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January 25, 2023

FCC Takes Steps To Combat Digital Discrimination

Equal access to high-quality, affordable broadband internet service has never been more critical, particularly as Americans increasingly rely on broadband for everything from work and education to healthcare and entertainment. Accordingly, as part of a broader effort to combat digital discrimination, the Federal Communications Commission recently [published](#) a Notice of Proposed Rulemaking (NPRM) that seeks to promote and facilitate equal access to broadband internet service for everyone.

As discussed in a [previous Update](#), this rulemaking is the result of a congressional directive in Section 60506 of the Infrastructure Investment and Jobs Act (the Infrastructure Act), signed into law in November 2021, to identify steps that will prevent and eliminate "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." This rulemaking follows a Notice of Inquiry (NOI) [released](#) by the FCC in March 2022 that sought preliminary comment on this statutory language and the rules the FCC should adopt to implement it.

In the NPRM, the FCC proposes and seeks comment on (1) possible definitions of "digital discrimination of access," (2) revisions to its informal consumer complaint process to accept complaints of digital discrimination, (3) rules that it should adopt to prevent digital discrimination of access, and (4) model policies and best practices for states and localities combating digital discrimination.

Comments are due on February 21, 2023, with reply comments due on March 21, 2023.

Defining "Digital Discrimination of Access"

In the NPRM, the FCC proposes to adopt a definition of "digital discrimination of access" that encompasses actions or omissions by a broadband provider that differentially affect consumers' access to broadband internet access service and where the actions or omissions are not justified on grounds of technical or economic infeasibility.

Disparate Impact vs. Disparate Treatment

The FCC proposes to base its definition of "digital discrimination of access" on disparate impact (i.e., discriminatory effect), disparate treatment (i.e., discriminatory intent), or both. Specifically, the FCC would define "digital discrimination of access" as "policies or practices, not justified by genuine issues of technical or economic feasibility," that either "differentially impact" or are "intended to differentially impact" "consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin."

In response to the NOI, commenters generally put forth arguments in support of one standard or the other. For instance, those in favor of a disparate impact standard contend that it is the only way to create an effective prohibition that captures discrimination as it happens in the real world, while those in favor of a disparate treatment standard contend that even broadband deployment driven by legitimate business reasons might lead to uneven deployment and that digital discrimination of access should not be understood to include such conduct. The FCC now seeks further comment on whether and how to incorporate these standards into its definition to best facilitate equal access.

Other Components of the Definition

The FCC seeks comment on other components of its proposed definition, including the following:

- **Covered Services.** The FCC seeks comment on the scope of services that individuals use when they experience digital discrimination of access, though it proposes to limit its focus to "broadband internet access service." The FCC also seeks comment on the types of technologies to which its rules should apply, as well as whether to include other services in its definition.
- **Covered Entities.** The FCC seeks comment on what types of entities should be covered by its definition of "digital discrimination of access," particularly whether the definition should extend beyond broadband providers to include those working on a provider's behalf, those involved in any of the logistical steps to provide broadband (e.g., state and local governments and those who maintain network infrastructure), and those that can affect an individual's ability to access broadband (e.g., landlords).
- **Prohibited Practices and Policies.** Based on the record developed in response to the NOI, the FCC seeks comment on whether it should consider policies and practices that relate to broadband infrastructure deployment, network upgrades, marketing or advertising, service provision, network maintenance, and customer service; service provider use of algorithms to make decisions about deployment and other aspects of providing internet service; and privacy and security practices.
- **Technical and Economic Feasibility.** Regarding how it should account for justifications based on technical and economic feasibility, the FCC seeks comment on two approaches: (1) adopting a safe harbor standard (i.e., a presumption of nondiscrimination when certain conditions are met or present) and (2) analyzing claims of infeasibility on a case-by-case basis. The FCC is considering whether it should adopt either approach or both.
- **Who Can Be Subject to Digital Discrimination.** The FCC seeks comment on how to identify those who might experience digital discrimination of access, asking whether individuals or communities (or both) may experience this problem, as well as whether the FCC should limit the concept of "consumers" in its definition to subscribers only.
- **Listed Characteristics.** The FCC also seeks comment on how to give meaning to the characteristics included as bases for discrimination (e.g., income level, race, ethnicity, color, religion, and national origin) and whether these characteristics should be considered exhaustive or merely illustrative.
- **Differential Impact.** Lastly, the FCC seeks comment on how it should compare services to determine when consumers face digital discrimination (e.g., whether it should look at the availability of service, or at the adoption, affordability, and quality of service already available), the geographic area across which it should compare (e.g., across cable franchise areas or a broader area), and the data sources it should use when making such determinations.

Revising the FCC's Informal Consumer Complaint Process

The FCC proposes to revise its informal consumer complaint process to accept complaints of digital discrimination of access. Generally, the FCC proposes to add a dedicated pathway for individuals to submit such complaints, with a separate pathway for submissions made by organizations (such as state, local, tribal, and community-based organizations). Some commenters argued that this bifurcated approach would ensure that organizations could advocate on behalf of disenfranchised and marginalized individuals who are either unserved or underserved as a result of digital discrimination of access. The FCC also proposes to collect voluntary demographic information from filers, and it seeks comment on making digital discrimination complaint data available to the public through the FCC's Consumer Complaint Data Center.

Seeking Comment on Rules To Be Adopted

Regarding the rules that it should adopt to address digital discrimination of access, the FCC seeks comment on four areas in particular.

First, the FCC seeks comment on whether it should adopt rules that broadly prohibit digital discrimination of access, and if so, how to structure and enforce such a prohibition. To implement a broad prohibition, the FCC suggests looking to analytical frameworks generally used by courts to evaluate claims of discrimination, such as a burden-shifting or "mosaic of factors" test. With respect to enforcement, the FCC seeks comment on several approaches, including (1) its current enforcement capabilities, (2) a new process for adjudicating formal complaints based on the Equal Employment Opportunity Commission's process (which some commentors argued would encourage settlement, prevent the FCC from being overwhelmed with complaints, and ensure individuals still have access to the legal system if necessary), and (3) reliance on state and local enforcement or the creation of private rights of action. Regardless of the approach adopted, commentators generally urged the FCC to ensure it is at least as accessible and user-friendly as the FCC's current Consumer Complaint Center and does not require an individual to seek the assistance of a lawyer.

Second, the FCC seeks comment on whether it should place affirmative obligations on broadband providers to address digital discrimination of access. In particular, the FCC seeks comment on proposals that call for providers to use FCC data to formulate plans to enhance digital equity in their operations and to give subscribers information on resources related to digital discrimination, among others.

Third, the FCC seeks comment on whether it should take action in other proceedings that bear on or relate to addressing digital discrimination, such as addressing state and local laws that may affect infrastructure deployment, spectrum policy, municipal broadband, and broadband service in multiple tenant environments.

Lastly, the FCC seeks comment on various other proposals for action it should take to address digital discrimination of access. In response to the NOI, commenters suggested proposals such as assisting those on tribal lands, undertaking outreach efforts to promote awareness of any digital discrimination rules the FCC adopts (e.g., developing a digital literacy program), and making organizational changes at the FCC (e.g., hiring staff with experience in discrimination law and establishing a dedicated ombudsperson role and Office of Civil Rights).

Adopting Model Policies and Best Practices for States and Localities

Following the congressional directive found in Section 60506, the FCC's Communications Equity and Diversity Council recently [issued](#) a report recommending certain model policies and best practices to prevent digital discrimination and promote digital equity (such as by making available recurring broadband equity assessments, identifying ways to incentivize equitable deployment, and managing rights-of-way). The FCC now proposes to adopt these recommendations as guidelines for states and localities.

Takeaways

The FCC's current rulemaking on digital discrimination underscores the Commission's sustained focus on promoting and facilitating equal access to broadband internet service for everyone. The NPRM not only represents another tangible step toward improving the reach of broadband infrastructure in the United States, but it also complements other FCC initiatives related to bridging the digital divide, such as those that seek to [subsidize](#) service for the disadvantaged and better [inform](#) internet access subscribers with broadband "nutrition" labels. More broadly, the NPRM also joins other digital equity-related efforts taking place across the Biden-

Harris administration, including a recent [request](#) for comment from the National Telecommunications and Information Administration to help inform its analysis of whether and how commercial data practices can negatively affect marginalized or underserved communities. Though much remains to be determined as the rulemaking proceeds, the NPRM is poised to help more Americans connect to and participate in the ever-more digital modern society.

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