Communications, Internet & Technology

Here Comes Sunshine: FCC Transparency Rule Guidance

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On May 19, the Chief Technologist, Office of General Counsel, and Enforcement Bureau of the Federal Communications Commission (FCC) added to a growing body of formal and informal guidance regarding the Commission’s Transparency Rule. This latest, a Public Notice, is the FCC’s third guidance document since the Commission first adopted the Transparency Rule in the 2010 Open Internet Order and the first since the FCC announced “enhancements” to the rule in the 2015 Open Internet Order. In this Public Notice, FCC staff clarifies requirements for disclosure of broadband Internet access service (BIAS) providers’ network management practices and performance metrics, with a special focus on the ways in which BIAS providers may rely on data from the Measuring Broadband America (MBA) program. The Notice also answers a few open questions concerning the requirement to disclose Transparency Rule data at the point of sale.

This Client Alert highlights important aspects of the Public Notice and suggests action items for clients seeking to incorporate the FCC’s guidance into their transparency practices.

New Clarity on Network Performance Metrics

The Transparency Rule, which has been in effect since 2011, requires BIAS providers to “publicly disclose accurate information regarding the network management practices, performance, and commercial terms” of their services. The May 19 guidance establishes clearer parameters for performance disclosures in a number of ways:

- **Distinct Service Categories.** In the 2015 Open Internet Order, the FCC explained that wireless providers must disclose independent sets of performance data for each service they offer (i.e., 3G or LTE). The Public Notice makes clear that wireline BIAS providers must also make independent disclosures for each combination of service technology (e.g., DSL or fiber) and tier speed.

- **Actual and Expected Performance Metrics.** The Public Notice clarifies that BIAS providers must disclose actual speeds and latency by reporting either median speeds or “a range of actual speeds that includes the median speed.” Similarly, latency may be reported using either median latency or “a range of actual latencies that includes the median latency.” Expected speeds and latency should be reported in the same format used to report actual speeds and latency.

- **Geographic Granularity.** Because BIAS performance is relatively uniform within wireline service areas where uniform network management practices are in use, the Public Notice explicitly allows BIAS providers to deliver one report regarding actual performance per “operational area for each broadband service offered.” Mobile BIAS providers may meet the FCC’s requirement for geographic specificity by
disclosing actual performance metrics for each of their Cellular Market Areas. The guidance indicates that the FCC will not require geographic granularity for expected performance data, except that “expected network performance disclosed for a geographic area should not exceed actual network performance in that geographic area.”

**Uses and Limits of MBA Data**

The Public Notice also discusses how fixed BIAS providers may—and may not—rely on data developed by the MBA program when complying with the Transparency Rule. In 2011 advisory guidance, FCC staff indicated that fixed broadband providers participating in the MBA program could “disclose their results from the project as a sufficient representation of the actual performance their customers can expect to experience.” Although the FCC reiterated in the 2015 Open Internet Order that such disclosure would constitute a safe harbor, this new guidance indicates that BIAS providers probably cannot rely on MBA data for some service tiers while remaining silent regarding the performance metrics of other tiers.

In view of this guidance, fixed BIAS providers without MBA data for every service tier may want to consider disclosing data regarding actual network performance that is developed in-house or from third-party sources. The Public Notice, moreover, indicates that such measurements should be taken from BIAS routes that “accurately represent the actual network performance experienced by consumers within [a given] geographic area.” In designing a measurement program, for instance, a BIAS provider may place measurement tools in broadband modems or in access networks, as long as the placement of those tools sufficiently represents the experience of end users.

**Point of Sale Guidance**

Finally, the Public Notice offers guidance on the requirement, adopted in the 2010 Open Internet Order, that BIAS providers must disclose their transparency data “at the point of sale.” Despite some confusing language in the 2015 Open Internet Order, the new guidance confirms that this disclosure may be made by directing consumers to a web link, as long as BIAS providers “ensure that consumers actually receive the information necessary to make informed decisions prior to making a final purchasing decision.” The Public Notice also clarifies that the recently released broadband “nutritional label” will operate as a voluntary safe harbor for BIAS providers at the point of sale. Elsewhere, however, FCC staff has indicated that the label will not operate as a safe harbor until the enhanced transparency requirements, which are subject to OMB review and approval, take effect.

**Action Items and Considerations**

- BIAS providers should take stock of their service tiers and geographic locations to understand the extent of their Transparency Rule reporting obligations.
- For tiers not enrolled in the MBA program, BIAS providers should implement alternate ways of representing consumers’ actual network performance experience.
- In developing measurement tools, fixed BIAS providers have some leeway to design an approach that is compatible with network functionality as long as it enables disclosure of actual and expected performance characteristics.
- BIAS providers should ensure that their customers actually receive the relevant Transparency Rule disclosures prior to sale, rather than receiving a link to be visited later.


2015 Open Internet Order, 30 FCC Rcd at 5674, ¶ 166.

Public Notice at 3.

Providers offering ranges must disclose the percentiles used to establish the reported ranges. See id.

Id.

See id.

Id. at 5.

See id.

Id. at 6.

The Public Notice anticipates that mobile BIAS providers may be able to use MBA data under certain circumstances, but only after its expected publication later in 2016. See id. at 5.


2015 Open Internet Order, 30 FCC Rcd at 5674-75, n.411.

Public Notice at 5-6.

See 2015 Open Internet Order, 30 FCC Rcd at 5674-75, n.411 (noting that “fixed providers that choose not to participate in MBA may measure and disclose performance . . . using the MBA’s methodology, internal testing, consumer speed data, or other data, including reliable, relevant data from third-party sources” (citing 2011 Advisory Guidance, 26 FCC Rcd at 9415)).

Public Notice at 7.

2010 Open Internet Order, 25 FCC Rcd 17,905, 17,940, ¶ 57 (2010).

Public Notice at 8.

Id.

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