination fees to make it easier for consumers to freely make choices in the broadband market.

Adopting a Right to Repair

As part of the Biden administration's effort to counter industry practices that allegedly undermine competition and reduce innovation, the Order focuses on "repair markets" for heightened enforcement under Section 5 of the FTC Act, which prohibits unfair and deceptive practices. According to the White House's aforementioned fact sheet, mobile phone manufacturers, among others, impose restrictions on the use of independent repair shops and do-it-yourself (DIY) repairs, making repairs both more costly and time-consuming for consumers.

The Order tracks the findings of a recent FTC report on right to repair issues. In May 2021, the FTC released a 56-page report on anticompetitive practices related to repair markets drafted pursuant to a congressional directive. In its report, the FTC concluded that repair restrictions have diluted the effectiveness of certain statutory anti-tying provisions and steered consumers either into manufacturers' repair networks or into replacing their products before the end of the products' life cycle. According to the FTC, mobile phone manufacturers restrict repair rights through several mechanisms, including (1) product designs that complicate or prevent repairs, (2) the unavailability of parts and repair information, and (3) designs that make independent repairs less safe.

News reports have similarly drawn attention to repair restrictions stemming from the design of products, particularly those that are complex and do not lend themselves to home repair. For instance, the lithium-ion batteries used in Apple AirPods are small and tightly packed into the device, making it "almost impossible" to swap out an old battery for a new one. The use of unlabeled parts bound together with sticky adhesives further compounds the problem.

While the Order encourages the FTC to exercise its rulemaking authority, the FTC's report to Congress identifies additional approaches for increasing consumer choice in repair markets. First, the report states that the FTC has several avenues that it can and should deploy, such as already-existent statutory anti-tying provisions, legal challenges under its Section 5 authority to prevent unfair and deceptive practices, or a rulemaking to prohibit certain types of repair restrictions, which the Order ultimately encouraged. Second, the report states that industry self-regulation can also be beneficial but concedes that it could be a challenge to create and implement a single self-regulatory scheme given the broad range of industries and products involved. Finally, the report examines legislative approaches for expanding repair options, noting that limited right to repair laws already exist in at least three states (i.e., Rhode Island, Indiana, and California) and that bills have been introduced in at least 20 state legislatures in the last few years.

Overall, the administration's recent executive order and the FTC's report to Congress could mean that future actions will be taken against restrictions on the use of independent repair shops or DIY repairs. Such actions likely will seek to make it "easier and cheaper" for consumers to repair items they own by "limiting manufacturers from barring self-repairs or third-party repairs of their products." Mobile phone and consumer electronics manufacturers in particular could be affected given modern design imperatives that eliminate screws and exterior openings, and the increasingly complex nature of their interior components.

Conclusion

By these three regulatory measures encouraged by the Order, the Biden administration has strongly signaled a repudiation of the Trump-era laissez-faire approach to telecom and tech regulation. Under the circumstances of a partisan political climate, however, actions by the FCC to carry out the Order may be delayed until a fifth member of the FCC is nominated and confirmed.

The authors recognize the contributions of summer associate Sam Klein to this update.

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