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FCC Internet Freedom Order: What Changed in the Final Decision

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The FCC has released the final version of its Restoring Internet Freedom decision, which largely reverses the 2015 Open Internet order and the "network neutrality" rules adopted in that order. Since the FCC had released a draft order in November, the key elements of the decision were known before the final order was made public, but there were a few changes. The most significant change modifies when the order will go into effect, most likely delaying that date for several months.

The basic outline of the decision remains the same as it was in the draft and as described by the FCC at the time of the vote on December 14:

- The order reverses the 2015 determination that broadband internet access is a common carrier service. It reclassifies broadband internet as an "information service" subject to much lighter regulation and generally operating outside the FCC's authority.
- The order repeals the 2015 rules against blocking, throttling, discrimination and paid prioritization, as well as the "general conduct rule" that prohibited unreasonable actions by broadband internet service providers and the requirement that broadband ISPs interconnect with other companies on reasonable terms and conditions.
- The order modifies the "transparency rule," which requires ISPs to disclose information about their services. ISPs still will be required to disclose performance data, the terms and conditions of service and network management practices. The new rule adds disclosures for blocking access to content, application and service providers; throttling; prioritization of affiliated content and paid prioritization, while eliminating disclosures relating to the technical performance of ISP networks.
- The order preempts states from adopting ISP-specific laws or regulations that are more stringent than the rules adopted in the order but does not affect generally applicable laws that cover ISPs.
- Customers, companies that connect to users or customers via ISPs and others will address any unfair or anticompetitive practices through the FTC and antitrust law.

While there are many changes in the order, the vast majority are minor wording changes that have no substantive impact. Only a handful of the changes are significant:

- The order will not take effect until after the new transparency rule has been approved by the federal Office of Management and Budget. Under the original draft, everything but the transparency rule would have been effective 60 days after the order was published in the Federal Register. The approval process likely will take several months and may not be completed until the middle of the year or later. Once approval has been obtained, the FCC will announce the effective date. **Until that time, all of the old rules remain in place.**
- The discussion of the legal underpinnings of the transparency rule was modified significantly. The draft order relied on multiple provisions of the Communications Act to support the rule; the final version relies on only a single provision and concludes, in part, that the rule is justified because the information disclosed under the transparency rule could be used to provide reports to Congress on market barriers to deployment of services.
- There is a new section that responds directly to Commissioner Rosenworcel's argument that the FCC should have delayed action because of evidence of a significant number of fraudulent comments. The order concludes that the suspicious comments can be discounted because they were non-substantive.
- There is a new paragraph describing when appeals and requests for reconsideration of the order can be filed. This date will be based on when notice of the order appears in the Federal Register. It will be different (and much sooner) than the date when the order goes into effect.

It also is noteworthy that the order makes no mention of the agreement between the FCC and the FTC that gives the FTC the responsibility to enforce the accuracy of disclosures under the transparency rule. This means that

the FCC and FTC could modify that agreement without going through a new rulemaking process.

The most significant impact of these changes is that implementation of the new regime will be delayed for several months, and perhaps longer, by the OMB approval process. This means that any plans that ISPs and companies that offer content, applications and services over the internet may have to change their operations in response to the order also will have to wait for OMB approval. ISPs, in particular, will continue to be bound by both the substantive requirements of the 2015 order and by the 2015 transparency rules. In the meantime, the appeal process will begin and could be well underway – although almost certainly not completed – by the time the order goes into effect. However, once the order is in effect, ISPs and companies that depend on the internet to connect with customers are likely to negotiate new arrangements. Cooley lawyers have significant experience in the issues that are likely to arise in such arrangements.

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