

Legal Sidebar

Broadband Data Privacy and Security: What's Net Neutrality Got to Do With It?

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This Sidebar is the third in a series discussing the potential impact of the Federal Communications Commission's proposal to reclassify broadband Internet access services (BIAS). This Sidebar focuses on the proposal's possible effect on the regulation of BIAS providers' privacy practices.

Whether the Federal Trade Commission (FTC) or the Federal Communications Commission (FCC) has or should have authority to regulate the privacy and data security practices of broadband Internet access service (BIAS) providers (e.g., Internet services offered via cable broadband, fiber optics, or digital subscriber lines) has been a [subject of great interest](#). Regulation of BIAS providers' privacy practices interplays with regulation of BIAS providers' data transmission practices. As discussed in [related sidebars](#), the FCC is reviewing the current regulations governing BIAS providers' data transmission practices, which are commonly referred to as net neutrality regulations. This sidebar explains how the current framework affects FTC and FCC authority to regulate BIAS providers' data privacy practices. This sidebar also considers the potential effects on that authority if the FCC adopts the [proposals](#) offered in its recent Notice of Proposed Rulemaking (NPRM).

The current debate over the regulation of broadband privacy practices was influenced by the FCC's adoption of the [2015 Open Internet Order](#) (2015 Order), which imposed net neutrality rules on BIAS providers. These rules [govern](#) how BIAS providers may manage data transmissions over their networks. As part of the 2015 Order, the FCC also [reclassified](#) BIAS as "telecommunication services" rather than "information services" under the Communications Act of 1934 (Communications Act), as amended by the Telecommunications Act of 1996. Telecommunications service providers [are](#) regulated as common carriers under Title II of the Communications Act (Title II). Importantly, [Section 222](#) of Title II places requirements on providers of telecommunications services to protect the privacy of data they collect. In the 2015 Order, the FCC [applied](#) Section 222 to BIAS providers, and subsequently conducted a separate rulemaking to clarify how BIAS providers would comply with that provision.

The FCC's 2015 Order also affected the FTC's separate authority over the privacy practices of BIAS providers. [Section 5](#) of the Federal Trade Commission Act (FTC Act) prohibits unfair and deceptive trade practices in interstate commerce. While the FTC does not have explicit authority to regulate companies' privacy practices, the [agency](#) has interpreted violations of companies' stated privacy policies to be unfair or deceptive trade practices prohibited by Section 5. Using this authority, the FTC has overseen the privacy practices of entities operating in interstate commerce that are not subject to more specific federal privacy laws (e.g., the [Health Insurance Portability and Accountability Act](#) and the [Graham-Leach-Bliley Act](#)). However, [Section 5](#) also prohibits the FTC from enforcing the FTC Act against common carriers already covered by [the Communications Act](#). The adoption of the 2015 Order [reclassified](#) BIAS as a telecommunications service, which is regulated as a common carrier service. As a result, the FTC currently does not have [authority](#) to enforce Section 5 against BIAS providers.

In October 2016, the FCC [promulgated](#) final rules (commonly referred to as the Broadband Privacy Order), which would have governed the management, collection, and disclosure of data by BIAS providers. Congress, in response, [enacted](#) a Joint Resolution of Disapproval under the [Congressional Review Act](#) (CRA) disapproving the rules and prohibiting the FCC from issuing new rules that are [substantially the same](#) as those that were disapproved. However,

disapproval of the Broadband Privacy Order did not alter the classification of BIAS as a telecommunications service under the Communications Act. The FTC, therefore, [continues](#) to lack authority under Section 5 of the FTC Act to regulate the privacy practices of BIAS providers. The FCC has authority over BIAS privacy practices pursuant to Section 222 and, potentially, other provisions of the Communications Act. However, the scope and extent of the FCC's authority to implement privacy rules may be limited by the CRA's [prohibition](#) on the issuance of new rules that are substantially the same as those contained in the Broadband Privacy Order.

The FCC's current Chairman, Ajit Pai, and the FTC's current Acting Chairman, Maureen Ohlhausen, [have said](#) that they believe that the FTC is the better agency to oversee the privacy practices of BIAS providers and that jurisdiction over those practices should be returned to the FTC. On May 18, 2017, the FCC took the first step in that process by [voting](#) to approve an [NPRM](#), which proposes to reclassify BIAS as an information service. Reclassification would end the common carrier status of BIAS providers, and the FTC's authority to oversee BIAS providers' privacy practices under Section 5 of the FTC Act would resume. Indeed, the NPRM [explicitly](#) "propose[s] to return jurisdiction over Internet service providers' privacy practices to the FTC[.]"

Assuming the FCC reclassifies BIAS as an information service, another legal issue arises. In 2016, a three-judge panel on the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) decided [FTC v. AT&T Mobility](#). The [question](#) before the court was whether the common carrier exemption from the FTC Act was status-based (i.e., it applied to any entity with the *status* of a common carrier) or activity-based (i.e., it applied only *to the extent* that an entity provides a common carrier service). The court [held](#) that the exemption is status-based. In other words, if a company has common carrier status under the Communications Act, the FTC Act prohibits the FTC from enforcing Section 5 against that company *in all lines of its business*. The court left unresolved the degree of common carrier activity necessary for an entity to receive common carrier status. However, it was undisputed in the case that AT&T engaged in common carrier activity in a substantial part of its business, which was sufficient to confer common carrier status. On [May 9, 2017](#), the Ninth Circuit granted [rehearing](#) en banc in the case, and accordingly, under [Circuit Rules](#), the three-judge panel decision shall not be cited as precedent within the Ninth Circuit except to the extent the panel decision is adopted by the en banc court.

If the Ninth Circuit sitting en banc adopts the panel's reasoning, it could affect the FTC's authority to oversee the privacy practices of some BIAS providers. Under the panel's decision, if a BIAS provider also provides telecommunication services, such as regular [wireline](#) and [wireless](#) telephone services, and those other services constitute a substantial portion of the provider's business, it is possible that none of the BIAS providers' services would be governed by Section 5 of the FTC Act. Accordingly, those providers may not be subject to the FTC Act, even when providing non-common carrier services, like BIAS. Such a result implies that neither the FCC (if it opts to no longer treat BIAS as a telecommunications service, as it proposed in its recent NPRM) nor the FTC would have authority to oversee the privacy practices of BIAS providers, whose non-BIAS, telecommunications services comprise a substantial part of their businesses. In any event, Congress may provide clarity to the regulatory status of BIAS by enacting legislation to eliminate the uncertainty over which regulatory agency will oversee BIAS providers.

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