

Preventing and Eliminating Digital Discrimination

What Congress Said

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (Infrastructure Act) of 2021. Section 60506(b) of the Infrastructure Act states:

Not later than 2 years after November 15, 2021, the Commission shall 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 Commission to take to eliminate discrimination described in paragraph (1).

Congress defined the term “equal access” in section 60506 to mean the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions.

What the FCC Did

- The FCC established a Task Force to Prevent Digital Discrimination, which conducted multiple listening sessions across the U.S. to inform the rulemaking process.
- Using information from this outreach and public comments the FCC received in response to a *Notice of Inquiry* (Mar. 16, 2022) and a *Notice of Proposed Rulemaking* (Dec. 21, 2022), the FCC adopted final rules in a *Report and Order and Further Notice of Proposed Rulemaking* on Nov. 15, 2023.

What Do the Rules Say

The new rules, which will be effective on March 22, 2024, establish a framework to facilitate equal access to broadband internet services by preventing digital discrimination of access.

Definition – In the *Report and Order*, the FCC defines “digital discrimination of access” as:

- “Policies or practices, not justified by genuine issues of technical or economic feasibility, that (1) differentially impact consumers’ access to broadband internet access service based on their income level, race, ethnicity, color, religion or national origin, or (2) are intended to have such differential impact.”

What is Prohibited – A policy or practice will violate the FCC’s prohibition on digital discrimination of access if it discriminates, either by intent or in effect, based on one of section 60506’s listed characteristics. The rules require assessment in the first instance of whether a policy or practice is discriminatory; and if so, whether there were reasonably available and achievable alternatives (i.e., alternatives that were technically and economically feasible) that would have been less discriminatory.

While fully taking into account technical and economic challenges, these rules target business practices and policies that impede equal access to broadband without adequate justification. The rules focus on the very real problem of outcome, such as when decisions untainted by discriminatory intent nevertheless cause different communities to receive different access to broadband services.

Who is Covered –

- *Covered Consumers* are current and prospective subscribers to broadband internet access service, including individuals, groups of persons, organizations, and groups of organizations.
- *Covered Entities* are entities that provide, facilitate, and affect consumer access to broadband.
- *Covered Services* include broadband internet access services.
- *Covered Elements of Service* include all policies and practices that may affect a consumer’s ability to have “equal access” to broadband internet access service.

How Will it Work –

The FCC will add to its Consumer Inquiries and Complaint Center a dedicated pathway for digital discrimination of access complaints. Both individual consumers and community and public interest organizations will be able to file informal complaints. The FCC is completing administrative requirements for the complaint process and will announce the process steps and easy-to-submit form for consumers to use in the first half of 2024.

There is also a process for covered entities to seek Advisory Opinions from FCC staff concerning the permissibility of their policies and practices.

FCC staff will review complaint information internally to inform policy and, when appropriate, to initiate potential enforcement action. The FCC will launch investigations into complaints and allegations of digital discrimination of access on a self-initiated basis. The FCC will not initiate possible enforcement investigations solely concerning conduct that produces differential impacts under the rules until six months after the effective date of the rules.

The FCC will investigate possible instances of discrimination of broadband access, work with companies to solve problems, facilitate mediation, and, when necessary, penalize companies for violating the rules.

The FCC will designate a Special Advisor for Equal Broadband Access within the Wireline Competition Bureau to provide technical assistance to all stakeholders.

Looking Ahead

The FCC issued a *Further Notice of Proposed Rulemaking* in November that proposed affirmative obligations (compliance measures) to facilitate equal access. These proposed rules would require that:

- Broadband providers annually submit to the FCC information about any large-scale broadband deployment, upgrade, or maintenance projects that were completed or substantially completed that year and the communities served by those projects, and
- Establish a mandatory internal compliance program requiring regular assessment of the communities served by recent, pending and planned large-scale projects; and whether those projects may differentially impact access to broadband.

The FCC is also seeking further comment on whether to establish an Office of Civil Rights.

Comments on these proposals were due on or before **March 4, 2024**. Reply comments are due on or before **April 1, 2024**. More information can be found on the Commission’s website.

Stay Informed

Keep up-to-date by visiting <https://www.fcc.gov/task-force-prevent-digital-discrimination>