

## VPS Consulting Memo

# FCC Releases Rules Regarding Digital Discrimination

The 2021 Infrastructure Investment and Jobs Act (IIJA) directed the Federal Communications Commission (FCC) to “adopt final rules to facilitate equal access to broadband Internet access service, taking into account the issues of technical and economic feasibility presented by that objective, including – (1) preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin; and (2) identifying necessary steps for the [FCC] to take to eliminate discrimination described in paragraph (1).”<sup>1</sup>

On November 20, 2023, the FCC released a *Report and Order and Further Notice of Proposed Rulemaking* as directed taking the first steps in its mission to eliminate digital discrimination.<sup>2</sup> The FCC also adopted digital discrimination regulations under 47 C.F.R. § 16.1-16.7 and modified its regulations on practice and procedure to allow for digital discrimination complaints.

## Core Policy of Digital Discrimination

The core of the FCC’s digital discrimination rules can be found in 47 C.F.R. § 16.3(b)’s prohibition. It states in full:

**(b) It shall be unlawful for any broadband provider, or covered entity as described in this part, to adopt, implement or utilize policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers’ access to broadband Internet access service based on their income level, race, ethnicity, color, religion, or national origin or are intended to have such differential impact.**

Notably, the FCC’s digital discrimination rule prohibits both **1) discriminatory intent** and **2) discriminatory effect**.

The FCC is focusing on **prohibition** with this rule. **Affirmative obligations** will come later.

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<sup>1</sup> See 47 U.S.C. § 1754(b).

<sup>2</sup> <https://docs.fcc.gov/public/attachments/FCC-23-100A1.pdf>

## Enforcement of the Digital Discrimination Rules

At this time, the FCC intends to enforce the Digital Discrimination Rules through its informal complaint process (which could lead to formal proceedings and applicable administrative remedies). Some complaints may be handled through voluntary mediation. The FCC will have some measure of prosecutorial discretion on whether to act upon complaints and how they will be handled.

The FCC is considering the adoption of further rules (i.e. affirmative obligations) applicable to Internet Service Providers (ISPs) including **reporting requirements** and **compliance programs**. In its FNPRM, the FCC is proposing that each broadband provider be required to:

- (1) Submit an annual, publicly-available supplement to the Broadband Data Collection (BDC) describing, on a state-by-state or territory-by-territory basis, any large-scale broadband deployment, upgrade, and maintenance projects that were completed or substantially completed during the preceding calendar year and the communities served by such projects; and
- (2) Establish a mandatory internal compliance program requiring regular internal assessment of:
  - a. What communities are served by recent, pending, and planned large-scale projects, and
  - b. Whether the provider's broadband-related policies and practices might differentially impact consumers' access to broadband based on a listed characteristic and without adequate technical or economic justification.

Further descriptions of these proposals are detailed in the FNPRM portion of the FCC's Digital Discrimination Order.

The FCC is also considering creating an "Office of Civil Rights" to govern these matters.

## What can you do to comply with the new Digital Discrimination Rules?

Critical to compliance with the new rules is **monitoring, evaluating, and documenting** your decision-making process and results to ensure discrimination is not a factor and that differential impacts unrelated to genuine issues of economic and technical feasibility are not occurring. ISPs should keep track of the economic and technical aspects of their projects and policies in case evidence is needed to justify a particular course of action. The FCC has indicated that the economic and technical feasibility analysis will include an analysis of whether there were reasonably achievable, less discriminatory alternatives to a course of action that led to a differential impact.

All areas of service are fair game for analysis— both **technical** and **non-technical** aspects of service – including but not limited to deployment, upgrades, speeds, latency, maintenance, contract terms, pricing, deposits, and discounts.

ISPs should consider creating or designating compliance officers and/or committees to conduct assessments and reports regarding discrimination and differential impact. ISPs should also consider engaging with state and local bodies to hear their feedback and concerns.

ISPs should be prepared to come into compliance with the FCC's proposed **reporting requirements** if adopted.

Additionally, the FCC has included information on its proposed **compliance program** requirement and explained that an effective program typically includes:

- (1) Development and implementation of written policies and procedures;
- (2) Designation of a compliance officer and/or compliance committee;
- (3) Conducting effective training and education regarding the purposes and operation of the compliance program;
- (4) Developing effective lines of reporting and communication;
- (5) Conducting internal monitoring and auditing;
- (6) Enforcing standards through well-publicized disciplinary guidelines; and
- (7) Responding promptly to detected problems through corrective action.

For additional help to ISPs, the FCC has also created an **Advisory Opinion process** under 47 C.F.R. § 16.7 whereby ISPs can request an advisory opinion from the Enforcement Bureau regarding the permissibility of its own policies and practices affecting access to broadband internet access service. Consider utilizing this process.

## Vantage Point Advocacy

Vantage Point Solutions (VPS) continues to monitor this important topic and will be actively engaged from both a policymaking perspective as well as assisting providers with implementation of compliant practices. The Digital Discrimination order will be subject to reconsideration requests and appeals. If the FCC adopts new rules pertaining to this topic or any specific guidance that would be helpful to ISPs, we will inform you of the same. If you would like to consult with a member of our team, please contact:

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