

Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–42266, approved by the Commission on December 22, 1999, which adopted Rule 10–01 of Regulation S–X under the Securities Act of 1933 and the Securities Exchange Act of 1934. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

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Rules and Forms Administered by the Division of Investment Management

Title: Rule 17j–1.

Citation: 17 CFR 270.17j–1.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–17(j), 80a–37(a).

Description: Rule 17j–1 under the Investment Company Act of 1940 (“Act”) prohibits fraudulent, deceptive or manipulative acts by persons affiliated with a registered investment company (“fund”) or with the fund’s investment adviser or principal underwriter in connection with their personal securities transactions in securities held or to be acquired by the fund. The rule requires 17j–1 organizations to adopt codes of ethics reasonably designed to prevent fraud and requires fund personnel to report their personal securities transactions to their 17j–1 organization.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–23958, which was approved by the Commission on Aug. 20, 1999. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

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Title: Rule 154.

Citation: 17 CFR 230.154.

Authority: 15 U.S.C. 77a *et seq.*

Description: Rule 154 under the Securities Act of 1933 permits an issuer or broker-dealer that has an obligation to deliver a prospectus to multiple persons at a single address to satisfy that obligation by delivering a single prospectus, subject to certain conditions.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–24123, which was approved by the Commission on November 4, 1999. Comments to the proposing release and any comments to

the Initial Regulatory Flexibility Analysis were considered at that time.

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Rules and Forms Administered by the Division of Trading and Markets

Title: Rule 10b–18.

Citation: 17 CFR 240.10b–18.

Authority: 15 U.S.C. 78b, 78c, 78i(a)(6), 78j(b), 78m(e), 78o(c) and 78w(a).

Description: Rule 10b–18 under the Securities Exchange Act of 1934 Rule 10b–18 provides a “safe harbor” from liability for manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b–5 thereunder, when an issuer or affiliated purchaser of the issuer bids for or buys shares of its common stock in compliance with the Rule’s conditions.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–41905, which was approved by the Commission on Sept. 23, 1999. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

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Title: Rules 15b3–1, 15Ba2–2, and 15Ca2–1.

Citation: 17 CFR 240.15b3–1, 240.15Ba2–2, and 240.15Ca2–1.

Authority: 15 U.S.C. 78o(a), 78o(b), 78o–4(a)(2), 78o–5(a)(2), and 78w(a).

Description: Rule 15b3–1 under the Securities Exchange Act of 1934 governs amendments to applications for registration as a broker or a dealer. Rule 15Ba2–2 under the Securities Exchange Act of 1934 governs applications for registration of non-bank municipal securities dealers whose business is exclusively intrastate. Rule 15Ca2–1 under the Securities Exchange Act of 1934 governs applications for registrations as a government securities broker or government securities dealer.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–41594, which was approved by the Commission on July 2, 1999. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

By the Commission.

Dated: September 3, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22574 Filed 9–9–10; 8:45 am]

BILLING CODE 8010–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[GN Docket No. 09–191; WC Docket No. 07–52; DA 10–1667]

Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission’s Wireline Competition and Wireless Telecommunications Bureaus (collectively, the Bureaus) seek comment on two issues in the open Internet proceeding that merit further development. The first issue is the relationship between open Internet protections and services that are provided over the same last-mile facilities as broadband Internet access service (commonly called “managed” or “specialized” services). The second is the application of open Internet rules to mobile wireless Internet access services, which have unique characteristics related to technology, associated application and device markets, and consumer usage. The intended effect is to develop a more detailed record in the Open Internet proceeding.

DATES: Comments are due on or before October 12, 2010 and reply comments are due on or before November 4, 2010.

ADDRESSES: You may submit comments, identified by GN Docket No. 09–191 and WC Docket No. 07–52, by any of the following methods:

- *Federal Communications Commission’s Web Site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.
- *E-mail:* ecfs@fcc.gov, and include the following words in the body of the message: “get form.” A sample form and directions will be sent in response. Include the docket numbers in the subject line of the message.
- *Mail:* Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.
- *Hand Delivery/Courier:* Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.
- Commercial overnight mail (other than U.S. Postal Service Express Mail

and Priority Mail): 9300 East Hampton Drive, Capitol Heights, MD 20743.

- *People with Disabilities*: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

William Kehoe, Competition Policy Division, Wireline Competition Bureau, at 202-418-1580 or william.kehoe@fcc.gov, or John Spencer, Broadband Division, Wireless Telecommunications Bureau, at 202-418-2487 or john.spencer@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Bureau's *Public Notice* in GN Docket No. 09-191 and WC Docket No. 07-52, DA 10-1667, released on September 1, 2010. The Notice of Proposed Rulemaking initiating this proceeding, *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 74 FR 62638, November 30, 2009 (*Open Internet NPRM*) addressed two issues in less detail than many other issues, and the Commission's analysis would benefit from further development of these issues in the record. The Bureaus therefore found it appropriate to further inquire into these areas. The complete text of this document is available on the Commission's Internet site at www.fcc.gov and for public inspection Monday through Thursday from 8 a.m. to 4:30 p.m. and Friday from 8 a.m. to 11:30 a.m. in the Commission's Consumer and Governmental Affairs Bureau Reference Information Center, Room CY-A257, 445 12th Street, SW., Washington, DC 20554. The full text of the *Public Notice* may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Washington, DC 20554, telephone 202-488-5300, facsimile 202-488-5563, e-mail at fcc@bcpiweb.com, or via its Web site at <http://www.bcpiweb.com>.

Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. When filing comments, please reference GN Docket No. 09-191 and WC Docket No. 07-52.

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. Comments filed through the

ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of the proceeding, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking numbers. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). Parties are strongly encouraged to file comments electronically using the Commission's ECFS. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

Effective December 28, 2009, all hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours at this location are 8 a.m. to 7 p.m.

Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY-B402,

Washington, DC 20554, 202-488-5300, or via e-mail to fcc@bcpiweb.com.

Documents in GN Docket No. 09-191 and WC Docket No. 07-52 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St., SW., Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone 202-488-5300, facsimile 202-488-5563, TTY 202-488-5562, e-mail fcc@bcpiweb.com.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Synopsis of Public Notice

1. In order to promote innovation, investment, competition, and free expression, and to protect and empower consumers, in late 2009 the Commission issued the *Open Internet NPRM*. That *NPRM* sought public comment on rules that would codify the four principles adopted in *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*) and strengthen them by prohibiting broadband Internet access providers from treating lawful traffic in a discriminatory manner, and by requiring providers to be transparent regarding their network management practices. The discussion generated by the Commission's *Open Internet* proceeding appears to have narrowed disagreement on many of the key elements of the framework proposed in the *NPRM*: First, that broadband providers should not prevent users from sending and receiving the lawful content of their choice, using the lawful applications and services of their choice, and connecting the nonharmful devices of their choice to the network, at least on fixed or wireline broadband platforms. Second, that broadband providers should be transparent regarding their network management practices. Third, that with respect to the handling of lawful traffic, some form of anti-discrimination protection is appropriate, at least on fixed or wireline broadband platforms. Fourth, that broadband providers must be able to reasonably manage their networks, including through appropriate and tailored mechanisms that reduce the effects of congestion or address traffic that is unwanted by users or harmful to

the network. Fifth, that in light of rapid technological and market change, enforcing high-level rules of the road through case-by-case adjudication, informed by engineering expertise, is a better policy approach than promulgating detailed, prescriptive rules that may have consequences that are difficult to foresee.

2. There are two complex issues, however, that merit further inquiry. The first is the relationship between open Internet protections and services that are provided over the same last-mile facilities as broadband Internet access service (commonly called “managed” or “specialized” services). The second is the application of open Internet rules to mobile wireless Internet access services, which have unique characteristics related to technology, associated application and device markets, and consumer usage. The *NPRM* raised both of these issues but addressed them in less detail than many other issues, and the Commission’s analysis would benefit from further development of these issues in the record. The Bureaus therefore find it appropriate to further inquire into these areas.

A. Specialized Services

3. In the *NPRM*, the Commission recognized that broadband providers may provide other services over the same last-mile facilities used to provide broadband Internet access service. These services may drive additional private investment in networks and provide consumers new and valued services. However, there appear to be three general areas of concern about how to maintain the investment-promoting benefits of specialized services while protecting the Internet’s openness: The *NPRM* used the term “managed or specialized services” to describe the services that we here call “specialized services.” We avoid the term “managed services” to prevent confusion with services that have long been provided by communications service providers to enterprise customers, which may include managing computing and communications facilities on behalf of such customers.

(1) *Bypassing Open Internet Protections*: Open Internet protections may be weakened if broadband providers offer specialized services that are substantially similar to, but do not technically meet the definition of, broadband Internet access service, and if consumer protections do not apply to such services. A similar concern may arise if specialized services are integrated into broadband Internet access service; for example, if a

broadband provider offers broadband Internet access service bundled with a “specialized service” that provides prioritized access to a particular Web site.

(2) *Supplanting the Open Internet*: Broadband providers may constrict or fail to continue expanding the network capacity allocated to broadband Internet access service in order to provide more capacity for specialized services. If this occurs, and particularly if one or more specialized services serve as substitutes for the delivery of content, applications, and services over broadband Internet access service, the open Internet may wither as an open platform for competition, innovation, and free expression.

(3) *Anti-competitive Conduct*: Broadband providers may have the ability and incentive to engage in anti-competitive conduct with respect to specialized services, particularly if they are vertically integrated providers of content, applications, or services; or if they enter into business arrangements with third-party content, application, or service providers concerning specialized service offerings. Such discriminatory conduct could harm competition among, and private investment in, content, application, and service providers.

These concerns, particularly the second and third, may be exacerbated by worries that due to limited choice among broadband Internet access service providers, consumers may not be able to effectively exercise their preferences for broadband Internet access service (or content, applications, or services available through broadband Internet access service) over specialized services.

4. There appear to be at least six general policy approaches to addressing these concerns while promoting private investment and encouraging the development and deployment of new services that benefit consumers. These approaches could be employed alone or in combination:

(A) *Definitional Clarity*: Define broadband Internet access service clearly and perhaps broadly, and apply open Internet rules to all forms of broadband Internet access service. Specialized services would be those services with a different scope or purpose than broadband Internet access service (*i.e.*, which do not meet the definition of broadband Internet access service), and would not be subject to the rules applicable to broadband Internet access service. But such services could be addressed through one or more of the below policy approaches, or, alternatively, the Commission could

address the policy implications of such services if and when such services are further developed in the market.

(B) *Truth in Advertising*: Prohibit broadband providers from marketing specialized services as broadband Internet access service or as a substitute for such service, and require providers to offer broadband Internet access service as a stand-alone service, separate from specialized services, in addition to any bundled offerings.

(C) *Disclosure*: Require providers to disclose information sufficient to enable consumers, third parties, and the Commission to evaluate and report on specialized services, including their effects on the capacity of and the markets for broadband Internet access service and Internet-based content, applications, and services. The Commission or Congress could then take action if necessary.

(D) *Non-exclusivity in Specialized Services*: Require that any commercial arrangements with a vertically-integrated affiliate or a third party for the offering of specialized services be offered on the same terms to other third parties.

(E) *Limit Specialized Service Offerings*: Allow broadband providers to offer only a limited set of new specialized services, with functionality that cannot be provided via broadband Internet access service, such as a telemedicine application that requires enhanced quality of service.

(F) *Guaranteed Capacity for Broadband Internet Access Service*: Require broadband providers to continue providing or expanding network capacity allocated to broadband Internet access service, regardless of any specialized services they choose to offer. Relatedly, prohibit specialized services from inhibiting the performance of broadband Internet access services at any given time, including during periods of peak usage.

5. The Bureaus seek comment on each of these concerns and suggested policy responses, as well as any other concerns or policies regarding specialized services that the Commission should consider. Which policies will best protect the open Internet and maintain incentives for private investment and deployment of innovative services that benefit consumers? In addition, the Bureaus seek comment on whether specialized services provided over mobile wireless platforms raise unique issues.

B. Application of Open Internet Principles to Mobile Wireless Platforms

6. The *NPRM* seeks comment on “how, to what extent, and when”

openness principles should apply to mobile wireless platforms, with a particular emphasis on furthering innovation, private investment, competition, and freedom of expression. In light of developments since the issuance of the *NPRM*, it is now appropriate to update the record on certain questions related to the application of openness principles to wireless. Mobile broadband providers such as AT&T Mobility and Leap Wireless (Cricket) have recently introduced pricing plans that charge different prices based on the amount of data a customer uses. The emergence of these new business models may reduce mobile broadband providers' incentives to employ more restrictive network management practices that could run afoul of open Internet principles. Additionally, Verizon and Google issued a proposal for open Internet legislation that would exclude wireless, except for proposed transparency requirements.

1. Transparency

7. The Bureaus seek comment on what disclosure requirements are appropriate to ensure that consumers and content, application, service, and device providers can make informed choices regarding use of mobile broadband networks. What information should be disclosed about device and application requirements and certification processes? Are there any existing models that could provide guidance for shaping such rules? For instance, the Commission adopted transparency requirements for licensees in the 700 MHz Upper C Block.

2. Devices

8. The Bureaus seek further comment on the ability of new technologies and business models to facilitate non-harmful attachment of third-party devices to mobile wireless networks. Can adherence to industry standards for mobile wireless networks ensure non-harmful technical interoperability between mobile broadband devices and networks? Will deployment of next-generation technologies (*e.g.*, LTE) further facilitate interoperability? To the extent that compliance with technical standards needs to be validated through

laboratory testing, could such testing be conducted through independent authorized test centers? Were the Commission to require mobile providers to allow any non-harmful device to connect to their network, subject to reasonable network management, how would mobile broadband provider conduct have to change, if at all, in light of existing device certification programs?

9. As noted above, some mobile providers have introduced usage-based data pricing. To what extent do these business models mitigate concerns about congestion of scarce network capacity by third-party devices?

3. Applications

10. The Bureaus seek comment on how best to maximize consumer choice, innovation, and freedom of expression in the mobile application space, while ensuring continued private investment and competition in mobile wireless broadband services. To what extent should mobile wireless providers be permitted to prevent or restrict the distribution or use of types of applications that may intensively use network capacity, or that cause other network management challenges? Is the use of reasonable network management sufficient, by itself or in combination with usage-based pricing, to address such concerns? Should mobile wireless providers have less discretion with respect to applications that compete with services the provider offers? How should the ability of developers to load software applications onto devices for development or prototyping purposes be protected?

11. The Bureaus also seek comment on the extent to which certain application distribution models—such as a mobile broadband Internet access service provider acting as both a network operator and an app store provider/curator—may affect consumer choice. If providers were to be prohibited from denying or restricting access to applications in their capacity as network providers, should they nevertheless have discretion regarding what apps are included in app stores that they operate? Are there safe-harbor criteria that, if met by a provider, would ameliorate potential concerns? For

example, if a provider's customer had a choice of several app store providers that offered applications that could be downloaded onto the customer's mobile device, would that adequately mitigate concerns about potentially anti-competitive or anti-consumer effects of a provider excluding applications from its own app store?

12. Finally, the Bureaus seek comment on how differences between web-based and native applications should inform the Commission's analysis. Should a mobile provider have more discretion to restrict consumers' downloading and/or use of native applications than they should with respect to web-based applications?

Regulatory Flexibility Analysis

The *NPRM* in this proceeding included an Initial Regulatory Flexibility Analysis (IRFA) pursuant to 5 U.S.C. 603, exploring the potential impact of the Commission's proposal on small entities. The matters discussed in the Bureaus' *Public Notice* do not modify in any way the IRFA the Commission previously issued. However, the Commission received comments concerning the IRFA with regard to matters discussed in this *Public Notice*. Parties that filed comments on the IRFA, and anyone else, are invited to file comments on the IRFA in light of this additional notice.

Procedural Matters

Ex Parte Presentations. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in § 1.1206(b) of the rules.

Federal Communications Commission.

Kirk Burgee,

Chief of Staff, Wireline Competition Bureau.

[FR Doc. 2010-22629 Filed 9-9-10; 8:45 am]

BILLING CODE 6712-01-P