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# ICA Webcast

## Open Internet: Dead or Alive?

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# Disclaimer

This presentation is not intended to provide legal advice with respect to any particular situation, and no legal or business decision should be based solely on its content

# Open Internet: The Beginning



# Open Internet: The Beginning

- December 2010: “Net Neutrality” or “Open Internet” rules
  - **Transparency:** *Fixed and mobile* broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services
  - **No blocking:** *Fixed* broadband providers may not block lawful content, applications, services or non-harmful devices; *mobile* broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services
  - **No unreasonable discrimination:** *Fixed* broadband providers may not unreasonably discriminate in transmitting lawful network traffic

# Open Internet: The Beginning

- **Reasonable Network Management:** A network management practice is reasonable if it is appropriate and tailored to achieving a *legitimate network management purpose*, taking into account the particular network architecture and technology of the broadband Internet access service
- **Legitimate network management purposes** include: ensuring network security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users (including by premise operators), such as by providing services or capabilities consistent with an end user's choices regarding parental controls or security capabilities; and reducing or mitigating the effects of congestion on the network

# Open Internet: The Beginning

- 2010 Open Internet Rules overturned by D.C. Circuit Court of Appeals in *Verizon v. FCC*
  - The transparency rule was not invalidated, and has been in effect since 2011
  - In its decision, the D.C. Circuit provided a “road map” for FCC regulation of the Internet

# Open Internet: The Middle





# Open Internet: The Middle

- February 2015: The FCC reclassifies BIAS as a telecommunications service subject to common carrier regulation under Title II of the Communications Act
  - Reclassification upheld by the D.C. Circuit in *U.S. Telecom Association v. FCC*
  - BIAS providers begin reviewing practices and policies to ensure compliance with the new rules
  - Impact on RLECs already providing broadband on a common carrier basis?

# Open Internet: The Middle

- 2015 Open Internet “bright line” rules
  - **No blocking:** a BIAS provider shall not block lawful content, applications, services or nonharmful devices, subject to reasonable network management
  - **No throttling:** a BIAS provider shall not impair or degrade lawful Internet traffic on the basis of Internet content, application or service, or use of a non-harmful device, subject to reasonable network management
  - **No paid prioritization:** a BIAS provider shall not engage in paid prioritization

# Open Internet: The Middle

- 2015 Open Internet “Internet conduct” standard
  - A BIAS provider shall not unreasonably interfere with or unreasonably disadvantage (a) end users’ ability to select, access, and use BIAS or the lawful Internet content, applications, services, or devices of their choice, or (b) edge providers’ ability to make lawful content, applications, services, or devices available to end users
    - Subject to reasonable network management

# Open Internet: The Middle

- 2015 Open Internet “enhanced” transparency rule
  - **Transparency Rule:** A BIAS provider shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its BIAS services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings

# Open Internet: The Middle

- 2015 Open Internet “enhanced” transparency rule
  - “Enhancements” include additional or increased disclosure requirements concerning network management, performance characteristics and commercial terms

# Open Internet: The Middle

- Other 2015 Open Internet takeaways
  - BIAS classified as jurisdictionally interstate, preempting state regulation
  - FCC develops “safe harbor” forms for consumer-facing disclosures
  - Title II reclassification impacts broadband consumer privacy
    - “reasonable efforts” evolves to broadband CPNI

# Broadband Privacy

- December 2016 broadband consumer privacy rules
  - Harmonize FCC's existing voice CPNI rules with new rules adopted for BIAS providers
  - New rules will supersede or eliminate certain existing voice CPNI requirements
  - New rules will preempt inconsistent state laws

# Broadband Privacy

- Impact on voice CPNI rules:
  - Eliminate the requirement that notices of privacy practices be re-sent to customers every two years
  - Eliminate requirements regarding specific content for customer notices
  - Eliminate requirements concerning specific subject lines for emails containing notices of material changes to privacy policies
  - Eliminate the 30-day waiting period before a carrier can consider a customer's "opt out" approval to be effective



# Broadband Privacy

- Impact on voice CPNI rules (cont.):
  - Eliminate specific recordkeeping and annual compliance certification requirements
  - Eliminate specific customer authentication requirements in favor of a comprehensive and more flexible data security standard
  - Eliminate the intent-based trigger for reporting data breaches to affected customers, the FCC and law enforcement agencies

# Broadband Privacy

- The new rules will apply to customer information and content obtained by carriers by virtue of their voice and/or broadband service relationship with voice and/or broadband customers
- The new rules will not apply to information that carriers obtain by virtue of providing non-telecommunications services or “edge services” such as email, websites, cloud storage services, social media sites, music streaming services, video streaming services, etc.

# Broadband Privacy

- The new rules will require carriers to provide **privacy notices** that clearly and accurately inform customers about what confidential information carriers collect, how they use that information, under what circumstances they share that information, and the categories of entities with which they share
- The Order instructs the CAC to convene a multi-stakeholder process to develop a model privacy notice that will serve as a safe harbor for the FCC's notice requirements
  - model policy due prior to June 1, 2017

# Broadband Privacy

- The new rules will require carriers to present their privacy notice to customers at the **point of sale**, and that they make their privacy policies **persistently available** and easily accessible on their websites, applications and the functional equivalents thereof
- Carriers will also be required to give customers advance notice of material changes to their privacy policies

# Broadband Privacy

- The new rules will permit carriers to use and share customer information without “opt in” or “opt out” consent in order to: (1) initiate, render, bill and collect for telecommunications services; (2) protect the rights or property of the carrier, or to protect users and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, telecommunications services; (3) provide any inbound marketing, referral, or administrative services to the customer for the duration of a call; (4) provide customer location information and non-sensitive customer information in certain specified emergency situations and (5) to the extent such use or sharing is allowed or required by other law

# Broadband Privacy

- The new rules expressly permit carriers to use and share customer information without “opt in” or “opt out” consent in order to: (1) initiate, render, bill and collect for telecommunications services; (2) protect the rights or property of the carrier, or to protect users and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, telecommunications services; (3) provide any inbound marketing, referral, or administrative services to the customer for the duration of a call; (4) provide customer location information and non-sensitive customer information in certain specified emergency situations and (5) to the extent such use or sharing is allowed or required by other law

# Broadband Privacy

- The new rules will require that carriers inform their customers about customers' rights to opt in to or opt out (as applicable) of the use or sharing of their personally identifiable customer proprietary information for any reasons other than those expressly permitted
- The new rules will require "opt in" consent for the use or sharing of personally identifiable customer proprietary information classified as "sensitive," including (1) financial information; (2) health information; (3) information pertaining to children; (4) Social Security numbers; (5) precise geo-location information; (6) content of communications; (7) call detail information; and (8) web browsing history, application usage history, and their functional equivalents
- The new rules will require "opt out" consent to use or share personally identifiable customer proprietary information classified as "non-sensitive."



# Broadband Privacy

- Customer “opt in” or “opt out” consent obtained prior to the effective date of the new rules will remain valid for the covered time period
- Going forward, the new rules will require carriers who seek “opt in” or “opt out” consent to provide customers with access to a **choice mechanism** that is simple, easy to use, clear and conspicuous, in language that is comprehensible and not misleading, and made available at no additional cost to the customer
- This **choice mechanism** must be persistently available to customers on the carrier’s website, applications and the functional equivalents thereof or by other easily accessible, persistently available means



# Broadband Privacy

- The new rules will permit carriers to use or share **de-identified** customer information without customer consent, provided that carriers employ well-accepted, technological best practices to de-identify the information and that such practices keep pace with evolving technology and data privacy science
- Customer information is deemed **de-identified** if the carrier (1) determines that the information is not reasonably linkable to an individual or device; (2) publicly commits to maintain and use the data in a non-individually identifiable fashion and to not attempt to re-identify the data; and (3) contractually prohibits any entity to which it discloses or permits access to the de-identified data from attempting to re-identify the data

# Broadband Privacy

- The new rules will require carriers that choose to collect and maintain customer proprietary information to adopt and implement **security practices** appropriate to the nature and scope of their activities, the sensitivity of underlying data, the size of the carrier and technical feasibility
- These data security requirements include **robust customer authentication**, but do not impose specific methods or processes for customer authentication

# Broadband Privacy

- The new rules will require carriers to notify the FCC, law enforcement agencies and affected customers of data breaches, unless the carrier is reasonably able to determine that a data breach poses no reasonable risk of harm to customers

# Broadband Privacy

- The new rules will require carriers to maintain records of the dates on which they determine reportable data breaches have occurred and the dates on which customers are notified
- Carriers will be required to preserve written copies of all customer notifications
- Records must be preserved for a minimum of 2 years from the date a breach was reasonably determined to have occurred
- Carriers are not required to retain records of breaches that are not reportable to the FCC

# Broadband Privacy

- The new rules prohibit carriers from using “take-it-or-leave-it” broadband service offerings in which customers are required to waive privacy rights as a precondition to receiving service
- The new rules will impose heightened disclosure and customer choice requirements on carriers that offer financial incentives in exchange for the right to use a customer’s personal information
- The new rules permit business and enterprise voice customers to negotiate their own privacy and data security protections, which may vary from what the new rules or existing voice rules otherwise require

# Broadband Privacy

- The Order provides a staggered implementation timeline for the new rules
- The rules are subject to legal challenges
- Certain of the rules require OMB approval under the Paperwork Reduction Act (PRA)
- Many of the rules not scheduled to take effect until December 4, 2017
  - December 4, 2018 for smaller BIAS providers

# Open Internet: The End?



# Looking Ahead

- Core Open Internet rules or principles seem likely to remain in place, at least in some form
- Title II classification of BIAS in serious doubt
  - Forbearance vs. Fauxbearance
  - Section 706 authority
  - Broadband subscriber privacy



# Looking Ahead

- Watch the FCC, FTC and Congress
- Relief for small businesses

# Open Internet: What Next?

- All BIAS providers should be comply with the FCC's "bright line" rules, including the prohibitions on blocking, throttling and paid prioritization
- Smaller providers should continue to monitor developments relating to the enhanced transparency requirements

# Open Internet: What Next?

- BIAS providers should comply with the core transparency requirements, including prominent, public disclosures of accurate information regarding network management practices, performance and commercial terms of service
- Review point of sale disclosures and online disclosures to ensure compliance with these basic transparency requirements

# Broadband Privacy: What Next?

- Carriers should review their CPNI compliance policies and internal business processes to ensure compliance with existing rules and to identify any modifications which may be necessary as the new rules are implemented
- Carriers should implement or continue CPNI training programs for employees
- Carriers should review their customer-facing privacy policies and customer choice mechanisms to ensure that they comply with the existing rules

# Broadband Privacy: What Next?

- Carriers should develop a written comprehensive data security program
- Carriers should review and monitor their written data security programs to ensure that they remain reasonably effective in protecting customer proprietary information from unauthorized use, disclosure or access

# Broadband Privacy: What Next?

- Carriers should be mindful that they remain subject to all other applicable laws and regulations that affect their collection, use, or disclosure of communications, including but not limited to, the Electronic Communications Privacy Act (ECPA), the Communications Assistance for Law Enforcement Act (CALEA), Section 705 of the Communications Act, and the Cybersecurity Information Sharing Act (CISA)

# Questions ???

- R-E-L-A-X ... at least for a little bit

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