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## *Net Neutrality at the FCC: Title II, Round 2, With a Twist*

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On October 19, the Federal Communications Commission (“FCC”) is expected to adopt a Notice of Proposed Rulemaking (“NPRM”) proposing to reclassify broadband internet access service as a “telecommunications service” under Title II of the Communications Act. This long-expected move marks the start of a push to implement net neutrality rules in line with those put in place in 2015 and reversed by later FCC leadership in 2018. While the NPRM largely mirrors the 2015 framework, in particular including broad forbearance from some of the most controversial regulatory elements of Title II, it departs from the past framework in several key ways, particularly regarding areas that may *not* be covered by the FCC’s forbearance. Also new is an emphasis on public safety, national security, and cybersecurity in the policy justifications for the rulemaking, marking yet another example of the FCC’s increasing forays into these spaces. A draft of the NPRM was released last week, and we’ve now had a chance to digest the FCC’s new direction on this intensely controversial issue.

### **Proposed Framework**

As widely expected given that September saw the start of the FCC’s first Democratic majority since early 2017, the NPRM proposes to reclassify broadband service as a “telecommunications service” under Title II, a regulatory regime designed for common carrier phone services but used to implement net neutrality rules in 2015 as well. The proposed net neutrality rules will generally prohibit blocking and throttling of content by internet service providers, and impose transparency requirements regarding network management practices—in each case, generally consistent with the rules previously in place from 2015 to 2018.

### **Forbearance & Section 214**

While Title II gives the FCC the power to impose rate regulation, network access and unbundling, and other major regulatory requirements on telecommunications services providers, the NPRM proposes (consistent with the 2015 rules) to forbear from applying these and numerous other Title II provisions.

Perhaps most significant is an area where the FCC is *not* proposing forbearance—Section 214. Telecommunications providers need authority under Section 214 to provide domestic and international telecommunications services in the United States, and up to this point, those authorizations have not been required for broadband providers. While domestic authority is granted by rule today, international authorizations (and transfers of control of those authorizations) require a lengthy application process including detailed ownership disclosures. Those disclosures in turn often trigger national security review by the Committee for the Assessment of Foreign Participation in the United States Telecommunications

Services Sector. This group, informally known as Team Telecom, is made up of executive agency representatives who conduct a national security review of an application, and can impose additional mitigation and reporting requirements. We've written previously about developments in that group's process [here](#).

In total, the Section 214 application or transfer of control process can take months, and in extreme cases a year or longer, so imposing Section 214 requirements on broadband providers would be a major change both operationally for those companies, and for investors active in the broadband and communications markets. The NPRM does not propose exactly how applicability of Section 214 to broadband would work, but invites extensive input from stakeholders regarding how to apply the existing Section 214 regime to broadband providers. Where the FCC lands on final rules in this area is something to monitor closely.

### **Public Safety, National Security, and Cybersecurity**

While the NPRM raises a broad array of policy arguments in favor of the changes, of note are an increased focus on public safety and in particular cybersecurity. The FCC's 2015 net neutrality rules and application of Title II did not directly contemplate cybersecurity requirements for broadband providers, nor address the resiliency of networks—both of which are major areas of focus for the FCC in recent years.

The NPRM does not go so far as to propose cybersecurity requirements, but is explicit that Title II would open the door to that possibility in the future. Outage reporting and monitoring are also not off the table, and the NPRM makes a point of highlighting threats to network integrity from foreign network equipment, referencing the past several years' FCC actions to restrict and prohibit the use of certain Chinese companies' network hardware in U.S. networks. This proceeding will not only have immediate impact in terms of net neutrality rules, but also set up potentially years of additional regulatory action in the broadband space looking ahead.

### **Next Steps**

There remains a great deal to play out before any of this is finalized, and the rules can and likely will change. The NPRM is expected to be formally adopted at the FCC's next meeting on October 19. After that comes likely extended public comment, and the earliest rules could be finalized is, realistically, sometime in 2024. This will be a major agency priority, though, and has sweeping implications for investors as well as network operators who will have ample opportunity to actively engage in and influence the FCC's rulemaking process.



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