

# Digital Discrimination Overview

April 15, 2024

Presented by:

**Barbara Greger**, John Staurulakis, LLC



# Agenda

1. **Overview of FCC Digital Discrimination Rules**
2. **Investigations**
3. **Compliance Best Practices**



# Section 1:

## Overview of the FCC's Digital Discrimination Rules



# Timing

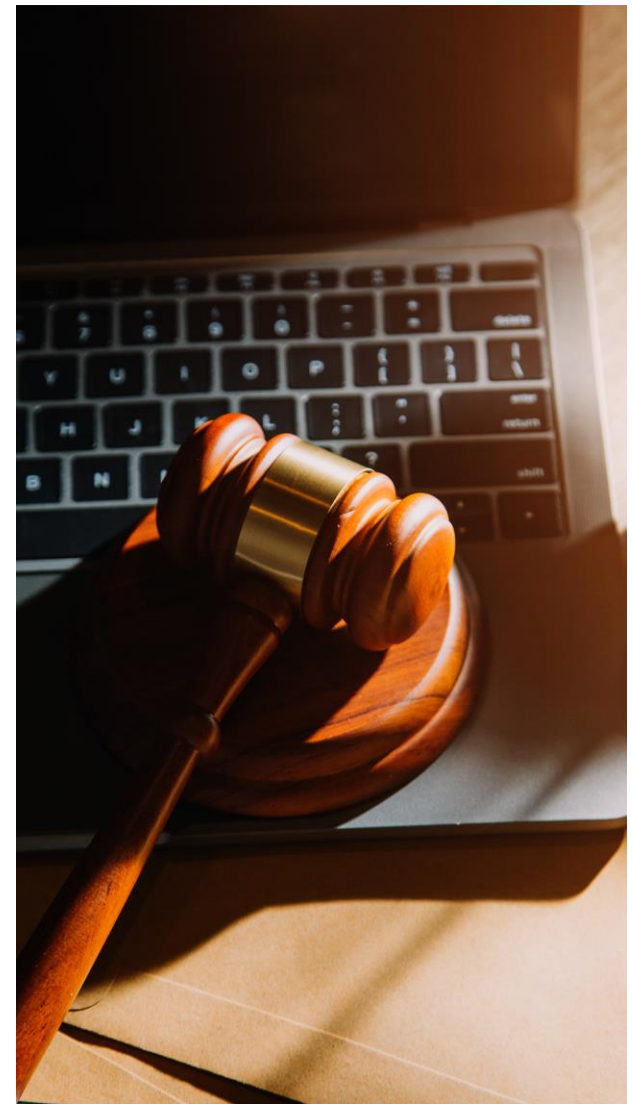
- Most of the rules took effect on March 22, 2024
- Complaint procedures and enforcement will take effect September 22, 2024
- The Federal Communications Commission (FCC) is also considering additional requirements on providers in a Further Notice of Proposed Rulemaking (FNPRM)
- Comment phase completed March 21, 2024
  - Reply comments due April 20, 2024

# Digital Discrimination

## The FCC's Report and Order:

Adopts rules that prohibit digital discrimination of access and a definition of “digital discrimination of access”

- Authorizes FCC investigations regarding digital discrimination of access
- Proposes annual reports and internal compliance protocols in a Further Notice of Proposed Rulemaking



# What Do These Rules Encompass?

Prohibits broadband providers (or entities supporting a broadband provider) from discrimination.

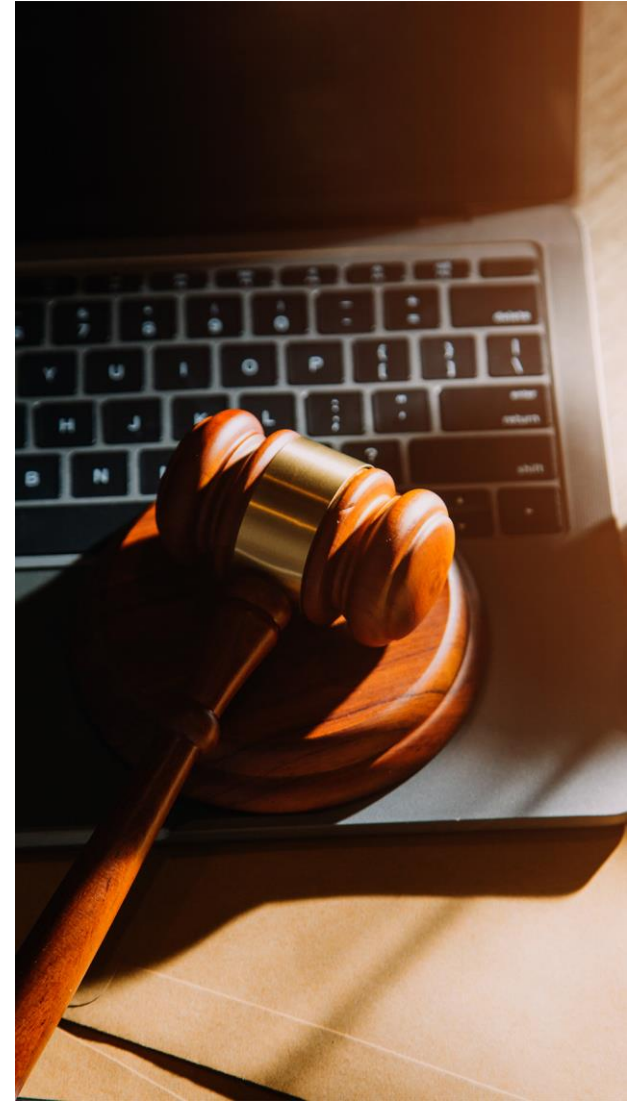
*“It shall be unlawful for any broadband provider, or covered entity as described in this part, to adopt, implement or utilize policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers’ access to broadband internet access service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

- Rules are very broad (cover almost all elements of broadband)
- FCC has lots of flexibility
  - Case-by-case basis
  - No compliance checklist or safe harbors.

# Listed Characteristics

FCC Rules prohibit  
Discrimination based on:

- Income Level
- Race
- Ethnicity
- Color
- Religion
- National Origin





# Covered Entities

Covered entities include, *but are not limited to:*

- **Broadband Providers**
- **Contractors** Retained By Broadband Internet Access Service Providers
- Entities Working Through **Partnership** Agreements Or Other Business Arrangements
- Entities **Facilitating** Or Involved In The Provision Of Broadband Internet Access Service
- Entities **Maintaining And Upgrading** Network Infrastructure
- Entities That **Otherwise Affect** Consumer Access To Broadband Internet Access Service

*Very broad scope!*



# Parts of Broadband Covered

- Deployment Technical Terms And Conditions of Service, such as Policies and Practices Regarding Speeds, Capacities, Latency, Data Caps
- Network Infrastructure Deployment
- Network Reliability
- Network Upgrades
- Network Maintenance
- Customer-Premises Equipment and Installation
- Non-Technical Terms and Conditions of Service such as Policies and Practices regarding Contractual Terms Generally
- Mandatory Arbitration Clauses
- Pricing
- Deposits
- Discounts
- Customer Service
- Language Options
- Credit Checks
- Marketing or Advertising
- Contract Renewal
- Upgrades
- Account Termination
- Transfers to Another Covered Entity
- Service Suspension

*“Includes but not limited to”*



# Evaluating Discrimination

Relying on U.S. Civil Rights law, the FCC provides two methods for evaluating discriminatory conduct:

- **Disparate Treatment**
- **Disparate Impact**

# Disparate Treatment

- Disparate Treatment is business conduct motivated by discriminatory *intent*.
- This is overt discrimination.
- According to the FCC:

“Based on the record before us, we do not expect to encounter many instances of intentional discrimination with respect to deployment and network upgrades, as there is little or no evidence in the legislative history of section 60506 [of the Infrastructure Act] or the record of this.”

# Disparate Impact

Disparate Impact = discriminatory *effects*

- Analysis is “*results*” based.
- If a provider’s provision of services has the demonstrable effect of discrimination, this too would be a violation of FCC rules.

# Presumption of Compliance for Federal Support

- FCC adopts a presumption of compliance for policies and practices that are in compliance with specific program requirements for the Broadband Equity, Access, and Deployment (BEAD) and Universal Service Fund (USF) high-cost programs.
- But the FCC does not specifically *exempt* recipients of federal support in the Order.

# Proposed Requirements in the FNPRM

FCC is evaluating additional proposed compliance obligations for providers:

- **Annual Reports:** submit an annual, publicly-available supplement to the March Broadband Data Collection
- **Internal Compliance Programs:** establish a mandatory internal compliance program requiring regular internal assessments, training, internal controls and processes

# Section 2: Investigations





# Methodology

Investigations concerning credible allegations that facially neutral policies or practices have discriminatory effects will generally involve:

1. the identification of a policy or practice that is causing a disparate impact on a prohibited basis
2. assessment of whether the policy or practice in question is justified by genuine issues of technical or economic feasibility
3. As part of Item (2), a determination of whether there were reasonably achievable, less discriminatory alternatives

# Enforcement

FCC adopts two paths of enforcement:

1. Informal Consumer Complaints
2. Direct FCC Investigation

*Complaints may be made by consumer groups*

Additionally, the FCC may receive allegations of digital discrimination of access from state, local, or Tribal governments.

# Section 3:

## Compliance Best Practices



# Responding to an FCC Investigation

- The rules will give covered entities an opportunity to present justifications for discriminatory policies and practices.
  - FCC wants to facilitate equal access while taking into account “issues of technical and economic feasibility.”
  - *“Issues of technical and economic feasibility” is the heart of any defense against allegations of discrimination.*
- Justifications likely will include proof that there is not a reasonably available and achievable alternative policy or practice that would serve the entity’s legitimate business objectives with less discriminatory effect.
  - FCC will apply these standards on a case-by-case basis.

# Keeping Your Business Safe

## Conduct an Operational Assessment

- Are your service offerings and build-out areas equitable to all *current* and *potential* customers?
- Do you have a process to document why plans are offered/not offered to customers?
- Do you have a customer complaint process in place today?
- Do you have written policies that detail how your company addresses digital discrimination?
- Are you training staff, disseminating policies, and implementing internal controls to be in compliance?

Clearly written policies and documentation of your business practices *will* make a difference if there is a complaint or audit.

# Keeping Your Business Safe

## Demographic Assessment

- Have you compared your services, pricing and deployments against U.S. Census information to identify potential areas of inadvertent risk based on income level, race, ethnicity, color, religion and national origin?
- Do you have a risk assessment matrix showing these potential risks?
- Do you assess competitors' buildout capabilities to gauge comparable offerings?

# Keeping Your Business Safe

## Create a Living Compliance Manual

- Develop written checklists, policies and procedures covering the following:
  - Respond promptly to detected problems and take corrective action
  - Address any consumer complaints and/or FCC inquiries
  - Develop, conduct and document staff training
  - Document reasoning for build-outs and/or upgrades in your footprint as well as those areas not selected
  - Maintain a risk assessment to continuously evaluate and identify potential areas of non-compliance



Thank you.

Connect with us:

**Barbara Greger**  
([Barbara.Greger@jsitel.com](mailto:Barbara.Greger@jsitel.com))

**Jenn Holtz**  
([Jenn.Holtz@jsitel.com](mailto:Jenn.Holtz@jsitel.com))

