

FCC Digital Discrimination Rules Will Affect Landlords, Building Owners, Contractors

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Having access to reliable broadband internet service has become critical as consumers and small businesses rely on the internet for everyday tasks. To help meet that need, Congress, as part of the Infrastructure Investment and Jobs Act, required the Federal Communications Commission (FCC) to adopt rules to facilitate equal access to broadband internet services. In response, the FCC has adopted [sweeping new rules](#) intended to identify instances of “digital discrimination” by any party that provides or facilitates access to broadband internet services to consumers or small businesses.

As drafted, these new rules apply to internet service providers – as well as building owners, contractors, infrastructure owners and landlords – to the extent that they affect consumer or small business access to broadband internet service (all of which the FCC references as “covered entities”). The majority of the new rules will become effective on March 22, 2024, and FCC enforcement actions are expected to begin approximately six months later.

Digital discrimination is defined as providing certain customers or prospective customers differing access to broadband internet service based on certain personal characteristics. While pricing disparities are one factor under the rules, speeds of service and availability also are significant considerations in the FCC’s analysis of whether discrimination is occurring, and so the availability of broadband service from a landlord in one location and the unavailability of that service in another could trigger an FCC investigation. Accordingly, a landlord or building owner’s offer of broadband facilities or services to some tenants but not others (even if the tenants are in different buildings), or offering those services on different terms, could violate the new rules. The new rules, therefore, greatly expand [the FCC’s current rules that govern telecommunications access in multiple-tenant environments](#).

At least eight appeals of the FCC’s orders have been filed in six federal appellate courts asking to vacate all or part of the FCC’s digital discrimination rules. However, none of those cases appear to include a request for the courts to stay – or delay implementation of – the FCC’s order, so the new rules will still take effect. While the courts may overturn aspects of the new rules, covered entities – including building owners – should evaluate how their policies, practices and existing broadband internet service infrastructure will be affected by the new rules, and then consider next steps, including whether to seek advisory opinions as discussed further below.

Overview of the new rules

Broadly speaking, digital discrimination includes policies, practices or actions that disadvantage disfavored communities’ access to broadband. The rules define “digital discrimination of access” as:

“Policies or practices, not justified by genuine issues of technical or economic feasibility, that

- (1) differentially impact consumers’ access to broadband internet access service based on their income level, race, ethnicity, color religion, or national origin, or
- (2) are intended to have such differential impact.”

The rules cover individuals, groups of persons, organizations and businesses that are current or prospective subscribers of “broadband internet access service.” The rules do not cover other types of broadband service – such as business data service or enterprise customer purchases. Residential consumers and small businesses that are current or prospective subscribers to broadband internet access service are specifically covered by the new rules.

This definition covers both intentional discrimination, known as disparate treatment, and also acts that result in discrimination, even if there was no discriminatory intent, known as disparate impact. A determination that a covered entity engaged in intentional discrimination will lead to a finding of liability in most cases, as the FCC does not expect the discriminatory conduct will be justified on technical or economic infeasibility grounds. For disparate impact claims, a statistical disparity alone will not establish liability. Instead, claimants must show that a challenged policy or practice is causing the disparity. Liability will be imposed only if the covered entity fails to prove that the challenged policy or practice is justified by “genuine issues of technical or economic feasibility.” The FCC did not establish feasibility presumptions or safe harbors, preferring to adopt a “case-by-case approach.”

Covered entities will have the burden of proof and will need to show that less discriminatory alternatives to the challenged policy or practice were not available due to genuine issues of technical or economic feasibility. Once the FCC begins an enforcement inquiry on digital discrimination, the target will need to prove there were no actions it could have reasonably taken to prevent the disparate outcome.

Covered elements of service

The rules cover all significant service quality metrics and all terms and conditions of service for broadband service. The FCC’s list includes, but is not limited to: pricing, technical terms and conditions of service – such as speed, capacity, latency and data caps, network infrastructure deployment (that is, availability of broadband in a particular area or differences in the speeds available in different places), network reliability, network upgrade, network maintenance, customer-premises equipment, installation, contractual terms, mandatory arbitration clauses, deposits, discounts, customer service, language options, credit checks, marketing or advertising, contract renewal, upgrades, account termination, and service suspension.

Enforcement

The FCC will establish a new portal for consumers and organizations to submit digital discrimination complaints. The FCC also can initiate formal enforcement reviews on its own based on any available information. When conducting an investigation, the FCC will review documentation submitted by the entity under investigation, as well as publicly available materials. The FCC also may ask for interviews and depositions of relevant personnel and could conduct audits. Existing civil rights standards will be applied to determine liability, although exactly how the FCC will apply the standards remains to be seen.

Advisory opinions

Recognizing that parties will have numerous questions about how the new rules will apply to existing policies and practices, the FCC will allow any covered entity to request an advisory opinion regarding the permissibility of its own policies and practices. The FCC will not entertain requests for advisory opinions on hypothetical scenarios, and it may decline to issue an advisory opinion. If a policy or practice currently in effect is found to violate the new rules, the affected party likely will be spared from enforcement action if the policy or practice is promptly corrected. The FCC did not establish limits on the types of issues for which a covered entity can request an advisory opinion.

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Key Contacts

Christy Burrow Washington, DC	cburrow@cooley.com +1 202 776 2687
Henry Wendel Washington, DC	hwendel@cooley.com +1 202 776 2943
Peter Crain Reston	pcrain@cooley.com +1 703 456 8189
John Lavoie Reston	jlavoie@cooley.com +1 703 456 8122

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