



PUBLIC NOTICE

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OPEN INTERNET ADVISORY OPINION PROCEDURES

Protecting and Promoting the Open Internet

GN Docket No. 14-28

On February 26, 2015, the FCC adopted the *2015 Open Internet Order* to protect Internet openness and promote continued innovation and investment in the nation's broadband networks.¹ It established three bright line rules that prohibit blocking, throttling, and paid prioritization.² To protect against similar Open Internet harms from new or different practices that fall outside of those three rules, the FCC established a legal standard under which it can prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of an "edge provider"³ (e.g., a website or application) to access consumers using the Internet.⁴ To complement these conduct rules, the FCC also enhanced its existing Open Internet Transparency Rule.⁵ The Open Internet rules are applicable to all providers of broadband Internet access service, including both fixed and mobile providers.

In the *2015 Open Internet Order*, the FCC also adopted a new process for companies to get advice from the FCC about the legality of new practices that companies may be considering. This new process involves requesting and receiving an advisory opinion on specific, prospective business practices.⁶

In this Public Notice, the Enforcement Bureau (Bureau) provides information about Open Internet advisory opinions and the process for submitting a request for an opinion.

¹ See *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, at paras. 4–5 (rel. Mar. 12, 2015) (*2015 Open Internet Order*).

² *Id.* at paras. 14–19, 110–32.

³ An "edge provider" is defined in the rules adopted in the *2015 Open Internet Order* as "any individual or entity that provides content, application or service over the Internet, and any individual or entity that provides a device used for accessing any content, application or service over the Internet." 47 C.F.R. § 8.2(b) (2015).

⁴ *Id.* at paras. 20–22, 133–37.

⁵ *Id.* at paras. 23–24, 162–81.

⁶ See 47 C.F.R. § 8.18 (Advisory Opinions); *2015 Open Internet Order* at paras. 36, 229–39.

What are Open Internet advisory opinions?

Advisory opinions are a tool available to companies that are concerned about whether a potential activity or new business practice they are considering will comply with the Open Internet rules. Companies may request an advisory opinion from the Bureau regarding such proposed conduct.⁷ The opinions will provide guidance about how the Bureau will evaluate the conduct and the factors that will be considered in determining whether the conduct would be consistent with the Open Internet rules.⁸ Specifically, parties may request advisory opinions regarding conduct that potentially could implicate the existing Open Internet rules or any rules or policies related to the Open Internet that may be adopted in the future.⁹

What is the purpose of advisory opinions?

Advisory opinions are intended to promote legal certainty, so that broadband providers can plan their activities based on clear guidance.¹⁰ Advisory opinions will allow companies to seek guidance on the propriety of certain Open Internet practices before implementing them, enabling them to be proactive about compliance and avoid enforcement actions later.¹¹ Because advisory opinions will be publicly available, they should also reduce the number of disputes by providing guidance to the industry.¹²

Who can request an advisory opinion?

Any entity subject to the FCC's jurisdiction can request an advisory opinion regarding its own prospective or proposed activity or business practice that may implicate the Open Internet rules.¹³

Am I required to request an advisory opinion? Are there any consequences if I don't?

No. Solicitation of advisory opinions is purely voluntary, and failure to seek an opinion will not be used as evidence that an entity's practices are inconsistent with the Open Internet rules.¹⁴

What are proper subjects for advisory opinions?

Requests for advisory opinions must relate to prospective or proposed conduct that the requesting party intends to pursue and which may implicate the Open Internet rules.¹⁵ A proposed course of conduct for which an advisory opinion is sought must be sufficiently concrete and detailed so as to be more than merely hypothetical; it must be sufficiently defined to enable the Bureau to conduct an in-depth

⁷ 47 C.F.R. § 8.18(a); *2015 Open Internet Order* at paras. 228–29, 234.

⁸ 47 C.F.R. § 8.18(a)(1); *2015 Open Internet Order* at para. 227.

⁹ 47 C.F.R. §8.18(a)(1).

¹⁰ *2015 Open Internet Order* at para. 229.

¹¹ *Id.*

¹² *Id.* See also 47 C.F.R. § 8.18(d).

¹³ 47 C.F.R. § 8.18(a)(1); *2015 Open Internet Order* at para. 230.

¹⁴ *2015 Open Internet Order* at para. 237.

¹⁵ 47 C.F.R. § 8.18(a)(1), (3); *2015 Open Internet Order* at paras. 230–32.

evaluation of the proposal.¹⁶ In addition, the Bureau will not respond to requests for opinions that relate to ongoing or prior conduct.¹⁷ The Bureau also will not respond to requests if the same or substantially the same conduct is the subject of a current government investigation or proceeding, including any ongoing litigation or open rulemaking at the Commission.¹⁸ Requesters are under a continuing obligation while the request is pending to inform the Bureau if the request involves the same or substantially the same conduct that is the subject of a current government investigation or proceeding.

How do I request an advisory opinion?

Requests for advisory opinions must be filed via the FCC's website or with the Office of the Secretary and also must be submitted to the Chief of the Enforcement Bureau and the Chief of the Investigations and Hearings Division of the Enforcement Bureau.¹⁹ To file via the FCC's website, go to "Submit a Non-Docketed Filing" from within the Electronic Comment Filing System (ECFS) at <http://apps.fcc.gov/ecfs/>. Select "Request for Open Internet Advisory Opinion" as the appropriate FCC inbox. This will bring the request to the attention of the Bureau. Any documents filed through ECFS will become publicly available. To submit a request for material to be withheld from public inspection, see section 0.459 of the Commission's rules.²⁰

What information will I need to include with my request?

Requests for advisory opinions must be accompanied by all material information needed for the Bureau to make a determination regarding whether the proposed conduct would comply with the Open Internet rules.²¹ As examples, a company may submit documents describing the program; disclosures, advertisements, or other consumer-facing materials; engineering analyses; rollout plans and schedules; and analyses of the potential effects on consumers. The Bureau will primarily be looking for factual information contained in business documents created in the normal course of business; legal analysis is not required. The submitting party can request confidential treatment of its materials in accordance with Section 0.459 of the Commission's rules.

The Bureau will have discretion to ask parties requesting opinions, as well as other parties that may have information relevant to the request or that may be impacted by the proposed conduct, for additional information that the Bureau deems necessary to respond to the request.²²

¹⁶ See *2015 Open Internet Order* at para. 232.

¹⁷ 47 C.F.R. § 8.18(a)(3); *2015 Open Internet Order* at para. 232.

¹⁸ 47 C.F.R. § 8.18(a)(3); *2015 Open Internet Order* at para. 231. This does not include any ongoing litigation or potential appeals challenging the *2015 Open Internet Order*.

¹⁹ 47 C.F.R. § 8.18(a)(1); *2015 Open Internet Order* at para. 231.

²⁰ 47 C.F.R. § 0.459.

²¹ 47 C.F.R. § 8.18(a)(4); *2015 Open Internet Order* at para. 233.

²² 47 C.F.R. § 8.18(a)(5); *2015 Open Internet Order* at para. 233.

Because advisory opinions will rely on full and truthful disclosures by the requesting entities, requesters must certify that factual representations are truthful and accurate, and that they have not intentionally omitted any material information from the request.²³

Will the Enforcement Bureau respond to every request for an advisory opinion?

No. The Bureau may, in its discretion, refuse to consider a request for an advisory opinion.²⁴ If the Bureau declines to respond to a request, it will inform the requesting party in writing.²⁵ As a general matter, the Bureau will be more likely to respond to requests where the proposed conduct involves a substantial question of fact or law and there is no clear FCC or court precedent, or the subject matter of the request and publication of FCC advice is of significant public interest.²⁶

What will happen after I submit my request for an advisory opinion?

After initial review of an advisory opinion request, the Bureau will often reach out to the requester for more information or to discuss the materials. The Bureau will coordinate with other bureaus and offices within the Commission, as appropriate, on the issuance of any opinions.²⁷ If the Bureau decides to issue an advisory opinion, it will discuss the scope and result of the opinion with the party, resolve any confidentiality concerns, and then issue a public advisory opinion that will state the Bureau's present enforcement intention with respect to the proposed practices. If the Bureau decides not to issue an advisory opinion, then it will issue a written statement to the party declining to respond to the request.²⁸

How long will it take for the Enforcement Bureau to issue an advisory opinion?

The Bureau will attempt to respond to requests for advisory opinions expeditiously, but there are no firm deadlines to rule on them or issue response letters.²⁹ Response times will likely vary based on numerous factors, including the nature and complexity of the issues, the magnitude and sufficiency of the request and the supporting information, and the time it takes for the requester to respond to any requests for additional information.³⁰

Are advisory opinions binding? Can I rely on the findings of an advisory opinion?

Although advisory opinions are not binding on any party, a requesting party may rely on an opinion if the request fully and accurately contains all the material facts and representations necessary for the opinion

²³ 47 C.F.R. § 8.18(a)(4)–(5); *2015 Open Internet Order* at para. 233. *See also* 18 U.S.C. § 1001; 47 C.F.R. § 1.17.

²⁴ 47 C.F.R. § 8.18(a)(2); *2015 Open Internet Order* at para. 231.

²⁵ 47 C.F.R. § 8.18(a)(2), (b)(2); *2015 Open Internet Order* at para. 231.

²⁶ *2015 Open Internet Order* at para. 231.

²⁷ *Id.*

²⁸ 47 C.F.R. § 8.18(a)(2), (b)(2); *2015 Open Internet Order* at paras. 232–36.

²⁹ *2015 Open Internet Order* at para. 234.

³⁰ *Id.*

and the situation conforms to the situation described in the request for opinion.³¹ This means that if the Bureau states in an opinion that it does not presently intend to take enforcement action with respect to proposed conduct, it will not take enforcement action with respect to that conduct if these conditions are met. The Bureau or Commission may later rescind an advisory opinion, but any such rescission would apply only to future conduct and would not be retroactive.

Will advisory opinions and requests be public?

Yes. The Bureau will make advisory opinions available to the public on the FCC's website.³² The Bureau also will publish the initial request for guidance and any associated materials.³³ However, parties soliciting advisory opinions may request confidential treatment of information submitted in connection with a request for an advisory opinion pursuant to the FCC's rules.³⁴

Can I withdraw my request for an advisory opinion?

Yes. Any requesting party may withdraw a request for review at any time before the Bureau issues an opinion or before the party receives notice from the Bureau that it intends to issue an adverse opinion.³⁵

Do any other government agencies issue advisory opinions?

Yes. Among other agencies, both the Federal Trade Commission and the Department of Justice Antitrust Division issue similar types of guidance.³⁶ Review of the requesting letters and opinions from these other agencies may provide guidance to requesters as they consider asking the FCC for an opinion. Information about the FTC opinions can be found here: <https://www.ftc.gov/policy/advisory-opinions>. Information about Antitrust Division opinions, called business review letters, can be found here: <http://www.justice.gov/atr/public/busreview/letters.html#page=page-0>.

Where can I find the Commission's rules governing advisory opinions?

The rules governing Open Internet advisory opinions are set forth in Section 8.18 of the Commission's rules, 47 C.F.R. § 8.18.

Where can I find more information about Open Internet advisory opinions?

³¹ 47 C.F.R. § 8.18(b)–(c); *2015 Open Internet Order* at para. 234.

³² 47 C.F.R. § 8.18(d); *2015 Open Internet Order* at para. 236.

³³ 47 C.F.R. § 8.18(d); *2015 Open Internet Order* at para. 236.

³⁴ 47 C.F.R. § 8.18(d); *2015 Open Internet Order* at para. 236. For example, trade secrets or commercial and financial information typically merit confidential treatment. See 47 C.F.R. §§ 0.457, 0.459.

³⁵ 47 C.F.R. § 8.18(e).

³⁶ See 28 C.F.R. § 50.6 (Dep't of Justice Business Review Procedure); 16 C.F.R. §§ 1.1–1.4 (Fed. Trade Comm'n Advisory Opinions).

For additional information regarding this Public Notice, please contact Gregory Simon, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau at 202-418-1764 or gregory.simon@fcc.gov, or Jennifer Epperson, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau at 202-418-1890 or jennifer.epperson@fcc.gov.

Please direct press inquiries to Morning Washburn at 202-418-0067 or morning.washburn@fcc.gov.

Links:

- FCC's Open Internet Webpage: <https://www.fcc.gov/openinternet>
- Open Internet Rules and Order: https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf
- FCC Electronic Comment Filing System: <http://apps.fcc.gov/ecfs/>

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