FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 8 and 20

[WC Docket No. 23–320; FCC 23–83; FR ID 179272]

Safeguarding and Securing the Open Internet

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission's (Commission) adopted a Notice of Proposed Rulemaking (NPRM) that proposes to reestablish the Commission's authority over broadband internet access service by classifying it as a telecommunications service under Title II of the Communications Act. This NPRM proposes to classify broadband internet access service as a telecommunications service and provide the Commission with authority necessary to safeguard the open internet, advance national security, and protect public safety. The NPRM also proposes to reestablish conduct rules for internet service providers that would provide a national approach for safeguarding internet openness.

DATES: Comments are due on or before December 14, 2023, and reply comments are due on or before January 17, 2024. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public and other interested parties on or before January 2, 2024.

ADDRESSES: You may submit comments, identified by WC Docket No. 23–320 by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing ECFS: *https://www.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, 35 FCC Rcd 2788 (2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice).

FOR FURTHER INFORMATION CONTACT: Wireline Competition Bureau, Competition Policy Division, *Openinternet2023@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Nicole Ongele, *Nicole.Ongele@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM) in WC Docket No. 23–320, FCC 23–83, adopted on October 19, 2023 and released on October 20, 2023. The full text of the document is available on the Commission's website at *https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf.* To request materials in accessible formats for people with disabilities (*e.g.,* braille, large print, electronic files, audio format, etc.), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice).

Initial Paperwork Reduction Act of 1995 Analysis

This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due January 2, 2024.

Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) way to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Providing Accountability Through Transparency Act

The Providing Accountability Through Transparency Act, Public Law 118–9, requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule. The required summary of this Notice of Proposed Rulemaking/Further Notice of Proposed Rulemaking is available at *https://www.fcc.gov/proposed-rulemakings.*

Synopsis

I. Proposed Classification of Broadband Internet Access Service

1. Today, we propose to return BIAS to its classification as a telecommunications service under Title II of the Act. We further propose to reclassify mobile BIAS as a commercial mobile service. In the time since the *RIF Order* (83 FR 7852 (Feb. 22, 2018)), propelled by the COVID–19 pandemic, BIAS has become even more essential to consumers for work, health, education, community, and everyday life. In light of this reality, we believe that looking anew at the classification of BIAS is necessary and timely given the critical importance of ensuring the Commission's authority to fulfill policy objectives and responsibilities to protect this vital service. Notable among these is enabling the Commission to safeguard the fair and open internet though a national regulatory approach. The Commission also has an important statutory mandate to protect ''life and property'' by supporting national security and public safety. We anticipate that the proper classification of BIAS as a telecommunications service will enhance the Commission's ability to advance these and other important interests, including protection of consumers' privacy and data security

interests and consumers' ability to access BIAS. Beyond these areas, we believe that classification of BIAS as a telecommunications service represents the best reading of the text of the Act in light of the marketplace reality of how the service is offered and perceived today. Below, we seek comment on our proposed classification framework, and particularly seek comment on its benefits and burdens. Additionally, we seek comment on the impact of reclassification on small businesses and entities, including small ISPs.

A. Broadband Internet Access Service Is Essential

2. While BIAS connections have long been important to full participation in our society and economy, we believe the COVID–19 pandemic dramatically changed the importance of the internet today, and seek comment on our belief. Not unlike other essential utilities, such as electricity and water, BIAS connections have proved essential to every aspect of our daily lives, from work, education, and healthcare, to commerce, community, and free expression. BIAS connections were so critical during the pandemic that Congress undertook a number of federal initiatives to improve the accessibility and affordability of BIAS across America, finding in the preamble to § 60101 of the bipartisan Infrastructure Investment and Jobs Act (Infrastructure Act) that ''access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States.'' A Pew Research Center survey highlighted this reality, showing that high speed internet was essential or important to 90 percent of U.S. adults during the COVID–19 pandemic. That finding is backed by the tremendous use during the pandemic of text messaging applications, voice services, and video conferencing for work, school, civic engagement, and connecting with family and communities, accessed through consumers' fixed and mobile broadband connections. The increased importance of BIAS connections has persisted post-pandemic. Compared to last year, nearly 45 percent of respondents to one survey said their internet usage had increased, while the average amount of time respondents spent actively using the internet on a phone, tablet, or computer was eight hours, excluding passive activities, such as streaming music or video in the background. OpenVault reports that almost 50 percent of fixed broadband subscribers in the U.S. used 533 gigabytes (GB) or more of bandwidth per month through the fourth quarter of 2022, compared to about 10 percent of subscribers in 2017. From year-end 2020 to year-end 2021, monthly data usage per smartphone subscriber rose to an average of 12.1 GB per subscriber per month—an increase of approximately 12 percent. We seek comment on how consumers' usage and view of BIAS has changed since 2018, when Title II classification was reversed, and particularly since the onset of the pandemic in 2020. In what ways has the importance of BIAS to consumers stayed the same? How should any evolution in the importance of BIAS to consumers drive our analysis today? We also seek comment on how the importance of BIAS is expected to evolve going forward.

3. We tentatively conclude that developments in the importance of the internet to consumers demonstrate that consumers perceive and use BIAS as a standalone service that provides telecommunications. In the *2015 Open Internet Order* (80 FR 19737 (April 13, 2015)), the Commission concluded that consumers perceive BIAS both as a standalone offering and as providing telecommunications. The D.C. Circuit found in *USTA* that these conclusions had ''extensive support in the record and together justify the Commission's decision to reclassify broadband as a telecommunications service.'' As the D.C. Circuit recognized, ''[e]ven the most limited examination of contemporary broadband usage reveals that consumers rely on the service primarily to access third-party content.'' We believe that the increased importance of BIAS to consumers since the onset of the pandemic shows that consumers' perception and use of BIAS as a standalone telecommunications service is even more pronounced now than it was in 2015. Indeed, consumers' use of BIAS today appears to go to the very heart of the purposes for which consumers have historically utilized ''telecommunication services'': to ''transmi[t], between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'' We seek comment on our tentative conclusion and this analysis.

4. We also believe that the COVID–19 pandemic, and the increased importance of BIAS to consumers, has spurred ISPs to market BIAS as a telecommunications service that is essential to accessing separate data-related ''add-on'' offerings. In the *2015 Open Internet Order,* the Commission concluded that ISPs ''market and offer consumers separate services that are best characterized as (1) a broadband internet access service that is a telecommunications service; and (2) 'add-on' applications, content, and services that are generally information services'' separate from the underlying broadband service. The Commission specifically found that ISPs market their BIAS ''primarily as a conduit for the transmission of data across the internet,'' with fixed providers distinguishing service offerings on the basis of transmission speeds, while mobile providers advertise speed, reliability, and coverage of their networks. Although the *RIF Order* contended that ''ISPs generally market and provide information processing capabilities and transmission capabilities together as a single service,'' it did not provide examples. Examples of ISP marketing today appear even more focused than in 2015 on the capability of BIAS to transmit information of users' choosing between internet endpoints, rather than its capability to generate, acquire, store, transform, process, retrieve, utilize, or make available that information. Such marketing emphasizes faster speeds aimed at connecting multiple devices, unlimited data for mobile service, and reliable and secure coverage. At the same time, ISPs appear to advertise data-related offerings as separate services that can be bundled with or added on to their BIAS services, including subscriptions to unaffiliated video and music streaming services, new devices, access to Wi-Fi hotspots, or mobile security apps. We seek comment generally on how BIAS offerings are advertised today. Have fixed or mobile ISPs changed their marketing or advertising of BIAS since 2018? We seek evidence and examples of how the BIAS market is shaped today, and particularly how it has changed in response to developments in consumers' perception about the essential nature of BIAS connections. How does the current marketing of BIAS by ISPs bear on our tentative determination that such service is a telecommunications service? We also seek comment on ways ISPs' advertising of bundled services and devices as ''add-ons'' to their BIAS offerings has evolved as a result of recent changes in the importance of BIAS to consumers. How do these additional offerings modify the underlying BIAS offered by the ISP, if at all?

5. We further seek comment on the development of third-party services and devices that utilize BIAS. We believe that since the 2018 reclassification of BIAS, and particularly as a result of the COVID–19 pandemic, there is substantial market proliferation of third-party services and devices and that

consumers' use of these offerings significantly outweigh their use of ISPs' affiliated offerings. We seek comment on this observation. How have trends in third-party services and devices impacted consumer use of BIAS? In what ways have these services and devices driven demand for fixed and mobile BIAS?

B. Reclassification is Necessary To Ensure Internet Openness, Safeguard National Security, Protect Public Safety, and Support Other Public Interest Goals

6. Given how essential BIAS is to consumers' daily lives, we believe that our proposed reclassification of BIAS as a telecommunications service is necessary to unlock tools the Commission needs to fulfill its objectives and responsibilities to safeguard this vital service. Critical among these is enabling the Commission to ensure that the internet is open and fair, including by establishing a national regulatory approach that would provide consistent protections for consumers and certainty for ISPs. We also believe that the proposed reclassification would enhance the Commission's ability to safeguard national security and protect public safety. Further, we anticipate that returning BIAS to its telecommunications service classification would provide us with better tools to address policy initiatives to protect consumers when they use communications services and support their ability to access BIAS, including through the Commission's universal service programs. We believe the *RIF Order*'s reclassification of BIAS as an information service not only inhibits the Commission's ability to achieve these outcomes, but that its policy rationales failed to support that reclassification. Below, we seek comment on these views and on any other considerations bearing on the grounds for us to return to a telecommunications service classification of BIAS, including the impact of our proposed reclassification on small ISPs and other small entities. In seeking comment on potential reclassification, we also welcome the submission of economic analyses that weigh the costs and benefits of the Commission taking such action. We also invite commenters to identify whether there are any other regulatory frameworks administered by the Commission, not discussed below, that might be affected by our proposed reclassification, and seek comment on how such reclassification would affect those frameworks.

7. Beyond these issues, we invite comment on additional public policy considerations we should examine in our analysis of BIAS classification. For instance, to what extent are there any reasonable reliance interests we should consider? We expect any commenters claiming reliance to submit evidence demonstrating the existence, magnitude, and reasonableness of any alleged reliance interests.

1. Ensuring Internet Openness

8. In light of how essential BIAS connectivity is to consumers following the COVID–19 pandemic, we believe that the open internet must be protected to ensure consumers can use their BIAS connections in all the lawful ways they see fit. We tentatively conclude that reclassification of BIAS as a telecommunications service will allow the Commission to safeguard the open internet and seek comment on this tentative conclusion. As an initial manner, following Title II classification, the Commission could rely on its authority in sections 201 and 202 of the Act to address practices that are unjust, unreasonable, or unreasonably discriminatory. Below, we also propose to reinstate rules that prohibit ISPs from blocking or throttling the information transmitted over their networks or engaging in paid or affiliated prioritization arrangements. Additionally, we propose to reinstate a general conduct standard that would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Our proposal would leave the existing transparency requirements undisturbed. The proposed rules would establish clear standards for ISPs to maintain internet openness and would give the Commission a solid basis on which to take enforcement action against conduct that prevents consumers from fully accessing all of the critical services available through the internet. We seek comment on this analysis. In particular, how would these rules ensure that consumers can continue to use their internet connections for healthcare, education, work, commerce, and civic engagement? What would be the potential impact on these uses if the open internet is not secured?

9. We further believe reclassification would enable the Commission to establish a nationwide framework of open internet rules for ISPs. In both the *2015 Open Internet Order* and the *RIF Order,* the Commission expressed concern that potentially inconsistent state laws could increase burdens for ISPs and hinder the broadband market. With the goal of avoiding this, the Commission, in each instance, attempted to establish a framework that would preempt any inconsistent state laws. However, by reclassifying broadband as a Title I service and eliminating the conduct rules established in the *2015 Open Internet Order,* the *RIF Order* failed to achieve this goal, because the *Mozilla* court vacated the *RIF Order*'s blanket preemption of inconsistent state laws, concluding that the Commission ''fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority.'' Thus, instead of creating ''a uniform set of federal regulations,'' the *RIF Order*'s hands-off approach to BIAS has led to the existence of state-by-state open internet requirements it sought to avoid. We remain concerned that differing state open internet requirements may be burdensome for ISPs, particularly small ISPs, thus hindering the broadband market, and at the same time, fail to ensure that all consumers are protected from conduct harmful to internet openness. We believe that reclassification will put our authority to preempt any inconsistent state laws on substantially stronger legal footing, thereby enabling the Commission to create a set of open internet standards that will apply nationwide. We seek comment on this analysis.

2. Safeguarding National Security and Preserving Public Safety

10. We tentatively conclude that the demonstrated need to address national security and public safety concerns makes it necessary and timely to revisit the statutory classification of BIAS. The D.C. Circuit criticized the *RIF Order* for giving short shrift to the evidence of public safety concerns in the record before it. The *RIF Remand Order* (86 FR 994 (Jan. 7, 2021)), in declining to reclassify BIAS as a telecommunications service on that basis, largely dismissed such concerns as speculative. But developments in recent years have highlighted national security and public safety concerns arising in connection with the U.S. communications sector, ranging from the security risks posed by malicious cyber actors targeting network equipment and infrastructure to the loss of communications capability in emergencies through service outages. We believe it is now timely for us to reevaluate the classification of BIAS to ensure the Commission can use all of its capabilities to address threats to national security and public safety.

11. *National Security and Law Enforcement.* We tentatively conclude that authority under applicable Title II provisions, reinforced by the Commission's existing authority, would

enhance the Commission's efforts to protect the national defense. The Commission's attention to national security is a responsibility that underlies its other statutory obligations, as evidenced by Congress's statement in the Communications Act that among the reasons it created the Commission was ''for the purpose of the national defense.'' This responsibility was affirmed by Presidential Policy Directive 21, which described how the FCC could, to the extent permitted by law, exercise its authority and expertise to identify and address vulnerabilities in the communications sector. We seek comment generally on how reclassification would advance the Commission's fulfillment of its national security responsibilities and how it specifically would affect the Commission's efforts, in coordination with other agencies, and with ISPs themselves, to protect the nation's communications networks from entities and equipment and services that pose threats to national security and law enforcement.

12. We tentatively conclude that our proposed reclassification would enhance the Commission's ability to protect the nation's communications networks from entities that pose threats to national security and law enforcement pursuant to its authority under section 214 of the Act, and we seek comment on this tentative conclusion. Under section 214, carriers must be authorized by the Commission to provide domestic and international telecommunications service in the United States. Section 214, however, applies to common carriers, and thus does not apply to BIAS under its current classification as an information service, potentially exposing the nation's communications networks to national security and law enforcement threats by entities providing BIAS. In the *China Telecom Americas Order on Revocation and Termination, China Unicom Americas Order on Revocation,* and *Pacific Networks and ComNet Order on Revocation and Termination,* the Commission extensively evaluated national security and law enforcement considerations raised by existing section 214 authorizations and determined, based on the record, that the present and future public interest, convenience, and necessity was no longer served by those carriers' retention of their section 214 authority. In particular, the Commission identified national security and law enforcement concerns with respect to those entities' access to Internet Points of Presence (PoPs) (usually located within data centers) and other harms in relation to the services provided by those entities pursuant to section 214 authorization. The Commission concluded that China Telecom Americas' (CTA) provision of services pursuant to its section 214 authority, ''whether offered individually or as part of a suite of services—combined with CTA's physical presence in the United States, CTA's ultimate ownership and control by the Chinese government, and CTA's relationship with its indirect parent [China Telecommunications Corporation], which itself maintains a physical presence in the United States—present unacceptable national security and law enforcement risks to the United States,'' and it reached similar conclusions in the other proceedings. We believe the same national security and law enforcement threats identified in those proceedings equally exist with respect to entities providing BIAS, and that reclassifying BIAS as a telecommunications service would allow the Commission to use its section 214 authority to address those threats and other threats to our communications networks. We seek comment on this analysis.

13. We also seek comment on other ways the proposed reclassification would enhance the Commission's ability to address national security and law enforcement threats by entities providing BIAS. Are there other specific national security and law enforcement risks in connection with the provision of BIAS resulting from the current classification of BIAS as an information service? Have there been relevant and demonstrable changes with respect to how nation-states have sought to exploit the technological convergence of broadband and other services that present vulnerabilities affecting the national defense? We ask commenters to provide detailed comments on any regulatory requirements designed to address such risks that would newly apply to these entities if the Commission were to reclassify BIAS as a telecommunications service. For instance, could the Commission prohibit ISPs from entering into internet traffic exchange arrangements with certain companies that operate data centers or other Internet Exchange Points in the U.S.? Would reclassification enable the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector to review telecommunications licenses or authorizations meeting appropriate thresholds of foreign ownership or control for national security and law enforcement concerns? Would reclassification increase law enforcement agencies' ability to seek lawful assistance, including identification and disruption of illegal activity, for investigations involving ISP networks? For mobile BIAS, would reclassification extend the foreign ownership restrictions for wireless common carriers that the Commission applies under section 310(b) of the Act and its implementing rules? In the absence of reclassification, does the Commission have other authority that it could use that is sufficient to protect the nation's communications networks against ISPs that pose national security and law enforcement threats? If so, we ask commenters to indicate the statutory authority and how the Commission could use such authority to ensure national security and law enforcement concerns are addressed.

14. We also seek comment on how reclassification would support the Commission's efforts to safeguard the nation's communications network infrastructure from equipment and services that pose a security threat. Pursuant to its universal service authority in section 254 of the Act, its authority to regulate equipment in sections 302 and 303 of the Act, and new mandates established by Congress through the Secure and Trusted Communications Networks Act of 2019, as amended, and the Secure Equipment Act of 2021 to address communications equipment and service that poses an unacceptable risk to national security, the Commission has undertaken significant efforts to improve supply chain security. In particular, the Commission has: prohibited the use of universal service fund (USF) support to purchase or obtain any equipment or services produced or provided by companies posing a national security threat; prohibited the use of federal subsidies administered by the Commission and used for capital expenditures to provide advanced communications service to purchase, rent, lease, or otherwise obtain such equipment or services; created and maintained a list of communications equipment and services that pose an unacceptable risk to the national security (''covered equipment and services''); established the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program) to reimburse the costs providers incur to remove, replace, and dispose of covered Huawei and ZTE equipment and services from their networks; and prohibited the authorization of equipment that poses a

threat and the marketing and importation of such equipment in the United States. We seek comment on how reclassification may allow the Commission to further these efforts. For instance, would reclassification give the Commission additional authority to restrict a larger class of entities from using equipment and services that pose a threat? Additionally, would reclassification give the Commission more robust authority to require more entities to remove and replace covered Huawei and ZTE communications equipment and services? Could the Commission prohibit the use of covered equipment or services in any network infrastructure that is used to route or transmit communications, including data centers and internet exchange facilities? Could we use the additional authority under Title II to prohibit carriers from interconnecting with other carriers who have a PoP within the U.S. and its territories that use such equipment and services? Are there other ways Title II authority could be used to address national security threats arising from equipment and services outside the scope of our prior actions? How does the Commission's role fit with that of other agencies that help to address potential security threats from foreign actors to the nation's communications network and equipment, and how would enhancements to the Commission's regulatory authority as a result of reclassification bolster that role?

15. *Cybersecurity.* We believe that returning BIAS to its telecommunications service classification would reinforce the Commission's authority to support its efforts to enhance cybersecurity in the communications sector, and we seek comment on this tentative conclusion. Among such efforts are those pursuant to Presidential Policy Directive 21, which tasks the Commission with ''identifying communications sector vulnerabilities and working with industry and other stakeholders to address those vulnerabilities . . . [and] to increase the security and resilience of critical infrastructure within the communications sector. . . .'' The Commission is actively involved in federal interagency cybersecurity planning, coordination, and response activities. However, the current classification of BIAS limits the regulatory and operational actions that the Commission can take to address cyber incidents impacting the communications sector, as well as other critical infrastructure sectors. For example, the Commission has limited authority to require providers of non-Title II services (*e.g.,* ISPs) to adopt cybersecurity standards or performance goals, which inhibits the Commission's ability to protect U.S. communications services and infrastructure from cyber-attacks and to ensure that communications devices and equipment do not pose security risks to other critical infrastructure sectors. While the Commission will continue to work closely with ISPs to secure their networks, reclassification of BIAS as telecommunications service would provide the Commission with the authority to act in the absence of voluntary action by ISPs or in cases of emergency or significant risk. We tentatively conclude that the proposed reclassification could address this issue by enhancing the Commission's cybersecurity authority, and we seek comment on this tentative conclusion.

16. Another initiative is the Commission's inquiry into vulnerabilities threatening the security and integrity of the Border Gateway Protocol (BGP), which impacts ''the transmission of data from email, e-commerce, and bank transactions to interconnected Voice-over Internet Protocol (VoIP) and 9–1–1 calls.'' The Commission noted that ''BGP's initial design, which remains widely deployed today, does not include security features to ensure trust in the information that it is used to exchange,'' which allows a bad network actor to ''deliberately falsify BGP reachability information to redirect traffic to itself or through a specific third-party network, and prevent that traffic from reaching its intended recipient.'' Would reclassification provide the Commission with additional authority to address BGP vulnerabilities, including, for example, by requiring providers to deploy solutions to address BGP vulnerabilities in the absence of voluntary action?

17. In what other ways could reclassification bolster the Commission's authority to address cybersecurity in the communications sector? For instance, would it strengthen the Commission's ability to establish rules mandating that service providers implement cybersecurity practices and risk management plans? Similarly, would reclassification permit the Commission to consider cybersecurity in its annual inquiry under section 706 of the Telecommunications Act 1996? For example, could the Commission determine that only broadband services that meet certain cybersecurity standards constitute ''advanced telecommunications capability''? To what extent would reclassification allow us to address threats related to the DNS, which enables domain names to resolve to the correct IP addresses, and other naming protocols? Could the Commission use Title II authority to require ISPs to block IP addresses that originate malicious software and ransomware? Would reclassification allow the Commission to mandate the adoption of Communications Security, Reliability, and Interoperability Council (CSRIC) best practices directed to ISPs and audit or enforce the implementation? Would it likewise enable the Commission to use Title II authority to require ISPs to implement or certify to their implementation of network security practices, such as those recommended in Executive Order 14028, the National Cybersecurity Strategy, or related cybersecurity measures recommended by the Deputy National Security Advisor, the Office of National Cyber Director, and other government agencies or intergovernmental agencies, such as the Federal Acquisition Security Council (FASC)? Would reclassification give the Commission sufficient authority to establish cybersecurity requirements for other components that facilitate communications between end points, such as internet exchange facilities and data centers that route communications and deliver applications? Could the Commission rely on authority in section 218 to require more comprehensive cyber incident reporting? Would reclassification permit the Commission to rely on a broader range of regulatory tools to ensure network and service reliability and better support an effective 911 and emergency preparedness efforts?

18. *Public Safety.* We next tentatively conclude that reclassifying BIAS as a telecommunications service would enable the Commission to advance several public safety initiatives, and we seek comment on this tentative conclusion. As the Commission recognized in the *RIF Remand Order,* ''[a]dvancing public safety is one of our fundamental obligations.'' Indeed, the Commission is ''required to consider public safety by . . . its enabling act.'' The *Mozilla* court explained that when '''Congress has given an agency the responsibility to regulate a market such as the telecommunications industry that it has repeatedly deemed important to protecting public safety,' then the agency's decisions 'must take into account its duty to protect the public.' '' We believe that the Commission's responsibility to address public safety is becoming increasingly important as the severity and frequency of natural

disasters are on the rise. We tentatively conclude that reclassification would enhance the Commission's jurisdiction over ISPs, which it could use in combination with other statutory authority to ensure BIAS meets the needs of public safety entities and individuals when they use those services for public safety purposes. We seek comment on this tentative conclusion and analysis below. We note that the *RIF Order* concluded that Title I classification advances, and does not harm, public safety, primarily based on its overarching policy rationales for reversing Title II classification. We seek comment on the *RIF Order*'s policy rationales and framework for protecting against harms elsewhere in this *Notice,* and we invite commenters to address whether those rationales sufficiently advance public safety. In particular, we invite comment on whether the Commission's ability to adopt *ex ante* regulations would provide better public safety protections than an *ex post* enforcement framework.

19. We seek comment on how our proposed reclassification would enable the Commission to support public safety officials' use of BIAS for public safety purposes. As a general matter, broadband services play an important role in how public safety officials communicate with each other and how they deliver and receive information from the public. Although much of the communications between public safety entities and first responders take advantage of enterprise-level dedicated public safety broadband services, they often rely on commercial broadband services to communicate during emergency situations. Increasingly, public safety entities rely on retail BIAS to access various databases, share data with emergency responders, and stream video into 911 and emergency operations centers. We also are aware that public safety officials often use services accessible over-the-top (OTT) of broadband connections, such as social media, to communicate important and timely information to the public and to gain valuable information from the public and build on-the-ground situational awareness. We seek comment on the extent to which public safety officials rely on BIAS for public safety purposes and on our tentative conclusion that reclassification would give us additional jurisdiction to advance the existing uses of BIAS by these officials.

20. We also seek comment on how reclassification could further other public safety initiatives. For instance, while the Commission has taken important steps to improve the effectiveness of Wireless Emergency Alerts (WEAs), would classification of BIAS as a telecommunications service enable the Commission to make the nation's alert and warning capabilities more effective and resilient by, for instance, requiring ISPs to transmit emergency alerts to their subscribers? More recently, the Commission modernized its priority services rules to authorize service providers to offer, on a voluntary basis, priority treatment of data, video, and IP-based voice services for public safety personnel and first responders, including by removing outdated requirements that may impede the use of IP-based technologies. Would reclassification allow the Commission to go a step further by requiring service providers to offer prioritized routing for all IP-based services and prioritized restoration for all network infrastructure? Could the Commission require ISPs to participate in Telecommunications Service Priority (TSP), Government Emergency Telecommunications Service (GETS), and Wireless Priority Service (WPS)? How, if at all, would reclassification allow the Commission to expand the applicability, and therefore the public safety benefits, of the Communications Assistance for Law Enforcement Act (CALEA) requirements?

21. We tentatively conclude that BIAS also plays an increasingly important role in allowing the public to communicate with first responders during emergency situations and seek comment on this tentative conclusion. In the *RIF Remand Order,* the Commission noted that retail broadband services are used to translate communications with 911 callers and patients in the field and to deliver critical information about 911 callers that is not delivered through the traditional 911 network. Are there other ways in which BIAS can or does supplement traditional 911 communications? The Commission has undertaken various efforts in recent years to improve how the public reaches and shares information with emergency service providers. What effect, if any, would Title II classification of BIAS have on these and future efforts? Would reclassification enhance the Commission's jurisdiction to improve the flow of voice communications, photos, videos, text messages, real-time text (RTT), or any other type of communication from the public to emergency service providers through Next Generation 911 or over the use of Wi-Fi calling to reach emergency service providers? If so, how? We also believe BIAS is critical when used by individuals with disabilities to communicate with public safety services, and the Commission has taken several steps to improve access to IP-enabled 911 communications for people with disabilities. How will reclassification fortify our existing jurisdiction to ensure these communications are not interrupted or degraded? To what extent does or will BIAS support alternatives to 911 communications, and will reclassification help to ensure that BIAS-based emergency communications meet certain reliability and security standards? Would reclassification of BIAS enhance the access to, availability of, and service quality for IP-based communication services used by people with disabilities in emergencies, including the IP-based forms of telecommunications relay services (TRS)?

22. BIAS is also critical for allowing the public to easily and efficiently access public safety resources and information. In particular, members of the public often rely on BIAS during emergencies to enable them to find and receive potentially life-saving information. As the Commission stated in the *RIF Remand Order,* ''consumers regularly use their mobile devices and broadband connections 'to access broadly available information regarding threatening weather, shelter-in-place mandates, ongoing active-shooter scenarios, and other matters essential to public safety.' '' The COVID–19 pandemic, severe natural disasters, and other incidents have demonstrated the importance of the public being able to access public safety information using their BIAS connections. We seek comment on how reclassification would allow the Commission to ensure that the public can access life-saving public safety resources and information using BIAS.

23. Furthermore, BIAS is important for public safety communications that occur outside of emergencies. The Commission observed in the *RIF Remand Order* that the COVID–19 pandemic demonstrated that many Americans rely on telemedicine over mass-market broadband services for routine health care, triage, and basic health advice, and that the ability of 5G networks to transmit massive amounts of data in real time will also help enable new applications for advanced communications between the public and health care officials, such as through the use of wireless sensors to for remote patient monitoring and data transmission so doctors can identify problems before they become emergencies, and through the

development of connected ambulance services for faster patient transport. BIAS connections are also playing a more important role in home safety and security as consumers increasingly purchase home security and monitoring systems that use connected devices to monitor, deter, and address theft, breaking and entering, and other home threats and BIAS connections are increasingly important for in-home monitoring of individuals who are elderly or disabled. We seek comment on the impact that reclassification may have on these and other public safety applications that rely on BIAS.

24. *Network Resiliency and Reliability.* We tentatively conclude that reclassifying BIAS as a telecommunications service would enhance the Commission's ability to ensure the nation's communications networks are resilient and reliable, and we seek comment on this tentative conclusion. For instance, under the Commission's Network Outage Reporting System (NORS), qualifying communications providers are required to report to the Commission network outages that satisfy certain criteria, and the Commission uses this information to advance network resiliency and reliability. Because this reporting requirement has generally been limited to outages affecting voice services, the Commission has historically lacked reliable outage information for today's modern, essential broadband networks, which inhibits the Commission from fully ensuring the resiliency and reliability of those networks. Would reclassification support the Commission's ability to expand the scope of NORS to require ISPs to submit outage reports in response to service incidents that cause outages or the degradation of communications services, such as cybersecurity breaches, wire cuts, infrastructure damages from natural disaster, and operator errors or misconfigurations? Under rules implemented in 2022, Federal, State, Tribal and Territorial public safety agencies are eligible to obtain direct read-only access to outage information filed in NORS and the Disaster Information Reporting System (DIRS) for their jurisdictions. Would reclassification and enhanced NORS reporting afford public safety officials greater transparency during outages and disasters to assess the operational status of networks for dissemination of emergency information or to assess where support is needed? Would it support reliability efforts for calls and texts to 911 and the 988 Suicide and Crisis Lifeline? How, if at all, would reclassification allow us to further our goal to improve the reliability of wireless networks? Would broadband reclassification give the Commission additional authority to facilitate the use of Wi-Fi calling during emergencies or network outages, and if so, to what extent could the Commission apply reliability standards for Wi-Fi calling? Are there other ways that reclassification of BIAS would help us improve network resiliency and reliability, such as requirements for network upgrades and changes, rules relating to recovery from network outages, and improving our incident investigation and enforcement authority? What impact would any such actions have on ISPs, particularly small ISPs?

3. Protecting Consumers' Privacy and Data Security

25. Since before the adoption of the 1996 Act, the Commission has consistently protected consumers from activities that undermine their ability to use communications services freely, fairly, and free from abuse by bad actors. As the communications industry has changed and the tactics used by bad actors have evolved, so too have the Commission's efforts. The current information service classification of BIAS, however, appears to inhibit the Commission's ability to fully ensure that consumers are protected from harmful conduct when they use communications services today and able to utilize these services in a fair and secure manner. We believe that classification of BIAS as a telecommunications service could support the Commission's efforts to protect consumers' privacy and data security and relieve them from unlawful robocalls and robotexts. We seek comment on this view.

26. *Privacy and Data Protection.* We tentatively conclude that reclassification of BIAS as a telecommunications service would support the Commission's efforts to safeguard consumers' privacy and data security, and we seek comment on this tentative conclusion. Highlighting the Commission's important role in this area, earlier this year, Chairwoman Rosenworcel established the FCC Privacy and Data Protection Task Force to coordinate the agency's efforts to protect against and respond to consumer privacy infringements and data breaches by communications providers. The Commission's efforts will rely on, among other things, its authority under section 222 of the Act. That provision governs telecommunications carriers' protection and use of information obtained from their customers or other carriers, and calibrates the protection of such information based on its sensitivity. Congress imposed a duty on every telecommunications carrier to protect the confidentiality of its customers' proprietary information, according the category of customer proprietary network information (CPNI) the greatest level of protection.

27. When the Commission classified BIAS as a telecommunications service in the *2015 Open Internet Order,* it declined to forbear from applying section 222 of the Act, citing the need to protect consumers' privacy regardless of whether they communicate via broadband or telephone services. The *RIF Order* eliminated these statutory protections for broadband customers and surrendered the Commission's authority over ISPs' privacy and data protection practices. We believe that ISPs are situated to collect vast swaths of information about their customers, including personal information, financial information, and information regarding subscriber online activity. We further believe that consumers currently may not fully comprehend—and therefore may not be able to meaningfully consent to—ISPs' collection, processing, and disclosure of customer information, including potentially through the use of artificial intelligence models. We are also concerned that, absent statutory and regulatory requirements to do so, ISPs may not adopt adequate administrative, technical, physical, and procedural safeguards to protect their customers' data. Indeed, ISPs appear to continue to be attractive targets to hackers and other bad actors, putting BIAS customer data at significant risk of compromise. We seek comment on these views.

28. Based on the foregoing, we once again propose herein not to forbear from section 222. Returning BIAS to its telecommunications service classification would bring ISPs back under the section 222 privacy and data security framework, and therefore restore those protections for consumers. Additionally, classifying BIAS as a telecommunications service could support a consistent privacy and data security framework for voice and data services, which we believe consumers often subscribe to from one provider in a bundle and perceive to be part of the same service, particularly for mobile services. We seek comment on this proposed analysis.

29. We further believe that, in addition to protecting consumers, reclassifying BIAS as a telecommunications service and declining to forbear from section 222 would protect information concerning entities that interact with ISPs. Section

222 places an obligation on telecommunications carriers to protect the confidentiality of the proprietary information of and relating to other telecommunication carriers (including resellers), equipment manufacturers, and business customers. We seek comment on how reclassification of BIAS will affect telecommunications carriers and equipment manufacturers who interact with ISPs, as well as the customers those entities serve, such as content creators and edge providers. Would these protections also have national security benefits by, for example, deterring ISPs from contracting with foreign companies that may pose a national security threat or are owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries? Would these section 222 requirements create a meaningful burden on ISPs, especially small ISPs?

30. *Robocalls and Robotexts.* We seek comment on whether reclassification can serve to enhance the Commission's authority to support consumer privacy by combating illegal robocalls and robotexts. In recent years, the Commission has undertaken extensive efforts to address these invasive communications, including by establishing rules for call authentication, robocall mitigation, and call blocking; expanding requirements and restrictions to robotexts; and taking enforcement action against providers who originate and transport these communications. Yet bad actors continue to evolve their techniques to find new ways to interrupt consumers and perpetuate fraud. We note that many illegal robocalls are transmitted via VoIP networks and many illegal robotexts are transmitted by OTT messaging services (*e.g.,* iMessage, WhatsApp, and Signal). We seek comment on the extent to which Title II classification would help the Commission in its efforts to combat these practices. Would Title II classification grant the Commission oversight to reach a larger class of entities, particularly for messages and calls delivered via broadband networks? For example, to the extent robotext scams include links to spoofed websites designed to defraud consumers, would reclassification allow us to require that ISPs block traffic to IP addresses associated with those websites? Would reclassification allow the Commission to apply new requirements and restrictions beyond what it can achieve under the sources of authority the Commission has relied on to date for its robocall and robotext actions? If so, how? Are there other ways in which reclassification would help the Commission combat illegal robocalls and robotexts? How would this affect ISPs, especially small ISPs?

4. Supporting Access to Broadband Internet Access Service

31. From the Commission's inception, it has played a critical role in facilitating the proliferation of communications networks and ensuring that consumers have access to the services these networks provide. While these efforts are crucial to the Commission's mission, we believe that the information service classification of BIAS has limited the Commission's efforts to achieve these goals for the communications service that has become fundamental to consumers' everyday lives. Classifying BIAS as a telecommunications service will enable the Commission to better support the deployment of wireline and wireless infrastructure, advance universal service, and increase the accessibility of communications networks. We seek comment on this tentative conclusion. We also seek comment on whether, and how, we could leverage our proposed reclassification in other proceedings to further encourage access to BIAS by all consumers.

32. *Wireline and Wireless Infrastructure.* We seek comment on the public policy impact of our proposed reclassification of BIAS on the Commission's goals to support investment in and deployment of wireline and wireless infrastructure. For example, section 224(b) of the Act grants the Commission clear authority to regulate the rates, terms, and conditions of pole attachments by a cable television system or provider of telecommunications service. Since 2011, the Commission has undertaken a series of reforms with the goal of improving access to poles to, among other things, help speed the deployment of broadband infrastructure. However, in the *RIF Order,* the Commission effectively eliminated section 224 pole attachment rights of broadband-only providers as a result of its classifying broadband as an information service. In 2020, following the *Mozilla* court's direction that the Commission ''grapple with the lapse in legal safeguards'' for broadband-only providers that resulted from the *RIF Order,* the Commission concluded that while there were potentially adverse effects to this class of providers resulting from the loss of pole attachment rights, the benefits of returning BIAS to an information service classification outweighed any drawbacks. We tentatively conclude that the Commission erred in its 2020 analysis and believe that reclassifying BIAS as a telecommunications service will help support the Commission's goals to facilitate broadband deployment, and we seek comment on this tentative conclusion. How has the market for broadband-only ISPs changed since 2015, in particular for new entrants and those ISPs seeking infrastructure access via pole attachments? What effect has the Commission's elimination of pole attachment rights for broadband-only ISPs had on the deployment of broadband, particularly to unserved or underserved areas? How would reinstatement of pole attachment rights benefit or burden ISPs, particularly small ISPs? As the Commission has recognized, Congress recently has made available unprecedented levels of federal funding for broadband buildout, including a variety of programs administered by the National Telecommunications and Information Administration (NTIA), including the Broadband, Equity, Access, and Deployment Program (BEAD), the State Digital Equity Capacity Grant Program and its federal counterpart, the Middle Mile Infrastructure Grant Program, and the Tribal Broadband Connectivity Program. We believe that ensuring the protections of section 224 are restored to all ISPs, including broadband-only providers, will pave the way for quicker and less expensive broadband deployment, thereby enabling that funding to go as far as possible. We seek comment on that view.

33. We also seek comment on how reclassifying BIAS as a telecommunications service and classifying mobile BIAS as a commercial mobile service will impact the Commission's authority over wireless infrastructure. Although section 332(e)(7) of the Act, and Commission interpretation thereof, regulate state and local authority over the placement, construction, and modification of personal wireless service facilities, are there ways in which classifying broadband as a telecommunications service can further advance the Commission's goals to ''improve service quality and lower prices for consumers'' for broadband access? Finally, we also seek comment on how reclassification of BIAS as a telecommunications service may affect the Commission's application of the Act's preemption frameworks in sections 253(d) and 332(c)(3) regarding infrastructure used to provide broadband-only services.

34. *Universal Service.* We tentatively conclude that classifying BIAS as a telecommunications service will strengthen our policy initiatives to

support the availability and affordability of BIAS through USF programs, and we seek comment on this tentative conclusion. The Communications Act defines universal service as an ''evolving level of telecommunications services,'' and charges the Commission with periodically establishing such services. BIAS is now clearly an essential service upon which consumers rely, and we believe that placing BIAS outside of the Commission's Title II authority weakens the Commission's ability to deliver universal service support for that essential service, especially in rural areas. We seek comment on this view. In *Mozilla,* the court found that the Commission failed to explain how its universal service authority over telecommunications carriers in section 254(e) of the Act could extend to ISPs without BIAS classified as a telecommunications service for purposes of the Lifeline program, and it remanded the issue back to the Commission. Although the Commission conceded in the *RIF Remand Order* that under a Title I regime, BIAS could not be a section 254(c) supported service because section 254(c) defines universal service as an ''evolving level of telecommunications services,'' it nevertheless asserted a theory under section 254(e) to enable Lifeline support for BIAS offered by eligible telecommunications carriers (ETCs), similar to the theory under which the Commission has funded broadband-capable networks through the High-Cost Program.

35. We tentatively conclude that reclassifying BIAS as a telecommunications service will bolster the Commission's ability to provide High-Cost and low-income support, and seek comment on this tentative conclusion. Among other things, we believe that reclassifying BIAS as a telecommunications service could eventually allow broadband-only providers to once again participate in the Lifeline program, and would give the Commission the ability to adjust certain service obligations for ETCs. We further believe that reclassifying BIAS as a telecommunications service would enhance our ability to connect low-income households in rural areas, including through the Link Up program, which provides support to reduce connection charges for eligible residents of Tribal lands who subscribe to telecommunications service from a telecommunications carrier receiving high-cost support. We seek comment on these views, including how this may impact ISPs, especially smaller ISPs and ISPs serving rural areas.

36. We also tentatively conclude that classification of BIAS as a telecommunications service protects public investments in BIAS access and affordability. Since the inception of BIAS, the Commission, along with other federal and state entities, have made significant investments to ensure that BIAS networks reach all consumers and are affordable, particularly through the Affordable Connectivity Program. These efforts increased dramatically since the beginning of the COVID–19 pandemic as Congress directed a large influx of funding in broadband deployment and consumer access. We believe our proposed reclassification will enable the Commission to protect these investments on an ongoing basis by enabling the Commission to ensure the connections supported by these funds align with the other policy goals we detail here: advancing national security and public safety and protecting consumers. In doing so, we believe we can ensure these connections continue to achieve their primary purpose of benefiting consumers. We seek comment on these views.

37. *Multiple-Tenant Environments (MTEs).* We seek comment on how reclassification may impact the Commission's authority to take action to promote tenant choice and competition in the provision of broadband services to the benefit of those who live and work in MTEs. The Commission has long prohibited agreements between providers of certain communications services and MTE owners that grant the provider exclusive access and rights to provide service to the MTE. In 2019, the Commission released a Notice of Proposed Rulemaking that sought comment about these practices and others that could have the effect of dampening competition or deployment, and on the Commission's authority to target different kinds of entities, including telecommunications providers, MVPDs, and broadband-only providers. In 2022, relying on sections 201 and 628 of the Act, the Commission adopted rules to prohibit telecommunications carriers and MVPDs from entering into exclusive and graduated revenue sharing agreements, and to require that telecommunications carriers and MVPDs include disclaimers on marketing materials distributed to MTE tenants that inform tenants of the existence of an exclusive marketing arrangement, among other things. The Commission determined that it was appropriate to ''proceed incrementally,'' but cautioned that it would ''continue to monitor competition in MTEs to determine whether we should alter the scope of our rules to cover other providers,'' including broadband-only providers. We seek comment whether reclassification of BIAS would provide additional authority for the Commission to further promote competition and consumer choice in communications services in MTEs.

38. *Free Expression.* We believe BIAS connections promote diversity of viewpoints by allowing traditionally disadvantaged communities to express themselves outside of traditional media. Social media websites and other platforms particularly have become important platforms for free expression, political engagement, and social activism. Indeed, Congress has recognized that ''the internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'' Accordingly, we invite comment on any free expression-related considerations associated with classifying BIAS as a telecommunications service and any benefits or drawbacks of such classification for relevant communications.

39. *Digital Equity.* The Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality, invites comments on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well as the scope of the Commission's relevant legal authority.

5. Access for Persons With Disabilities

40. We seek comment on how reclassification may impact the Commission's authority to ensure that individuals with disabilities can communicate using BIAS. People with disabilities ''increasingly rely upon internet-based video communications, both to communicate directly (point-to-point) with other persons who are deaf or hard of hearing who use sign language, and through video relay service.'' Section 716 of the Act requires that interoperable video conferencing services be accessible, regardless of how those services are transmitted—by broadband or otherwise—and also requires that text messaging, email,

other electronic messaging services, and interconnected and non-interconnected VoIP services, be accessible. In addition, section 718 of the Act requires that internet browsers installed on mobile phones must be accessible to people who are blind or visually impaired to ensure the accessibility of mobile broadband. How would reclassification affect the Commission's ability to implement and enforce these provisions? We seek comment on the impact, if any, that reclassification may have on the Commission's goals to ensure that BIAS remains accessible to individuals with disabilities. For instance, if the Commission declines to forbear from section 255 of the Act, as we propose below, would that provide additional authority for the Commission to require that ISPs' telecommunications services and equipment be accessible to and usable by people with disabilities?

6. The RIF Order's Policy Rationales Did Not Justify Reversing the Classification of Broadband Service

41. In the *RIF Order,* the Commission's primary policy justifications for reclassifying BIAS as a Title I service were its conclusions regarding the alleged harm to investment by Title II classification and the benefits to investment by Title I classification. However, the *RIF Order* gave little weight to the *2015 Open Internet Order*'s showing that investment continued for broadband services that were regulated as Title II common carrier services, including digital subscriber line (DSL), which was regulated as such until 2005.

42. We tentatively conclude that the Commission's conclusions in the *RIF Order* that ISP investment is closely tied to the classification of BIAS were unsubstantiated. Instead, we agree with the *RIF Order*'s statement that ''owners of network infrastructure make long-term, irreversible investments,'' which we believe makes it unlikely that changes in investment shortly following the adoption of each *Order* were actually related to the effects of each *Order.* We seek comment on this belief. We note that the Commission received conflicting viewpoints regarding the actual effect of Title II classification on investment. Instead of concluding, as the *2015 Open Internet Order* did, that conflicting viewpoints concerning the effect of classification on investment prevented the Commission from being certain which viewpoint was more accurate, the Commission chose to rely on certain studies purporting to show that Title II classification in the *2015 Open Internet Order* hurt investment to reach its conclusion about the effect of Title II classification on investment, even as the Commission seemed to recognize the weaknesses of those studies. Additionally, similar to the *2015 Open Internet Order* record, the *RIF Order*'s record showed opposing views on the likely long-term effects of the Commission's regulatory decisions on investment. We believe, as the Commission did in 2015, that ''no party [could] quantify with any reasonable degree of accuracy how either a Title I or a Title II approach may affect future investment.'' As such, we tentatively conclude that changes in ISP investment following the adoption of each *Order* were more likely the result of other factors unrelated to the classification of BIAS, such as broader economic conditions at the time, technology changes such as the transition from 3G to 4G LTE networks, and ISPs' general business development decisions. We seek comment on this tentative conclusion. Is there any evidence that ISP investment is closely tied to the regulatory classification of BIAS? Can any declines or increases in investment following adoption of either the *2015 Open Internet Order* or the *RIF Order* be directly attributed to the classification of BIAS in those *Orders?* What other factors besides the regulatory classification of broadband impact investment decisions? We invite parties to comment on the strength of any evidence submitted on these issues.

43. Notwithstanding these tentative conclusions, we seek comment generally on how, and the extent to which, our proposed classification of BIAS as a telecommunications service will affect ISPs' investment incentives today. How will it affect small ISPs? Is it possible to evaluate ISPs' investment incentives independent of any incentives and investment activity that may result from the billions of dollars in federal and state funding that has been and will be provided to ISPs to support infrastructure deployment and broadband connectivity?

C. Scope of Reclassification

44. *Broadband Internet Access Service.* We propose to continue using the definition of ''broadband internet access service'' as a ''mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service,'' as well as ''any service that the Commission finds to be providing a functional equivalent of the service described [in the definition] or that is used to evade the protections set forth'' in part 8 of the Commission's rules. The Commission has chiefly retained this definition since it first defined broadband internet access service in the *2010 Open Internet Order* (76 FR 60754 (Sept. 30, 2011)). We seek comment on whether there is any reason to depart from this definition of broadband internet access service.

45. Similarly, we propose to continue to define ''mass market'' as the Commission did in the *2015 Open Internet Order* and *RIF Order*—''a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as school and libraries.'' In addition to including broadband internet access service purchased with support from the E-Rate, Lifeline, and Rural Health Care programs, as well as any broadband internet access service offered using networks supported by the Connect America Fund or the Rural Digital Opportunity Fund, we propose that such ''mass market'' services would also include any broadband internet access service purchased with support from the Affordable Connectivity Program and the Connected Care Pilot Program. Consistent with the *2015 Open Internet Order* and *RIF Order,* the proposed definition excludes enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements, and special access services. We seek comment on our proposal. Should we apply the modified definition of broadband internet access service used for the broadband label requirement in this context to make clear that enterprise services are excluded even when they are supported by the Commission's broadband access and affordability programs?

46. We also propose to remain consistent with the Commission's conclusions in prior *Orders* to include in the term ''broadband internet access service'' those services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite. We seek comment on this proposal. We continue to intend broadband internet access service ''to cover the entire universe of internet access services at issue in the Commission's prior broadband classification decisions, as well as all other broadband internet access services offered over other technology platforms that were not addressed by prior classification orders.'' As in prior orders, we propose that ''fixed''

broadband internet access service refers to a broadband internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other internet access device to the internet, and encompasses the delivery of fixed broadband service over any medium, including various forms of wired broadband service (*e.g.,* cable, DSL, fiber), fixed wireless broadband service (including fixed services using unlicensed spectrum), and fixed satellite broadband service. Likewise, we propose that ''mobile'' broadband internet access service refers to a broadband internet access service that serves end users primarily using mobile stations, and includes, among other things, services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the internet, as well as mobile satellite broadband service. Consistent with the existing definition, we propose to include within the definition of broadband internet access service any such service, regardless of whether the ISP leases or owns the facilities used to provide the service. We seek comment on our proposals.

47. We also propose that to the extent coffee shops, bookstores, airlines, private end-user networks such as libraries and universities, and other businesses acquire broadband internet access service from an ISP to enable patrons to access the internet from their respective establishments, provision of such service by the premise operator would not itself be considered BIAS unless it was offered to patrons as a retail mass-market service. Likewise, when a user employs, for example, a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network that is not intentionally offered for the benefit of others, we believe he or she is not offering a broadband internet access service under our proposed definition, because the user is not marketing and selling such service to residential customers, small businesses, and other end-user customers. Such proposed findings are consistent with the manner in which the Commission has historically defined broadband internet access service, and we seek comment on any changed circumstances that would justify a different outcome.

48. We seek comment on whether there are other types of services we should address in defining the scope of broadband internet access service. For example, with respect to 5G deployments, new network architectures and uses of the technology are emerging, including some that offer both private and public 5G connectivity, like 5G Internet of Things (IoT). We seek comment on how we should view these services for purposes of defining broadband internet access service—are these types of services best viewed as enterprise services excluded from the definition of broadband internet access service or should they be treated as non-BIAS data services?

49. *Non-BIAS Data Services.* We also seek comment on whether to continue excluding non-BIAS data services (formerly ''specialized services'') from the scope of broadband internet access service. In the *2015 Open Internet Order,* the Commission explained that certain services offered by ISPs that share capacity with broadband internet access service over ISPs' last-mile facilities were not broadband internet access service and provided examples and characteristics of services that, at that time, likely fit within this category of non-BIAS data services. The Commission defined characteristics of these services, explaining that they (1) are not used to reach large parts of the internet; (2) are not a generic platform, but rather a specific ''application level'' service; and (3) use some form of network management to isolate the capacity used by these services from that used by broadband internet access service. We seek comment on whether these characteristics still appropriately describe non-BIAS data services. Are there any other characteristics of such services on which we should rely? Are these still appropriate examples of data services that are outside the scope of broadband internet access service? Have the distinctions between mass-market retail and non-BIAS data services changed, particularly from a consumer, technical, or other perspective, to warrant reconsideration of this exclusion?

50. We also tentatively conclude that we should maintain the *2015 Open Internet Order*'s approach to continue closely monitoring the development of non-BIAS data services. In the *2015 Open Internet Order,* the Commission emphasized that non-BIAS data services might still be subject to enforcement action if the Commission determined that: (1) a particular service is providing the functional equivalent of BIAS; (2) an ISP claimed or attempted to claim that a service that is the equivalent of BIAS is a non-BIAS data service not subject to any rules that would otherwise apply; or (3) a non-BIAS data service offering is undermining investment, innovation, competition, and end-user benefits. We are especially concerned about activities that may undermine national security and public safety, consumers' use of broadband internet access service, and the ability of consumers to access broadband internet access service. We also share the Commission's concern in the *2015 Open Internet Order* ''that over-the-top services offered over the internet are not impeded in their ability to compete with other data services.'' We seek comment on our proposed approach.

51. *Internet Traffic Exchange.* We next tentatively conclude that broadband internet access service, as we propose to define it, includes arrangements for the exchange of internet traffic by an edge provider or an intermediary with the ISP's network, referred to as internet peering, traffic exchange or interconnection, to the extent they provide the ''capability to transmit data to and receive data from all or substantially all internet endpoints . . . [and] enable the operation of the communications service.'' We seek comment on this position. As the Commission explained in 2015, ''[t]he representation to retail customers that they will be able to reach 'all or substantially all internet endpoints' necessarily includes the promise to make the interconnection arrangements necessary to allow that access'' and ''the promise to transmit traffic to and from those internet end points back to the user.'' We tentatively conclude that the Commission's findings and rationale regarding internet traffic exchange in the *2015 Open Internet Order*—that such ''edge service'' is derivative of broadband internet access service and constitutes the same traffic—remain valid, and we seek comment on our tentative conclusion. We observe that the *RIF Order* does not appear to dispute the Commission's previous conclusion that broadband internet access service includes this ''edge service,'' and instead determined that internet traffic exchange arrangements were appropriately regulated as an information service by virtue of its conclusion that broadband internet access service is an information service. We seek comment on whether there are circumstances under which ''edge service'' would not be best characterized as a part of broadband internet access service, and how commenters would characterize that service, given the *Verizon* court's conclusion that, in addition to the retail service provided to consumers, ''broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers.' '' We seek comment on the *Verizon* court's characterization of broadband internet access service in

relation to service provided to both consumers and edge providers. How, if at all, has edge service changed in relation to broadband internet access service? Are there any grounds to depart from the Commission's prior treatment of edge service and edge providers as a ''derivative'' service of broadband internet access service?

52. We also seek comment on whether we should exclude any particular services or functions from the definition of broadband internet access service. For example, should we exclude virtual private network (VPN) services, web hosting services, and/or data storage services from the scope of broadband internet access service? For purposes of this NPRM, ''data storage services'' refers to the provision of access to data storage platforms. The term is distinct from ''caching,'' which involves the temporary storage of data for purposes of delivering content to specific endpoints. While the Commission has previously excluded content delivery networks (CDNs) and internet backbone services, including transit arrangements, we seek comment whether a different approach may be warranted because these services are integral to transmitting data and delivering communications to internet endpoints, thus falling within the proposed definition of ''broadband internet access service.'' We observe that these services directly or indirectly provide data on behalf of their clients. For example, while VPN servers reflect one end-point of an underlying communication stream, they act as a launching pad to forward traffic to the destination identified by the user. We seek comment on this proposed analysis. Do these services fall within the scope of broadband internet access service, as we propose to define it?

D. Classifying Broadband Internet Access Service as a Telecommunications Service

53. The 1996 Act enacted the ''telecommunications service'' and ''information service'' definitional frameworks, and since that time, the Commission and courts have grappled with the classification of internet access services as technology and the communications marketplace have evolved and the internet has become essential to our daily lives. Courts have long recognized the Commission's authority to interpret and implement the Communications Act of 1934. Both the *2015 Open Internet Order* and the *RIF Order* recognized this authority. And on review of each of those decisions, the D.C. Circuit accepted the Commission's authority to make classification decisions, even when this involved a change in course. In addressing a prior Commission decision classifying BIAS, in *Brand X,* the Supreme Court confirmed not only that an administrative agency *can* change its interpretation of an ambiguous statute, but that it ''*must* consider varying interpretations and the wisdom of its policy on a continuing basis, for example in response to . . . a change in administrations.'' In light of this precedent, we believe that we not only have the authority to classify BIAS, but that we must reevaluate the 2018 information service classification in consideration of the policy rationales and marketplace developments we have described above as warranting a return to the telecommunications service classification. We seek comment on this view.

54. In evaluating the classification of BIAS, three definitional terms are relevant. First, the Act defines ''telecommunications'' as ''the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'' Second, the Act defines ''telecommunications service'' as ''the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.'' Finally, the Act defines ''information service'' as ''the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . , but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'' When Congress enacted the definitions of ''telecommunications service'' and ''information service'' in the 1996 Act, it substantially incorporated the ''basic'' and ''enhanced'' service classifications from the *Computer Inquiries* line of decisions. Under the *Computer Inquiries,* facilities-based telephone companies were obligated to offer the transmission component of their enhanced service offerings—including broadband internet access service offered via DSL—to unaffiliated enhanced service providers on nondiscriminatory terms and conditions pursuant to tariffs or contracts governed by Title II. Thus, there is no disputing that until 2005, Title II applied to the transmission component of DSL service. Further, because the statutory definitions substantially incorporated the Commission's terminology under the *Computer Inquiries,* Commission decisions regarding the distinction between basic and enhanced services—in particular, decisions regarding features that are ''adjunct to basic'' services—are relevant to our analysis, as discussed further below, because the Commission's definition of ''adjunct to basic'' services has been instrumental in determining which functions fall within the ''telecommunications systems management'' exception to the ''information service'' definition.

55. We tentatively conclude that both a reasonable and the best reading of these definitional provisions supports classifying BIAS as a telecommunications service. As explained in the *2015 Open Internet Order,* ''the critical distinction between a telecommunications and an information service turns on what the provider is 'offering.' '' If the provider is offering ''telecommunications'' to the public for a fee, then the service is necessarily a telecommunications service. Thus, in 2015, the Commission interpreted these terms to classify BIAS as a telecommunications service, finding that BIAS, as then offered, is sufficiently independent from the information services that ISPs may also offer. Consistent with the Commission's finding in 2015, we believe that BIAS is best understood as making available high-speed access to the internet (that may be bundled with other applications and functions)—and therefore that it provides telecommunications—and that ISPs offer BIAS to the public for a fee. Accordingly, we tentatively conclude the best reading of the Act is that BIAS, as offered to and understood by consumers today, is a telecommunications service rather than an information service. We seek comment on this tentative conclusion.

56. *Broadband Internet Access Service Provides Telecommunications.* We tentatively conclude that BIAS provides ''telecommunications'' as it is defined under the Act, and seek comment on this conclusion. As discussed above, the Act defines ''telecommunications'' as ''the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'' As discussed above, we believe that users rely on BIAS to transmit ''information of the user's choosing,'' ''between or among points specified by the user.'' We further believe, as the Commission has previously found, that the term ''points

specified by the user'' is ambiguous, and that ''uncertainty concerning the geographic location of an endpoint of communication is irrelevant for the purpose of determining whether a broadband internet access service is providing 'telecommunications.' '' We also contend that these points are not constrained to be defined in one particular format. They may be in the form of an IP address or perhaps more commonly associated with fully qualified domain names resolved by the DNS, such as *www.example.com.* This is consistent with the Commission's prior deduction that while consumers often do not know the precise physical or virtual location of the edge provider or other user they want to access, ''there is no question that users specify the end points of their internet communications'' and ''would be quite upset if their internet communications did not make it to their intended recipients or the website addresses they entered into their browser would take them to unexpected web pages.'' As the Commission explained, ''numerous forms of telephone service qualify as telecommunications even though the consumer typically does not know the geographic location of the called party,'' including cell phone service, toll free 800 service, and call bridging service. Likewise, the fact that DNS may resolve the same domain name to one or more virtual locations (*e.g.,* due to load balancing), just as in the toll free arena a single telephone number may route to multiple locations, ''does not transform that service to something other than telecommunications.'' In the *RIF Order,* the Commission conceded that at least some telecommunications are used as an input into BIAS and ''an ISP *makes* use of telecommunications'' in the provision of BIAS, but found that it ''need not further address the scope of the 'telecommunications' definition in order to justify [its] classification of broadband internet access service,'' and did not further address the Commission's interpretation and application of the ''telecommunications'' definition in the *2015 Open Internet Order.* We seek comment on the analysis that BIAS provides ''telecommunications,'' including whether there is any reason to depart from it.

57. We further tentatively conclude that there is no change or modification to the form or content of information during transmission, and seek comment on this analysis. In 2015, the Commission explained that ''the packet payload (*i.e.,* the content requested or sent by the user) is not altered by the variety of headers that a provider may use to route a given packet'' and therefore, the ''form and content of the information'' is the same when an IP packet is sent by the sender as when the same packet is received by the recipient. We seek comment on whether this analysis of packet transmission remains accurate and relevant today. Have there been any developments or changes in how BIAS is provisioned that would cause us to reconsider this analysis? How do ISPs transmit data information from one point on the network to another? How does it differ from how PSTN calls are transmitted today?

58. *Broadband Internet Access Service is a Telecommunications Service.* Here, we propose to build off our tentative conclusion that BIAS provides telecommunications and our belief that current factual circumstances show that consumers perceive BIAS as a standalone offering used to access third-party services and, as such, ISPs routinely market BIAS widely to the general public. Viewed together, ISPs would necessarily offer BIAS ''for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,'' and therefore we tentatively conclude that BIAS is a telecommunications service as defined in the Act. We seek comment on our tentative conclusion and assessment. We further propose to find that the implied promise to make arrangements for exchange of internet traffic as part of the BIAS offering does not constitute a private carriage arrangement, and that the rationale adopted in the *2015 Open Internet Order* remains persuasive. We seek comment on this approach. How do internet traffic arrangements with negotiated terms differ from mass-market services offered to the public? Have there been any significant developments in the internet traffic exchange market since 2015 that would cause us to reconsider these proposals? We observe that in 2015, the Commission concluded that ''some individualization in pricing or terms is not a barrier to finding that a service is a telecommunications service,'' and the *RIF Order* does not appear to disturb this finding. We seek comment on this analysis.

59. *Broadband Internet Access Service Is Not Best Classified an Information Service.* We tentatively conclude that, as offered today, BIAS is not an information service under the best reading of the Act. The Act defines an information service as the offering ''of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'' We believe that the Commission's reasoning in the *RIF Order*—that because BIAS has the ''capability'' to be used to engage in the activities within the information service definition, it is best interpreted as an information service—is flawed. Concluding that BIAS ''is an information service irrespective of whether it provides the *entirety* of any end user functionality or whether it provides end user functionality in tandem with edge providers,'' as the Commission did in the *RIF Order,* fails to recognize the relationship of BIAS transmission services to other functions, which may be offered by either the ISP or a third party of the end user's choice. Logically, under the framework set out in the *RIF Order,* even traditional switched telephone service would be classified as an information service, as it provides customers with the ability to make information available to others (*e.g.,* public service announcements), retrieve information from others, and process and utilize stored information from others (*e.g.,* by interacting with a call menu). We tentatively conclude that the best and more reasonable interpretation of the statutory language is that BIAS is a telecommunications service, while the applications that run over BIAS either constitute distinct information services or fall within the exception to the information service definition for capabilities used ''for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'' We seek comment on this proposed analysis.

60. We tentatively conclude that companion services, such as DNS and caching, when provided with BIAS, fit within the telecommunications systems management exception to the definition of ''information service,'' and therefore when these services are provided with BIAS, they do not convert BIAS into an information service. We seek comment on this tentative conclusion. The Act's telecommunications systems management exception excludes from the definition of ''information service'' ''any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'' In the *2015 Open Internet Order,* the Commission concluded that when DNS and caching are offered with BIAS, they ''either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband internet

access service, or both.'' In the *RIF Order,* the Commission took a contrary view, concluding that ''DNS and caching functionalities . . . offered by ISPs[ ] are integrated information processing capabilities offered as part of broadband internet access service to consumers today.'' On review of the *RIF Order,* Judge Millet explained in her concurrence that ''the question is whether the combination of transmission with DNS and caching *alone* can justify the information service classification. If we were writing on a clean slate, that question would seem to have only one answer given the current state of technology: No.'' She added that ''new factual developments call[ed] for serious technological reconsideration and engagement through expert judgment. Instead, the Commission's exclusive reliance on DNS and caching blinkered itself off from modern broadband reality, and untethered the service 'offer[ed]' from both the real-world marketplace and the most ordinary of linguistic conventions.'' We intend to guide our decisionmaking about the role of DNS and caching based on today's broadband reality, and we seek information on the present circumstances.

61. We tentatively conclude that the Commission's 2015 analysis provides the more reasonable application of the relevant statutory terms and Commission precedent to DNS functionality with respect to BIAS, and we seek comment on this tentative conclusion. In the *2015 Open Internet Order,* the Commission analogized DNS to adjunct-to-basic services, such as speed dialing, call forwarding, and computer-provided directory assistance, and concluded that because it is effectively equivalent to routing information and does not alter the fundamental character of the telecommunications service, it falls within the telecommunications systems management exception to the definition of ''information service.'' ''Adjunct-to-basic'' functions were those features and services that met the literal definition of ''enhanced service'' but did not alter the fundamental character of the associated basic transmission service and thus were treated as basic (*i.e.,* telecommunications) services even though they went beyond mere transmission. The Commission has held that such functions: (1) must be ''incidental'' to an underlying telecommunications service—*i.e.,* '' 'basic' in purpose and use'' in the sense that they facilitate use of the network; and (2) must ''not alter the fundamental character of [the telecommunications service].'' The *RIF Order* rejected the adjunct-to-basic comparison largely based on its contention that adjunct-to-basic services and the telecommunications systems management exception must be viewed narrowly, effectively to only include functions that solely facilitate transmission. Because it concluded that DNS, as then used, is a core function of BIAS that provides more than a functionally integrated address-translation capability, it determined that DNS did not fall within the exception. We tentatively disagree with the *RIF Order*'s narrow characterization of adjunct-to-basic services and the telecommunications systems management exception as not mandated by the statutory language; however, even under that unnecessarily narrow characterization, we believe DNS would fall under the telecommunications management exception, as its fundamental purpose is to route information—*i.e.,* to facilitate transmission.

62. We further believe that even if DNS did not fall within the telecommunications systems management exception to the Act's definition of ''information services,'' it is not so inextricably intertwined so as to convert the entire BIAS offering into an information service, consistent with the Commission's finding in 2015. In support of the *2015 Open Internet Order*'s conclusion, the Commission explained that IP packet transfer can work without DNS and that DNS lookup is available through third parties. In the *RIF Order,* the Commission argued that even though DNS can also be provided by third parties, the focus should remain on the capabilities that ISPs offer, which it concluded is a single, inextricably intertwined information service. However, in her *Mozilla* concurrence, Judge Millet noted that ''DNS, much like email, is now free and widely available to consumers in the internet marketplace.'' We tentatively conclude that the *2015 Open Internet Order*'s showing that DNS is not a necessary component of BIAS, which the *RIF Order* did not dispute, provides the better rationale for evaluating whether DNS transforms the entire BIAS offering into an information service, and tentatively conclude that it does not. We seek comment on this tentative conclusion. Does the Commission's 2015 analysis of DNS as it relates to BIAS remain relevant, accurate, and persuasive? Why or why not? Are there any technical or commercial developments that should cause us to reconsider this analysis?

63. For the same reasons the Commission found in 2015, we believe that caching, when provided in connection with BIAS, is ''used to facilitate the transmission of information so that users can access other services, in this case by enabling the user to obtain 'more rapid retrieval of information' through the network,'' and thus falls within the telecommunications systems management exception. We seek comment on this analysis. The Commission concluded otherwise in the *RIF Order,* finding that ''ISP-provided caching does not merely 'manage' an ISP's broadband internet access service and underlying network, it enables and enhances consumers' access to and use of information online'' and that because it is ''useful to the consumer,'' caching does not fall within the telecommunications systems management exception. However, we do not believe consumers consider caching capabilities when purchasing BIAS. We seek comment regarding the technical and commercial aspects of caching, how caching functionality is both provisioned by ISPs and offered to customers, as well as the relevance (if any) of Commission precedent as applied to caching today.

64. In particular, given that web pages today change constantly and are often customized on a per-user basis, we question whether ISPs cache popular content requested by multiple users to supply the same web page when requested later, rather than fetching the page anew. Further, as Judge Millett observed in *Mozilla,* caching ''does not work when users employ encryption,'' which as of 2017 constituted a majority of internet traffic, which suggests ''that caching no longer enjoys the pride of place ascribed to it'' by the *RIF Order.* We seek comment on whether ISPs use this practice and, to the extent that commenters contend they do, why (given the ever-changing nature and high customization of contemporary web pages). In addition, should the Commission distinguish between caching by ISPs and the kind of caching that third-party content providers use to keep copies of content (such as videos and images, but possibly also web pages) closer to users? We preliminarily conclude that caching of this kind is not provided by ISPs and thus is not a part of BIAS, and as such does not transform BIAS into an information service.

65. We also seek comment on whether there are other functionalities provided or offered with BIAS, besides DNS and caching, that might fall into the telecommunications systems management exception, as well as on

other add-on information services offered in conjunction with BIAS and how they might affect our analysis with respect to the classification of BIAS. The *2015 Open Internet Order* identified examples of processing-related capabilities that fall within the telecommunications systems management functions, such as security virus protection and blocking denial of service attacks, as well as add-on information services such as cloud-based storage services, email, and spam protection that were often offered in conjunction with BIAS but were not inextricably intertwined with it. Consistent with the Commission's finding in 2015, we propose that ''such services are not inextricably intertwined with [BIAS], but rather are a product of the provider's marketing decision not to offer the two separately,'' and seek comment on this proposal. We believe that, to the extent BIAS is offered along with other capabilities that would otherwise fall into the ''information service'' definition, such an offering does not turn BIAS into a functionally integrated information service. Are there examples of other information services or capabilities that are often offered by ISPs in conjunction with BIAS? How do consumers view and use these products in relation to their BIAS subscription? How has the market for third-party information services offered in tandem with BIAS developed since the *RIF Order* was adopted? We also seek comment on any devices or applications, such as Wi-Fi hotspots, wearables, appliances, and other IoT devices that an ISP may include with its BIAS offering and how they may function both in conjunction with and apart from the underlying BIAS. How does a secondary market for such devices and applications impact our interpretation that they are separable information services?

66. *Major Questions Doctrine Applicability.* We seek comment on whether, and if so how, the major questions doctrine—the notion that Congress is expected to speak clearly when delegating authority in certain extraordinary cases—should inform the conclusions we reach based on the text and structure of the Act. In the *USTA* decision, the D.C. Circuit reasoned that *Brand X* conclusively held that the Commission has the authority to determine the proper statutory classification of BIAS and that its determinations are entitled to deference, and so there is no need to consult the major questions doctrine here. In opinions respecting the denial of rehearing *en banc,* several judges debated how (if at all) the major questions doctrine would otherwise apply to the issue. The *RIF Order* did not directly dispute this conclusion, but stated that the doctrine supported its decision to classify BIAS as an information service in order to steer clear of any major questions doctrine issues.

67. What factors are relevant to the Commission's consideration of whether the major questions doctrine applies to the classification of BIAS, taking account of evolving Supreme Court precedent? Among other factors, we ask that commenters consider the extent to which this matter falls within the Commission's recognized expertise and authority as the federal regulator responsible for ''regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, . . . wire and radio communications service with adequate communications facilities at reasonable charges.'' In light of relevant Commission precedent, both before and shortly after Congress adopted the 1996 Act, classifying analogous transmission services—including the transmission component of broadband internet access service offered via digital subscriber line (DSL)—as common carrier services, what basis is there, if any, for concluding that the Commission's proposed classification action here is an exercise of ''newfound power'' not previously recognized? Has Congress acted or failed to act on proposals to clarify the proper classification of broadband in subsequent years, and to what extent does such action or inaction inform the Commission's exercise of its claimed classification authority or the application of the major questions doctrine?

68. We also seek comment on how and to what extent each relevant factor should affect the Commission's analysis of whether the classification of BIAS implicates the major questions doctrine. Commenters should consider how the relevant factors apply to the specific proposals here. For example, should the Commission evaluate the applicability of the major questions doctrine for BIAS as a whole, or should it distinguish between or among particular categories of BIAS offerings? How would the major questions doctrine apply in the case of particular rules we might adopt if we determine BIAS meets a given statutory classification?

69. Separately, even assuming *arguendo* that the major questions doctrine were applied to our classification of BIAS, we seek comment on whether Congress has spoken sufficiently clearly in the Act—in definitional provisions or more generally—to satisfy that standard.

E. Classifying Mobile Broadband Internet Access Service as a Commercial Mobile Service

70. In addition to our proposed return to the *2015 Open Internet Order*'s classification of BIAS as a telecommunications service, we propose to return to that *Order*'s classification of mobile BIAS as a commercial mobile service. In the alternative, even if mobile BIAS does not meet the definition of ''commercial mobile service,'' we propose to find that it is the functional equivalent of a commercial mobile service and, therefore, not private mobile service.

71. Section 332(d)(1) of the Act defines ''commercial mobile service'' as ''any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.'' As an initial matter, we tentatively conclude that mobile BIAS is a ''mobile service'' because subscribers access the service through their mobile devices. Next, we tentatively conclude that mobile BIAS is provided ''for profit'' because ISPs offer it to subscribers with the intent of receiving compensation. We also tentatively conclude that mobile BIAS is widely available to the public, without restriction on who may receive it.

72. We also propose to return to the *2015 Open Internet Order*'s determination that mobile BIAS is an interconnected service. Section 332(d)(2) states that the term ''interconnected service'' means ''service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission). . . .'' In the *2015 Open Internet Order,* the Commission reached the conclusion that mobile BIAS was an interconnected service through the application of an updated definition of ''public switched network'' that included networks that use public IP addresses. In doing so, the Commission highlighted the Commission's longstanding determination from the *Second CMRS Report and Order* (59 FR 18493 (Apr. 19, 1994)) that the term ''public switched network'' ''should not be defined in a static way'' as ''the network is continuously growing and changing because of new technology and increasing demand.'' The Commission reversed course in the *RIF Order,* reinstating the prior definition of

''public switched network.'' We believe the Commission's decision in the *RIF Order* fails to align with the technological reality and widespread use of mobile BIAS. The ubiquity of mobile BIAS that the Commission recognized in 2015 is even more pronounced today, as mobile broadband networks have continued to develop and grow in the intervening years, with more users and increased mobile data traffic. In 2022, there was more than 73 trillion megabytes of mobile data traffic exchanged in the United States, representing a 38 percent increase from the previous year. Continued growth of mobile BIAS is expected, with one forecast predicting that there will be 410 million 5G mobile subscriptions in North America by 2028. In light of these factors, we propose to return to the *2015 Open Internet Order*'s modernized definition of ''public switched network'' in § 20.3 of the Commission's rules, specifically defining the term to mean ''the network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.'' We believe this definition, which includes IP addresses, embodies the current technological landscape and the widespread use of mobile broadband networks, and is therefore more consistent with the Commission's recognition that the public switched network will grow and change over time. We seek comment on this analysis and our proposed approach.

73. We further propose to reach the same conclusion the Commission did in the *2015 Open Internet Order* that mobile BIAS is interconnected with the ''public switched network,'' as we propose to define it today. The *2015 Open Internet Order* found that mobile BIAS should be considered interconnected because it was a broadly available mobile service that provided users with the ability to send and receive communications to all other users of the internet. Given the ''universal access'' and expected future growth of mobile BIAS, the *2015 Open Internet Order* determined that finding mobile BIAS to be interconnected and a commercial mobile service was consistent with Congress' objective in section 332 of the Act in creating a symmetrical regulatory framework among similar mobile services that were available to the public. Mobile BIAS remains a broadly available mobile service that provides its users with the ability to send and receive communications and is an essential component of today's technology landscape. As discussed above, there has been a marked increase in the amount of mobile data traffic in recent years, and continued growth is predicted. Given the continued widespread use and availability of mobile BIAS, we propose to find that mobile BIAS is an interconnected service, and propose to support this finding by applying the Commission's analysis from the *2015 Open Internet Order* to today's marketplace. We seek comment on our proposed approach.

74. We also propose to rely on the Commission's analysis from the *2015 Open Internet Order* that mobile BIAS is an interconnected service for the additional reason that it provides users with the capability to communicate with other users of the internet and with people using telephone numbers through VoIP applications. The *2015 Open Internet Order* found that ''users on mobile networks can communicate with users on traditional copper based networks and IP based networks, making more and more networks using different technologies interconnected.'' It further identified mobile VoIP, as well as over-the-top mobile messaging, as ''among the increasing number of ways in which users communicate indiscriminately between [North American Numbering Plan (NANP)] and IP endpoints on the public switched network.'' Since 2015, mobile BIAS users continue to communicate using these tools, with 85 percent of Americans owning a smartphone that offers access to VoIP and over-the-top communications apps. We seek comment on whether there have been any material changes in technology, the marketplace, or other facts that would warrant refinement or revision of the analysis regarding the interconnected nature of mobile BIAS from the *2015 Open Internet Order.*

75. In connection with this approach, we seek comment on whether we should readopt the *2015 Open Internet Order*'s revised definition of ''interconnected service'' in § 20.3 of the Commission's rules. That *Order* defined ''interconnected service'' to mean a service that gives subscribers the ability to ''communicate to or receive communications from other users of the public switched network,'' removing the requirement that such service provide the ability to communicate with *all* other users of the public switched network. It did so to ensure that services that provide the *capability* to access all other users, including through the use of OTT services, but limit that access in certain limited ways, are not excluded from the definition of ''interconnected service.'' The *RIF Order* reverted to the prior definition, concluding that ''the best reading of 'interconnected service' is one that enables communication between its users and all other users of the public switched network'' and that the service ''must itself provide interconnection to the public switched network using the NANP.'' We seek comment on whether it is necessary to return to the definition of ''interconnected service'' in the *2015 Open Internet Order* to ensure that all appropriate services are covered by the definition.

76. Because we also propose to reclassify mobile BIAS as a telecommunications service, we believe that classifying it as a commercial mobile service would avoid the inconsistency that would result if the service were both a telecommunications service and a private service. The Commission explained this reasoning in the *2015 Open Internet Order,* and we propose to adopt a consistent rationale here. The Commission stated that, because it determined mobile BIAS to be a telecommunications service, ''designating it also as commercial mobile service subject to Title II is most consistent with Congressional intent to apply common carrier treatment to telecommunications services.'' The Commission found that classifying mobile BIAS as a commercial mobile service was necessary ''to avoid a statutory contradiction that would result if the Commission were to conclude both that mobile broadband internet access was a telecommunications service and also that it was not a commercial mobile service. A statutory contradiction would result from such a finding because, while the Act requires that providers of telecommunications services be treated as common carriers, it prohibits common carrier treatment of mobile services that do not meet the definition of commercial mobile service. Finding mobile broadband internet access service to be commercial mobile service avoids this statutory contradiction and is most consistent with the Act's intent to apply common carrier treatment to providers of telecommunication services.'' We seek comment on this proposal.

77. In the alternative, to the extent that mobile BIAS falls outside the definition of ''commercial mobile service,'' we propose to find that it is the functional equivalent of a commercial mobile service and, thus, not private mobile service. The Commission found that mobile BIAS service was functionally equivalent to

commercial mobile service because, ''like commercial mobile service, it is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications on their mobile device to and from the public. Although the services use different addressing identifiers, from an end user's perspective, both are commercial services that allow users to communicate with the vast majority of the public.'' The *RIF Order* found that the *2015 Open Internet Order*'s focus on the public's ''ubiquitous access'' to mobile BIAS alone was ''insufficient'' to establish functional equivalency and that the test established in the *Second CMRS Report and Order* provided a more thorough consideration of factors of whether a service is closely substitutable for a commercial mobile service. We seek comment on both of these analyses. As the *RIF Order* acknowledged, however, the Commission has discretion to determine whether services are functionally equivalent. Congress expressly delegated authority to the Commission to determine whether a particular mobile service may be the functional equivalent of a commercial mobile service, defining ''private mobile service'' as ''any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.'' For the reasons outlined in the *2015 Open Internet Order* and in light of the continued increased use and distribution of mobile broadband services and devices, we propose to find that mobile BIAS is the functional equivalent of commercial mobile service. We seek comment on this proposal and on any other or different definition of ''functional equivalent'' that the Commission should adopt.

78. We anticipate that returning mobile BIAS to its classification as a commercial mobile service and reinstating openness requirements on a larger set of mobile ISPs will allow mobile providers that would become subject to such rules to continue to be able to compete successfully in the marketplace and continue to have incentives to develop new products and services. For example, the Commission has applied open access rules to upper 700 MHz C Block licensees, including Verizon Wireless, for more than a decade, and the mobile operators subject to these requirements have continued to compete successfully in the marketplace. We seek comment on this view and on any policy consequences that commenters believe may result from the proposed reclassification of mobile BIAS.

F. Preemption of State and Local Regulation of Broadband Service

79. We seek comment on how best to exercise our preemption authority to ensure that BIAS is governed primarily by a national framework, including a uniform floor of ISP conduct rules. The *RIF Order* adopted an expansive preemption decision, but the D.C. Circuit in *Mozilla* concluded that the *RIF Order* ''fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority,'' and vacated that preemption action. The D.C. Circuit concluded that ''in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law.'' A number of states quickly stepped in to fill that void, adopting their own unique regulatory approaches for BIAS, including their own versions of open internet requirements, and even measures like regulation of retail rates that the *2015 Open Internet Order* found unnecessary. We anticipate that our proposed regulatory approach to BIAS will remedy the infirmities the D.C. Circuit identified in the *RIF Order*'s approach, and we seek comment on the best way to use our preemption authority.

80. We seek comment on the best sources of preemption authority for us, if needed. For one, we anticipate that the regulatory approach proposed here would give us authority to oversee BIAS under Title II with forbearance, under Title III in the case of mobile ISPs, as well as under section 706 of the 1996 Act. These sources of authority could enable us to adopt regulations that preempt contrary state requirements. We also expect that our proposed regulatory approach could make it more straightforward to rely on various express preemption provisions in the Act, such as the preemption that accompanies forbearance under section 10(e), the preemption that arises when state requirements hinder provision of services covered under sections 253 or 332(c)(7) of the Act, the preemption of state requirements contrary to federal universal service policies under section 254(f), and other possible preemption provisions. We expect that Commission decisions finding BIAS to be interstate for regulatory purposes largely resolve possible arguments premised on the limitation on FCC authority over state communications services under section 2(b) of the Act that otherwise could arise here. We seek comment on these views and on any additional sources of statutory authority for preemption, if needed.

81. We seek comment on how far to go in this proceeding in exercising our preemption authority to ensure that BIAS principally is governed by a federal framework. Should we adopt a broad preemption decision like the Commission attempted to do in the *RIF Order*? Or should the Commission proceed more incrementally, such as by only addressing in this proceeding those state or local legal requirements squarely raised in the record, and otherwise deferring to future case-by-case adjudications of preemption? Under an incremental approach, should we identify in this proceeding issues where the Commission will decline to preempt state requirements and thereby share regulatory responsibility with the states, such as state privacy and consumer protection laws? For what issues, if any, is the Commission required to share regulatory responsibility with the states? What are the benefits and drawbacks of permitting state regulation in specific issue areas? What issues may benefit most from shared regulatory responsibility with states?

82. We also seek comment on how best to define the scope of preemption to ensure that BIAS is principally governed by a federal framework. For example, should open internet conduct rules of the sort proposed below be seen not only as an appropriate nationwide floor providing those protections to everyone, but also as an appropriate ceiling to reflect the balancing of relevant policy considerations? The *2015 Open Internet Order* stated that ''should a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of BIAS through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.'' Should the Commission affirmatively preempt in those scenarios here rather than leaving those scenarios for future case-by-case evaluation as it did in 2015? In addition, how should the Commission define what state or local actions are within the scope of any affirmative preemption it might adopt here? To what extent should these decisions be informed by traditional preemption frameworks, such as express preemption, field preemption, or conflict preemption?

II. Proposed Forbearance

83. We propose to forbear from applying some Title II provisions to BIAS in the event that we reclassify the service, and we seek comment on what

the parameters of such forbearance should be, taking into account as a primary matter that we believe we must enable the Commission to fulfill its responsibility under the Act to protect national security and public safety when executing its other statutory obligations. In the *2015 Open Internet Order,* the Commission accompanied Title II classification with ''substantial'' forbearance for BIAS in a way that was designed to ''strike the right balance at this time of minimizing the burdens on ISPs while still adequately protecting the public, particularly given the objectives of section 706 of the 1996 Act.'' We propose to return to largely the same forbearance that was adopted in the *2015 Open Internet Order,* tailored as appropriate in light of any updated conclusions the Commission reaches in this proceeding regarding the need for particular rules, requirements, or sources of authority covering BIAS. Notably, we propose to forbear from Title II provisions insofar as they would support the adoption of *ex ante* rate regulations for broadband internet access service.

84. However, subsequent developments have highlighted the importance of retaining statutory authority to enable the Commission to address national security and public safety concerns that could arise with respect to BIAS. Those considerations provide a leading basis for revisiting the statutory classification of BIAS, and therefore we propose to depart from the forbearance approach reflected in the *2015 Open Internet Order* by declining to forbear from applying section 214 of the Act, and expressly clarifying that our proposed forbearance would not encompass Title III licensing and authorization authorities, given that those statutory provisions could provide important additional tools to advance the Act's national security and public safety objectives. We seek comment on that proposal and on any issues related to forbearance with respect to BIAS if classified as a Title II service, including the best understanding of the current status of the forbearance granted in the *2015 Open Internet Order,* the appropriate analytical approach to evaluating forbearance, and the substantive scope of forbearance that should be granted. We also seek comment on the impact of our proposed forbearance approach on ISPs, particularly small ISPs.

A. Forbearance Framework

85. As a threshold matter, we seek comment on the best way to interpret the effect of the *RIF Order* on the forbearance previously granted in the *2015 Open Internet Order.* The *RIF Order* stated that, due to the reclassification decision there, ''the forbearance granted in the [*2015 Open Internet Order*] is now moot,'' and that ''carriers are no longer permitted to use the [*2015 Open Internet Order*] forbearance framework (*i.e.,* no carrier will be permitted to maintain, or newly elect, the [*2015 Open Internet Order*] forbearance framework).'' We seek comment on how to interpret those statements in the *RIF Order.*

86. Next, we seek comment on the appropriate analytical approach to use when evaluating the statutory forbearance criteria. In the *2015 Open Internet Order,* the Commission stated that ''[b]ecause the Commission is not responding to a petition under section 10(c), we conduct our forbearance analysis under the general reasoned decision making requirements of the Administrative Procedure Act [(APA)], without the burden of proof requirements that section 10(c) petitioners face.'' The Commission explained how its approach to forbearance in the *2015 Open Internet Order* satisfied the statutory forbearance criteria, other relevant statutory objectives such as section 706 of the 1996 Act, and applicable procedural requirements under the Act and the APA, and the D.C. Circuit rejected challenges to that forbearance approach in its *USTA* decision. We propose to follow the same analytical approach here and seek comment on that proposal. We also seek comment on alternative analytical approaches or other ways to effectuate the forbearance analysis.

87. We seek comment on the interplay between our approach to forbearance and the argument in the *RIF Order* that the scope of forbearance granted in the *2015 Open Internet Order* suggests that classification of BIAS as a Title II service is contrary to the statutory scheme. In particular, does such an argument fail to account for important aspects of the approach to forbearance in the *2015 Open Internet Order*? For example, we note that in many cases the *2015 Open Internet Order* evaluated forbearance assuming *arguendo* that particular provisions of the Act or Commission rules apply to BIAS, rather than ''first exhaustively determining provision-by-provision and regulation-by-regulation whether and how particular provisions and rules apply to this service.'' Do objections to Title II classification premised on the scope of forbearance adequately account for that fact, or do they draw unduly broad conclusions based on simple counts of rules or statutory provisions subject to the forbearance decision?

88. Separately, we propose to leave ISPs' broadband transmission services—as distinguished from BIAS that relies on that transmission as an input—subject by default to the framework of the *Wireline Broadband Classification Order* (70 FR 60222 (Oct. 17, 2005)) as the Commission has done previously. The *RIF Order* observed that such services ''have never been subject to the [*2015 Open Internet Order*] forbearance framework,'' and stated that ''carriers that choose to offer transmission service on a common carriage basis are, as under the *Wireline Broadband Classification Order,* subject to the full set of Title II obligations, to the extent they applied before the'' *2015 Open Internet Order.* The *2015 Open Internet Order* did, however, allow a provider previously offering broadband transmission on a common carrier basis ''to change to offer internet access services pursuant to the construct adopted in'' that *Order* subject to filing with and review by the Wireline Competition Bureau of the provider's proposal for the steps it would take to convert to such an approach. We propose to follow the same approach here, and seek comment on that proposal.

B. Proposed Forbearance

89. We seek comment on the particular statutory provisions and rules that should or should not be subject to forbearance. In this regard, we propose to use the forbearance granted in the *2015 Open Internet Order* as the starting point for our consideration of the appropriate scope of forbearance. There, although the Commission granted broad forbearance, the Commission did not forbear from a number of specific protections or authorities:

- The open internet rules and section 706 of the 1996 Act;
- ''[S]ections 201, 202, and 208, along with key enforcement authority under the Act, both as a basis of authority for adopting open internet rules as well as for the additional protections those provisions directly provide'';
- Section 222 of the Act, ''which establishes core customer privacy protections'';
- Section 224 of the Act and the Commission's implementing rules, ''which grant certain benefits that will foster network deployment by providing telecommunications carriers with regulated access to poles, ducts, conduits, and rights-of-way'';
- Sections 225, 255, and 251(a)(2) of the Act and the Commission's implementing rules, ''which collectively

advance access for persons with disabilities; except that the Commission forbears from the requirement that providers of broadband internet access service contribute to the Telecommunications Relay Service (TRS) Fund at this time'';

- Section 254 of the Act and ''the interrelated requirements of section 214(e), and the Commission's implementing regulations to strengthen the Commission's ability to support broadband, supporting the Commission's ongoing efforts to support broadband deployment and adoption''; and
- Requirements governing the wireless licensing process in section 309(b) and (d)(1) of the Act and §§ 1.931, 1.933, 1.939, 22.1110, and 27.10 of the Commission's rules.

90. We propose to forbear from all provisions of Title II that would permit Commission regulation of BIAS rates. We believe that Commission rate regulation is unnecessary because the tailored approach we adopt here will enable the Commission to promote broadband deployment and competition, and because we will be able to rely on sections 201 and 202 to address non-rate related issues. Therefore, while we do not propose to forbear from sections 201 and 202 of the Act as a general matter, we ''do not and cannot envision adopting new *ex ante* rate regulation'' or *ex post* rate regulation of BIAS, and we therefore propose to forbear from applying sections 201 and 202 to BIAS insofar as they would support adoption of rate regulations for BIAS. We seek comment on this proposal. With respect to section 254, we propose to forbear in part from the first sentence in section 254(d) and our associated rules ''insofar as they would immediately require new universal service contributions associated with'' BIAS, as the Commission did in 2015, and seek comment on this proposal.

91. In addition to declining to forbear from applying those specifically enumerated provisions of the Act and Commission rules, the Commission also more generally limited its forbearance to the scope of its section 10 forbearance authority, and thus did not forbear from applying statutory provisions or rules that ''are not applied to telecommunications carriers or telecommunications services.'' The Commission also did not forbear from applying provisions of the Act or Commission rules that already applied to BIAS irrespective of the Title II classification of that service. The Commission cited illustrative examples falling within one or both of those categories, including provisions imposing obligations on the Commission, like section 257 of the Act, provisions that simply reserve state authority, and the CALEA requirements in section 229. In addition, the Commission did not forbear from provisions that would benefit ISPs. This would include, for example, preemption provisions such as those in sections 253 and 332(c) of the Act, as well as liability limitation provisions in sections 223, 230, and 231 of the Act. To the extent that forbearance was considered and rejected in the *2015 Open Internet Order* for particular statutory provisions, we propose to once again decline to grant forbearance here, and we seek comment on that proposal. As part of that analysis, we seek updated information and analyses regarding the application of the statutory forbearance criteria regarding these provisions and rules that were not subject to forbearance in the *2015 Open Internet Order.* We also seek comment on any relevant analyses or conclusions in the *RIF Order.*

92. Other than in the specific areas described above, the *2015 Open Internet Order* broadly granted forbearance from applying provisions of the Act and Commission rules that newly applied by virtue of the Title II classification of BIAS. We generally propose to again adopt broad forbearance consistent with that outcome, with the exception of statutory authorities that could enable the Commission to advance the Act's goals of national security and public safety. For example, section 1 of the Act makes clear that the Commission was established, among other reasons, ''for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications.'' Section 4(n) of the Act directs the Commission to takes steps to promote the ''maximum effectiveness from the use of radio and wire communications in connection with safety of life and property.'' In addition, the D.C. Circuit in *Mozilla* emphasized the need to consider the potential benefits of Title II classification of BIAS for the Commission's authority to protect public safety. Although public safety considerations were an important element of the Commission's overall decision in the *2015 Open Internet Order,* preserving the Commission's public safety authority above and beyond that granted in sections 201 and 202 of the Act was not as explicit a focus in much of the Commission's tailoring of forbearance there. We thus seek comment on what specific provisions should be excluded from the scope of forbearance here in light of those national security and public safety interests, as discussed in greater detail above.

93. Given the role section 214 of the Act has played in the Commission's efforts to address national security and law enforcement concerns related to U.S. telecommunications networks, we tentatively conclude that we should exclude that provision from any forbearance granted here. How should the Commission apply its existing procedures for international section 214 authorizations, which include coordination of applications that have reportable foreign ownership with the relevant Executive Branch agencies, to BIAS providers? We seek comment on any implementation issues arising from our tentative conclusion and how we could best address them. For example, would implementation challenges arise if the Commission immediately applied to BIAS providers its existing procedures for international section 214 authorizations, which include coordination of applications that have reportable foreign ownership with the relevant Executive Branch agencies? We note that the *2015 Open Internet Order* recognized that certain implementation issues could arise from the application of section 222 and the Commission's implementing rules to BIAS, and sought to mitigate those effects pending a rulemaking specifically focused on implementing section 222 for BIAS. Should we proceed in a similar manner with respect to some or all aspects of international section 214 authorizations, whether by adopting temporary forbearance, temporary grants of blanket international section 214 authority, or in some other manner? We also seek comment on any implementation issues concerning our domestic section 214 requirements.

94. We also make clear that our proposed forbearance would not encompass Title III licensing authorities, including sections 301–303, 307–309, 312, and 316 of the Act, which we believe likewise grant us important authority that can be used to advance national security and public safety with respect to the services and equipment subject to licensing. We also seek comment on whether we should exclude from the scope of our forbearance provisions sections 218 and 220 of the Act, which authorize the Commission to obtain information from common carriers, which could provide important tools to investigate public safety and security-related issues that arise. We seek comment on those proposals and on any other provisions of the Act or Commission rules that

likewise should be expressly excluded from the scope of forbearance based on national security and/or public safety considerations, including, for example, sections 305, 310, and 332 of the Act.

95. The D.C. Circuit's *Mozilla* decision also highlighted the potential benefits of Title II classification of BIAS for the Commission's authority to encourage deployment through regulation of pole attachments and to provide universal service support for low income households. In consideration of those interests, the Commission previously excluded sections 224 and 254 of the Act from the scope of its forbearance in the *2015 Open Internet Order.* We seek comment on whether there are additional or different ways those interests should be reflected in the tailoring of forbearance here.

96. We believe that the *RIF Remand Order* was too quick to dismiss concerns regarding public safety, pole attachments, and low income universal service support as speculative or unproven, and we seek comment on that view. Do commenters agree that the *RIF Remand Order* gave insufficient weight to the potential additional benefits that could be achieved through additional authority retained by virtue of Title II classification of BIAS?

97. We also seek comment on any additional or different ways that forbearance could be tailored here. For example, the *2015 Open Internet Order* adopted conditional forbearance from common carrier roaming regulations, subject to mobile ISPs complying with the data roaming requirements. Conditioned in that manner, the Commission was able to find the statutory forbearance criteria satisfied. We propose to follow the same approach with respect to our roaming rules here, and also seek comment on whether there are other provisions of the Act or Commission rules where conditional forbearance would satisfy the statutory forbearance criteria, even if unconditional forbearance would not. More generally, we also seek comment on alternative frameworks we might draw upon in deciding on how to tailor forbearance here. For example, in the *2015 Open Internet Order,* the Commission elected to grant broader forbearance despite some calls to limit forbearance just to the scope of relief previously granted to CMRS providers. We seek renewed comment on that approach, as well as any alternative options for tailoring forbearance here based on the regulatory experience in other contexts.

98. We also seek comment on whether forbearance should be differently tailored in the specific context of the internet traffic exchange portion of BIAS. In the *2015 Open Internet Order,* the Commission's ''definition for broadband internet access service include[d] the exchange of internet traffic by an edge provider or an intermediary with the broadband provider's network.'' Consequently, under the *2015 Open Internet Order,* internet traffic exchange was subject to the same forbearance as BIAS more generally. We propose to continue that uniform approach here, but also seek comment on whether and to what extent the internet traffic exchange component of BIAS should be subject to different tailoring of forbearance.

99. Finally, we also seek comment on any relevant new rules or statutory requirements enacted subsequent to the forbearance analysis in the *2015 Open Internet Order.*

III. Proposed Open Internet Rules

100. Today we propose to return to the basic framework the Commission adopted in 2015 to protect the openness of the internet. In 2015, consistent with its longstanding policy approach to protect internet openness through basic conduct ''rules of the road,'' the Commission adopted a set of carefully tailored conduct rules to prevent specific practices harmful to an open internet—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent deployment of new practices that would harm internet openness, and enhancements to the existing transparency rule. In the *RIF Order,* the Commission broke with this longstanding approach by altogether eliminating the open internet conduct rules, which we believe left consumers exposed to behavior that can hinder their ability to access the open internet. Below, we propose to reinstate straightforward, clear rules that are designed to prevent ISPs from engaging in practices harmful to consumers, competition, and public safety, and that would provide the basis for a national regulatory approach toward BIAS.

101. We first propose to reinstate the rules adopted in the *2015 Open Internet Order* that prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We similarly propose to reinstate the general conduct standard adopted in the *2015 Open Internet Order,* which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Finally, with regard to transparency, we propose to retain the current disclosures, and we seek comment on the means of disclosure, the interplay between the transparency rule and the broadband label requirements, and any additional enhancements or changes we should consider. The rules we propose today are consistent with numerous other steps the Commission has taken to ensure that this country has access to affordable, competitive, secure, and reliable broadband. The proposed rules would establish clear standards for ISPs to maintain internet openness and would give the Commission a solid basis on which to take enforcement action against conduct that prevents people from fully accessing all of the critical services available through the internet.

A. Need for Rules

102. We believe that the rules we propose today will establish a baseline that the Commission can use to prevent and address conduct that harms consumers and competition when it occurs. Above, we express our belief that consumers perceive and use BIAS as an essential service, critical to accessing healthcare, education, work, commerce, and civic engagement. Because of its importance, we further believe it is paramount that consumers be able to use their BIAS connections without degradation due to blocking, throttling, paid prioritization, or other harmful conduct. The rules we propose today are designed to ensure these protections. Below, we seek comment on particular issues that inspire the need for these rules, including protecting public safety, ISPs' incentives and abilities to harm internet openness, the effects of harmful conduct on consumer demand and edge innovation, reliance on the Commission's communications sector expertise to address harmful conduct, and how the *RIF Order*'s oversight framework addresses harmful conduct. We invite commenters to submit economic analyses that weigh the costs and benefits of the Commission potentially adopting open internet rules.

1. Promoting Innovation and Free Expression

103. In the *2015 Open Internet Order,* the Commission found that internet openness helps promote innovation, investment, and free expression, among other goals. Among other things, the Commission found that the record there ''overwhelmingly support[ed] the proposition that the internet's openness is critical to its ability to serve as a platform for speech and civic engagement,'' facilitate ''the development of diverse content,

applications, and services,'' and enable ''a virtuous cycle of innovation.'' We continue to place high importance on innovation, investment, and free expression, and we believe that conduct rules designed to ensure internet openness will better advance those goals, consistent with the reasoning in the *2015 Open Internet Order.* We seek comment on that view.

104. We are skeptical of the *RIF Order*'s rejection of free expression as a likely benefit of internet conduct rules designed to advance internet openness. The *RIF Order* theorized that competition ''will protect values such as free expression, to the extent that consumers value free expression as a service attribute and are aware of how their ISPs' actions affect free expression.'' We question, however, whether the *RIF Order* was correct to place such confidence in the marketplace as sufficient to advance free expression on the internet. Do consumers and the public have information about how ISP actions affect free expression on a sufficiently granular and detailed basis to act on that information? Separately, the *RIF Order* acknowledged that ''[t]he competitive process and antitrust would not protect free expression in cases where consumers have decided that they are willing to tolerate some blocking or throttling in order to obtain other things of value.'' We doubt that consumers are likely to act uniformly as a single, undifferentiated group, particularly where issues like free expression are concerned. We thus question how well the *RIF Order*'s analysis accounts for the interests of consumers who place different values on free expression. More generally, we seek updated information and analysis about the anticipated effects of internet conduct rules on free expression.

2. Protecting Public Safety

105. We believe that blocking, throttling, paid prioritization, and other potential conduct have the potential to impair public safety communications in a variety of circumstances and therefore harm the public. As discussed above, one of the Commission's fundamental obligations under the Act is to advance public safety. The *Mozilla* court highlighted this charge and recognized the significance of it, emphasizing that ''whenever public safety is involved, lives are at stake.'' It went on to note that ''[a]ny blocking or throttling of [safety officials'] internet communications during a public safety crisis could have dire, irreversible results.'' Similarly, in the *2015 Open Internet Order,* the Commission recognized that paid prioritization and peering disagreements can negatively affect public safety communications traveling over the same networks. Above, we detail and seek comment on the wide range of public safety communications and applications that rely on broadband networks and on the related national security concerns implicating broadband service providers. We now seek comment on our belief that maintaining the *RIF Order*'s *ex post* enforcement framework will provide insufficient protection against conduct harms, which includes harms to public safety or national security. We note that the *Mozilla* court expressed specific skepticism about the Commission's contention in the *RIF Order* that post-activity enforcement is a suitable method to address harmful conduct in the public safety context, emphasizing that ''even if discriminatory practices might later be addressed on a post-hoc basis by entities like the Federal Trade Commission, the harm to the public cannot be undone.'' We believe that the conduct rules we propose are necessary to prevent and mitigate harms to those public safety uses that would result from blocking, throttling, and other conduct, and we seek comment on our tentative conclusion. Our proposed conduct rules may also support consumer use of telehealth service and remote healthcare monitoring, such as through connected devices, by ensuring consumers can continue to access these services without the threat of blocking, throttling, or other degradation. We seek comment on consumer experiences where they have been harmed.

106. We further believe our proposed conduct rules would have particular benefits for the safety of individuals with disabilities. Above, we highlighted that these individuals increasingly rely on internet-based communications, and that ''[t]hese applications often require significant bandwidth, making their use particularly sensitive to data caps and network management practices.'' We believe the use of broadband to facilitate internet-based communications by persons with disabilities for public safety purposes, such as to contact emergency service providers, has a higher likelihood of being degraded by prioritization of latency-sensitive applications on the same facilities than less data-intensive uses, such as email, software updates, or cached video. We accordingly believe that our proposed rules would prevent such degradation and seek comment on this proposed analysis.

107. We seek comment on any other public safety harms or unaddressed concerns that the proposed rules would help to alleviate. For example, would the proposed rules help to improve public safety officials' ability to communicate via alerting systems to help improve emergency preparedness? Would they help to provide additional necessary bandwidth for IP-based communications to Public Safety Answering Points via 9–1–1? Would such rules help the authorities responding to such calls to have better or more complete information about an emergency to ensure a more comprehensive or timely response? Would such rules help public safety and law enforcement authorities to better communicate with one another during their responses to emergencies? What public safety issues have arisen since the Commission's prior 2015 and 2018 orders that the proposed rules would help to address?

3. ISPs' Incentive and Ability To Harm Internet Openness

108. In both the *2010 Open Internet Order* and *2015 Open Internet Order,* the Commission concluded that open internet rules were needed because ISPs have the incentive and ability to engage in practices that pose a threat to internet openness. In particular, the Commission found that because ISP networks serve as platforms for internet ecosystem participants to communicate, ISPs ''are in a position to act as a 'gatekeeper' between end users' access to edge providers' applications, services, and devices and reciprocally for edge providers' access to end users.'' The *2015 Open Internet Order* highlighted several economic incentives ISPs have to exploit this gatekeeper role, ''such as preferring their own or affiliated content, demanding fees from edge providers, or placing technical barriers to reaching end users.'' This behavior, the Commission found, ''has the potential to cause a variety of other negative externalities that hurt the open nature of the internet,'' which ISPs do not internalize. The Commission also concluded that ISPs ''have the technical ability to act on incentives to harm the open internet.''

109. The *RIF Order* offered several reasons for rejecting the prior rationales, including ISPs' economic incentives and supposed material competitive restraints. We believe these conclusions presumed that there were other ISPs to which consumers can switch if they were suffering open internet harms, and that the switching costs would not deter such switching. In addition, we tentatively agree with the *Mozilla* court, which found that, ''[t]aken together, the Commission fail[ed] to provide a fully

satisfying analysis of the competitive constraints faced by broadband providers.'' The Commission also claimed that ''from the perspective of many edge providers, end users do not single home, but subscribe to more than one platform (*e.g.,* one fixed and one mobile) capable of granting the end user effective access to the edge provider's content (*i.e.,* they multi-home),'' and ''to the extent multihoming occurs in the use of an application, there is no terminating monopoly.'' However, consumers may lack access to both fixed and mobile connections, and even when they do have access to both, the Commission did not show that these connections allow consumers to access all edge provider services unhindered, and therefore are truly competitive alternatives. Indeed, the Commission has since concluded that ''fixed broadband and mobile wireless broadband are not substitutes in all cases,'' finding that each type of service ''enables different situational uses.'' We seek comment on this analysis.

110. The *RIF Order* also found the Commission's action in the *2015 Open Internet Order* was unjustified because it lacked evidence of harms to internet openness. Setting aside the several examples of harmful conduct discussed in the *2015 Open Internet Order* and detailed in the record for the *RIF Order,* we believe the *RIF Order*'s conclusion gave inadequate consideration to the effects of the Commission's consistent efforts to apply and enforce the open internet standards since early 2005, which we believe deterred harmful ISP conduct. Thus, to the extent there is limited evidence of harmful conduct prior to the *2015 Open Internet Order,* we believe that demonstrates the Commission's consistent efforts to apply and enforce open internet standards since 2005 were effective and are needed, not that the *2015 Open Internet Order* and the protections it adopted were unjustified. We seek comment on this analysis.

111. We tentatively conclude that ISPs continue to have the incentive and ability to engage in practices that pose a threat to internet openness, and seek comment on this tentative conclusion and the above analysis. We also seek to update the record underlying the conclusions in the *2010 Open Internet Order* and *2015 Open Internet Order.* How have changes in the marketplace or technology since 2015 affected ISPs', including smaller ISPs, incentives and ability to engage in such practices? To what extent do ISPs have economic incentives and mechanisms to block or disadvantage a particular edge provider or class of edge providers? To what extent do vertically integrated providers have particularized incentives to discriminate—on price, quality, or other bases—in favor of affiliated products? For instance, we believe that many major ISPs are affiliated with OTT services or continue to offer competitive vertically integrated OTT services, and frequently provide consumers with promotional offers that bundle OTT services with BIAS. Do these affiliate relationships and vertically integrated offerings create additional incentive for ISPs to favor those services over others? To what extent should the Commission evaluate the ability and incentives of other intermediaries involved in the exchange of internet traffic, such as middle mile and backbone providers, to engage in conduct harmful to internet openness, particularly with respect to their relationships with ISPs? We seek comment on this analysis.

112. We also seek comment on whether ISPs are incentivized to increase revenues by charging edge providers for access or prioritized access to the ISPs' end users. Are there justifications for charging fees to edge providers that were not present in 2015? We seek comment on these and other economic incentives and abilities that ISPs may have to limit openness.

113. We seek comment on the state of competition in the BIAS market. We note that the Commission's *2022 Communications Marketplace Report* found that, as of 2021, approximately 36 percent of households lack a competitive option for fixed broadband at speeds of 100/20 Mbps and that 70 percent of households in rural areas lack such an option. Preliminary FCC staff calculations using December 2022 Broadband Deployment Collection data yield similar results. While competition in the mobile BIAS market is somewhat more significant, fixed and mobile services have not proven to be substitutable. To what extent does the state of competition affect ISPs' incentives to limit openness? Are there different incentives for small ISPs? Similarly, to what extent does the state of competition affect ISPs' incentives to innovate and invest in their networks? We seek insight into whether consumers in all areas of the country have adequate choices in the fixed and mobile broadband service market. Also, to what extent do broadband services with substantially different technical characteristics serve as competitive substitutes? How, if at all, do commercial practices differ in places where consumers have only one or two choices, particularly when those choices use different technologies? Although the Commission previously found that its authority is not predicated on a finding of market power, and this finding has twice been upheld, is there a reason we should engage in a market power analysis now with respect to ISPs and, if so, how? We further seek comment on whether there are other economic theories that we should consider to better understand and assess ISP incentives to engage in practices that affect the internet's openness. We also seek comment on the extent to which the state of competition in the BIAS market should play a role in our decision as to whether or not to reclassify BIAS as a Title II service.

114. We further seek information on ISP conduct since the *RIF Order* was adopted. Are there examples of conduct that has harmed internet openness? We note that one 2019 study suggested that ISPs regularly throttle video content. Aside from specific examples of harm, could other factors have deterred ISPs from engaging in any behavior that might have violated open internet principles? For instance, while the *RIF Order* was published in the **Federal Register** in February of 2018, it was not until the *Mozilla* case concluded in October of 2019 that it was clear open internet rules would no longer be in effect. To what degree might long-term contracts, and the general difficulty of implementing new business models, also have played a role in making it difficult for ISPs to exploit opportunities the *RIF Order* created? Could the threat of regulation have led ISPs to make voluntary commitments to maintain service consistent with certain conduct rules established in the *2015 Open Internet Order,* as they did, and if so, would this threat have dimmed with time? Because broadband connections were so essential during the pandemic, we believe ISPs have been under increased scrutiny by the Commission, the media, and the public since March 2020, and therefore have had a strong incentive to follow their voluntary commitments. Further, following the *RIF Order,* ISPs have been subject to state laws and executive orders addressing internet conduct. How have state regulations addressing ISP conduct affected ISP conduct nationwide? We also observe that unprecedented consumer demand for BIAS and edge innovation that occurred during the pandemic also led to unprecedented growth for ISPs. How did this growth impact providers' incentives either to comply with open internet principles or to engage in behavior that might increase their revenues at the expense of internet openness? Are smaller ISPs' incentives or ability to engage in

conduct that might harm internet openness different from those facing larger ISPs? What are the costs and advantages of waiting to act only after ISPs begin to take actions that might harm internet openness? Would such conduct be immediately identifiable? How quickly could ISPs comply with new rules and what harms would occur in the meantime? Going forward, is there reason to believe that ISPs will engage in conduct that harms the open internet, particularly if the Commission chooses not to adopt open internet rules?

4. Consumer Demand and Edge Innovation

115. We believe that an important byproduct of an open internet is the edge innovation and consumer demand that promotes ISP investment, and seek comment on this position. In the *2015 Open Internet Order,* the Commission recognized that ''innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.'' The Commission referred to this as the ''virtuous cycle,'' and it was the foundation for the action the Commission took in both the *2010 Open Internet Order* and *2015 Open Internet Order.* The validity of the virtuous cycle was upheld by both the *Verizon* court and the *USTA* court. The *RIF Order,* however, discounted the *2015 Open Internet Order*'s reliance on the virtuous cycle, contending there was a two-sided market in which ISPs acted as platforms and benefited from facilitating interactions between both sides of the market—edge providers and end users—and profits from inducing both sides of the market to use its platform.

116. We tentatively conclude that the *RIF Order*'s explanation of how two-sided markets work does not address a central problem open internet rules are intended to address. When an ISP's actions harm content creators and edge providers, the impact is distributed across all ISPs, not just the ISP undertaking the action. Yet, each ISP only accounts for the impact on its own operations. Consequently, a profit-making decision from the perspective of the individual ISP creates repercussions across all ISPs that harm the industry and the economy at large. When an ISP makes the profit-maximizing decisions the *RIF Order* describes, it only accounts for the impacts of its decision on its own company. It does not account for the impact of those actions on ISPs that lie outside its geographic market. These constitute the bulk of ISPs. Thus, an ISP, for example, that does not face fully effective competition, might expect to see higher profits if it sets prices for edge providers that recover in expectation a little more than its long-term costs. However, consistent with the reasoning of the *RIF Order,* it will not set prices for edge providers that are so high that the impact on the quality of edge provider service would cause the ISP to lose more because it would be forced to lower prices to its own consumers. We believe that the difficulty with the *RIF Order* analysis is that in setting its profit-maximizing prices for edge providers, the ISP lowers service quality for all ISPs, but that harm does not feature in the ISP's profit-maximizing calculation. While the impact on content quality of a single ISP setting prices for edge providers somewhat above the competitive level will be small and spread out over all ISPs, all similarly situated ISPs face similar incentives. Thus, since ISPs have no means of coordinating their behavior, and doing so could be illegal, each will behave in this way with material negative cumulative effects. The result is a breaking of the virtuous cycle described in the *2010 Open Internet Order:* not only will ISPs collectively be worse off, but so will the broader economy. We seek comment on this analysis and other bases for validating or questioning the *RIF Order*'s analysis.

117. We believe it is necessary to secure the open internet to preserve the virtuous cycle wherein market signals on both sides of ISPs' platforms encourage consumer demand, content creation, and innovation, with each respectively increasing the other, providing ISPs incentives to invest in their networks. We further believe that if innovative edge services are subject to blocking, throttling, paid prioritization, or other conduct by ISPs that harms internet openness, that conduct will reduce edge innovation. This will, in turn, reduce the quality and quantity of edge services available to consumers, and, specifically with blocking and throttling, directly inhibit consumers from accessing the edge services they desire. The impacts on edge services and consumers will reduce demand for broadband connections and ultimately suppress the need for ISPs to invest in upgrades to their networks or new deployments to meet that demand. Stalled ISP network improvements ultimately will undermine new edge innovation and consumer demand. We seek comment on this proposed analysis.

118. We believe the conduct rules we propose will protect edge innovation and the ability of consumers to access those new and developing services, thereby promoting both edge and ISP investment. We seek comment on this view. In particular, what is the role of the internet's openness in facilitating consumer demand and edge innovation that encourages edge and ISP investment? We are also interested in understanding the role the open internet may play in the promotion of edge competition or in the reduction or elimination of barriers to edge entry and investment.

5. The Commission's Ability To Address Conduct That Undermines an Open Internet

119. We believe that, as the expert agency on communications, the Commission is best positioned to safeguard internet openness. The *RIF Order* removed the Commission's authority to enforce open internet requirements and left to the FTC the responsibility to address harmful ISP conduct. The current Chair of the FTC agrees that the Federal Communications Commission ''has the clearest legal authority and expertise to fully oversee internet service providers,'' noting specifically that she supports efforts by the Commission ''to reassert that authority and once again put in place the nondiscrimination rules, privacy protections, and other basic requirements needed to create a healthier market.'' We seek comment on whether the Commission's longstanding oversight of the communications industry gives it unique technical, economic, and public interest aptitude in evaluating ISP conduct. To what extent does the Commission's enforcement apparatus provide it with sufficient authority and capabilities to address harmful conduct by ISPs, including by securing administrative relief? What efficiencies would be achieved as a result of the Commission having authority over BIAS along with other communications services (*e.g.,* voice and cable) that providers offer to customers as part of bundled offerings?

6. The RIF Order's Framework

120. When the Commission repealed the open internet rules in the *RIF Order,* it broke from the Commission's persistent efforts to preserve an open internet. The *RIF Order* did not address the longstanding bipartisan agreement that the Commission should prohibit ISPs from engaging in blocking, throttling, and other conduct that undermines an open internet and—importantly—that it should have the authority to enforce those restrictions. This was echoed by the *Mozilla* court, which was ''troubled by the

Commission's failure to grapple with the fact that, for much of the past two decades, ISPs were subject to some degree of open Internet restrictions.'' The *Mozilla* court explained, that ''[w]hile outside observers may associate 'light touch' with a distinct era in regulation and 'open Internet' with another era, the successive Commission majorities have consistently vowed fealty to both.'' We believe the *RIF Order* failed to ensure the most basic protections for the open internet—prohibitions on blocking and throttling—let alone other threats to the open internet identified in the *2015 Open Internet Order.* We seek comment on this analysis.

121. We believe that the *2015 Open Internet Order* was consistent with Commission precedent by applying a light-touch regulatory framework to preserve an open internet. When the *Verizon* court struck down the *2010 Open Internet Order,* the Commission sought to implement a solution to preserve longstanding open internet standards that supported the unprecedented growth in fixed and mobile subscribership, edge innovation, and network investment that occurred up to that point. The Commission determined that classifying BIAS as a Title II service was not only more consistent with a modern assessment of how the definition of ''telecommunications service'' applies to current BIAS offerings, but would also enable it to apply and enforce open internet rules. Thus, in establishing open internet rules using a light-touch application of Title II, we believe the *2015 Open Internet Order* ensured maintenance of the status quo that had existed for more than ten years prior to that *Order.* As such, we tentatively conclude that the action we propose today restores the status quo that had existed up until the Commission adopted the *RIF Order,* in which clear rules of the road ensure that edge innovation and investment flourish and consumers can access all lawful content they see fit. We seek comment on our proposed assessment.

122. *Transparency.* The Commission's transparency rule requires ISPs to publicly disclose the network practices, performance characteristics, and commercial terms of the BIAS they offer, including disclosure of any blocking, throttling, and affiliated or paid prioritization practices. We recognize that transparency is a valuable tool to protect the open internet, but that it is only one element of a comprehensive framework that prevents consumers from experiencing harms that inhibit their access to an open internet. While the transparency requirements currently in place provide consumers and edge providers the ability to make informed decisions, we believe their effectiveness is limited because they do not restrict ISPs from engaging in activities that have long enjoyed bipartisan opposition—blocking, throttling, and discrimination—let alone other conduct that has the potential to cause harm, such as paid prioritization. Indeed, the *RIF Order* only requires that companies disclose their blocking, throttling, and paid or affiliated prioritization in their transparency disclosures; it does not prohibit companies from engaging in these practices. We tentatively conclude that these are the types of conduct that require *ex ante* intervention to ensure they do not happen in the first instance, and therefore tentatively conclude that the comprehensive set of conduct rules that we propose today are needed to protect consumers from this conduct. We seek comment on this tentative conclusion.

123. *Consumer Protection and Antitrust Law.* We seek comment on whether, in practice, consumer protection and antitrust laws provide sufficient protections against blocking, throttling, paid prioritization, and other conduct that harms the open internet, as the *RIF Order* asserted. The *Mozilla* court explained that the *RIF Order* ''theorized why antitrust and consumer protection law is preferred to *ex ante* regulations but failed to provide any meaningful analysis of whether these laws would, in practice, prevent blocking and throttling.'' The *RIF Order* also seems to concede that blocking, throttling, and discrimination may be permitted under its chosen oversight and enforcement framework, and that paid prioritization may be found to be permissible in many instances.

124. We seek comment on the application of consumer protection laws by the FTC. Notably, a 2021 Supreme Court ruling restricted the FTC's ability to seek monetary relief on behalf of consumers, thereby reducing the deterrent effect of the FTC's actions. Congress has also created other exceptions to the FTC's consumer protection authority and assigned consumer protection responsibilities to other agencies that have expertise in both consumer protection and the relevant industry. Finally, we also observe that while the FTC has generally proceeded through *ex post* enforcement actions and public guidance, reclassification would allow the Commission to proceed by establishing *ex ante,* commonly applicable rules. We seek comment on the benefits and burdens of such an approach.

125. We also seek comment on whether the FTC's and Department of Justice's (DOJ) antitrust enforcement authority is limited in its ability to protect against open internet harms. The *RIF Order* claims that antitrust would be effective because harmful conduct would be evaluated under the ''rule of reason,'' which it claims amounts to a ''consumer welfare test.'' However, the ''rule of reason'' analysis includes a subjective determination about whether alleged economic benefits outweigh recognized consumer harms. Because the analysis focuses on economic factors, does it provide sufficient weight to important non-economic factors, which courts have recognized are appropriate to consider under the public interest standard of the Act? Even if strict application of antitrust law does not reveal a violation of section 1 or section 2 of the Sherman Act, could there still be market distortions and power asymmetries, both between ISPs and other market players and between ISPs and consumers, that require *ex ante* intervention in the public interest, at least in instances where the Commission may find that conduct is unjust, unreasonable, or unreasonably discriminatory? For example, would regulatory intervention be necessary in instances when there is a high likelihood of harm to consumers and the likelihood or availability of effective remedies for consumers is speculative?

126. *Consumer Relief.* Even if the *RIF Order*'s oversight and enforcement framework were to provide some protection, we seek comment on whether it gives consumers a meaningful opportunity to secure relief. The *RIF Order* concluded that its framework ''ensures that consumers have means to take remedial action if an ISP engages in behavior inconsistent with an open Internet.'' It appears that consumers' primary means for seeking recourse under that framework is to submit complaints to the FTC with the goal of spurring the agency to direct its resources to investigate and address the alleged harms. With antitrust, in particular, it appears that to pursue relief, consumers must submit complaints that describe conduct that inhibits their access to the internet, attempt to tie that conduct to anticompetitive behavior that harms other entities, and otherwise rely on the FTC or other entities to bring suits alleging anticompetitive conduct that also harms the open internet. We seek comment on whether consumers can effectively use these mechanisms to obtain relief, and do so in a timely

manner, and we seek comment generally regarding consumers' experiences obtaining relief following the *RIF Order.*

127. Aside from the remedies offered by law, we seek comment on the adequacy of other methods the *RIF Order* offers that consumers can use to secure relief. First, the *RIF Order* suggests that consumers may be able to seek service from another ISP if they are experiencing harmful conduct, but as discussed above, it is not clear there is adequate local competition in many areas, especially rural areas, to give consumers a meaningful choice among providers, and we seek comment on this assessment. For instance, 36 percent of households lack a competitive option for broadband at speeds of 100/20 Mbps and 70 percent of households in rural areas lack such an option. At higher speeds, the level of competition becomes non-existent in most areas with approximately 96 percent of households lacking a competitive option for gigabit broadband service. Even when consumers have access to another provider not engaging in behavior that is inconsistent with an open Internet, to what extent is their choice between providers often negated because the alternatives charge significantly higher prices or provide lower performance and quality of service? Second, the *RIF Order* states that if ISPs engage in conduct that harms the open internet, public attention from consumer backlash would police their behavior, but it seems to assume that the harmful conduct by ISPs would be obvious or widespread—rather than surreptitious or sporadic—such that a sufficient number of consumers would be aware of the conduct and vocal in their objections to have the necessary force to influence ISP conduct. Third, even if ISP conduct was sufficiently egregious to result in a consumer backlash, how would that backlash police ISP behavior? We seek comment on the foregoing.

128. Further, to the extent the *RIF Order*'s oversight and enforcement framework can address harmful conduct when it occurs, we seek comment on whether the framework will still result in fewer instances where ISPs will be subject to enforcement action for conduct that is clearly harmful to an open internet. If the *RIF Order*'s framework becomes the settled approach, will consumers suffer a greater amount of harmful conduct than would exist under the open internet rules we propose, and receive fewer remedies when that harm occurs? Even when remedies are achieved, will they provide sufficient redress to harms resulting from ISPs' conduct? Does the *RIF Order*'s regulatory framework adequately serve the public interest, given how essential broadband is to full participation in today's society and economy?

129. *Edge Provider Protections.* We believe the *RIF Order*'s reliance on antitrust protections undermines the virtuous cycle by failing to protect the small edge services that comprise an important part of the internet. While antitrust protections would apply where, for example, an ISP favored its own edge provider, or sought to harm a competing edge provider, antitrust protections do not forbid the unjust or unreasonable exercise of market powers. But it is exactly those practices that could unravel the virtuous cycle. As part of its justification for reliance on antitrust law, the *RIF Order* expresses particular concern about the effect of regulations on small ISPs. But we believe that there are far more edge services that are small—typically many times smaller than the smallest ISPs—which the *RIF Order* does not acknowledge or evaluate. We seek comment on this belief and on the extent to which providers of these edge services would have any leverage in negotiations with ISPs of any size, let alone large, vertically integrated ISPs. Should large, or even small, ISPs begin seeking paid prioritization arrangements, for example, would this disproportionately harm small edge providers, for example, because larger edge providers could use their own countervailing power to better manage the situation? Would this increase entry barriers, harming edge provider competition and innovation, for example, by discouraging new entry against larger established edge providers? In all of these cases, what legal case would a harmed edge provider be able to bring under antitrust law and what would the likelihood of success be? The *RIF Order* argues that ISPs have incentives to support nascent competition as more edge provider competition will reduce the countervailing power of large, entrenched ISPs. We seek comment on whether this is accurate, and in particular whether any efforts or investments by an ISP to help nascent edge providers would produce diffuse benefits to all ISPs, and thus whether any single ISP would have appropriate incentives to help develop edge provider competition.

130. Research in innovation economics suggests that edge innovation is heterogeneous. Some types of edge innovation will thrive under general purpose open networks. Such innovations could have significant positive spillover effects that benefit the broader internet ecosystem. However, other types of edge innovation, especially during the early phases of the innovation process, may be facilitated by quality of service differentiation of the network. This suggests that a forward-looking open internet policy will be most supportive of innovation if it protects the openness of the access platforms for innovations with high spillover effects while at the same time allowing non-discriminatory forms of network differentiation to support edge innovations that are facilitated by such support. We seek comment on this proposed analysis.

131. *Costs of Oversight Regime.* We seek comment generally on the costs to ISPs resulting from the *RIF Order*'s chosen oversight regime. The *RIF Order* claims that its approach would lower compliance costs for ISPs. We reiterate, however, that because the *RIF Order*'s preemption directive was vacated by the D.C. Circuit in *Mozilla,* ISPs are now subject to a patchwork of state requirements for BIAS, rather than a national regulatory framework. We seek comment on the costs of this patchwork approach.

132. We also seek comment on the costs of the *RIF Order*'s consumer protection and antitrust oversight framework. We observe that whether an act is unfair or deceptive under consumer protection law each depends on its own three-prong subjective test, which can result in unforeseen outcomes, and the antitrust rule of reason relies on a case-by-case evaluation. In light of these factors, we seek comment on whether the *RIF Order*'s removal of bright-line, *ex ante* rules can result in significant compliance cost for ISPs. Relatedly, what are the costs to ISPs for having to evaluate the risks of their planned conduct under this consumer protection and antitrust oversight framework?

B. Conduct Rules

133. We propose to adopt rules to prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements, and also seek comment on the adoption of a proposed general conduct standard for ISPs. The last several years have demonstrated not only broadband's essential value, but also the consequences to consumers of its absence or degradation, and we therefore believe it important to establish clear, bright-line rules. We seek comment on the proposals and analyses herein.

134. The conduct rules we propose track the language of the rules the Commission adopted in the *2015 Open internet Order.* In 2015, the Commission found that blocking, throttling, and paid prioritization arrangements were three practices that ''in particular demonstrably harm the open internet.'' The Commission adopted rules to ban these three practices, finding that they are ''inherently unjust and unreasonable, in violation of section 201(b) of the Act, and that these practices threaten the virtuous cycle of innovation and investment that the Commission intends to protect under its obligation and authority to take steps to promote broadband deployment under section 706 of the 1996 Act.'' Even while eliminating these protections in 2018, the *RIF Order* still recognized the harms of blocking and throttling practices and required disclosure of such practices under its revised transparency rule. Below, we seek comment on how experience since the *RIF Order* would help inform the scope and language of prohibitions on blocking, throttling, and paid prioritization arrangements. At the outset, however, we seek comment at a broader level on whether these three practices are still the key threats to internet openness.

135. We do not anticipate that the open Internet rules we propose today will have a harmful effect on investment. ISP investment was not inhibited from 2005 through 2016, when the Commission consistently sought to impose and enforce open internet standards. We also believe that many ISP investment decisions over the next several years will be significantly influenced by the influx of federal and state funding allocated to ISPs to support infrastructure deployment and broadband connectivity. In light of these facts, we do not expect that adopting open internet rules will change ISP investment decisions. Do commenters agree? Furthermore, we believe that ''[w]ithout an open Internet, there would be less broadband investment and deployment'' because of the expected harm to the virtuous cycle. As the Commission concluded in the *2015 Open Internet Order,* ''to the extent that our decision might in some cases reduce providers' investment incentives, we believe any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote.'' We seek comment on these views.

1. Preventing Blocking of Lawful Content, Applications, Services, and Non-Harmful Devices

136. We propose to adopt a bright-line rule prohibiting ISPs from blocking lawful content, applications, services, or non-harmful devices. In 2015, the Commission found that ISPs function as gatekeepers for both their end-user customers who access the internet, and for various transit providers, CDNs, and edge providers attempting to reach the broadband provider's end-user subscribers. The Commission concluded that ISPs have the economic incentives and technical ability to engage in practices that pose a threat to internet openness by harming other network providers, edge providers, and end users. Reversing course in 2018, the Commission determined, in contrast, that ''ISPs have strong incentives to preserve internet openness, and these interests typically outweigh any countervailing incentives an ISP might have.'' As discussed above, we tentatively conclude that ISPs continue to have the incentive and ability to engage in practices that threaten internet openness, and as such, we believe rules are needed to protect a consumer's right to access lawful content, applications, and services, and to use non-harmful devices. We seek comment on this proposed analysis.

137. As the Commission found in the *2010 Open Internet Order* and the *2015 Open Internet Order,* we believe that ''the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness.'' To that end, we propose to adopt the following no-blocking rule applicable to both fixed and mobile providers of BIAS, which tracks the language of the prohibition adopted by the *2015 Open Internet Order:*

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

We seek comment on this proposed rule and whether this remains the best formulation of a no-blocking principle for ISPs. As in 2015, we intend that the phrase ''content, applications, and services'' refers to all traffic transmitted to or from end users of a broadband internet access service, including traffic that may not fit clearly into any of these categories. Is this language expansive enough to encompass all types of internet traffic, or are there additional categories that we should include? We also propose to make clear that the no-blocking rule would prohibit ISPs from charging edge providers a fee to avoid having the edge providers' content, service, or application blocked from reaching the broadband provider's end-user customers. As in 2015, we also propose that this prohibition will apply to transmission of lawful content only and does not prevent or restrict an ISP from refusing to transmit unlawful material. We seek comment on these proposals. What other consequences of a no-blocking rule should we consider?

138. As far back as the Commission's *Internet Policy Statement* in 2005, major ISPs have broadly accepted a no-blocking principle. Even after the repeal of the no-blocking rule, many ISPs continue to advertise a commitment to open internet principles on their websites, which include commitments not to block traffic except in certain circumstances. Rather than reflect a lack of potential harm to consumers and the open internet, we believe that these continued commitments to no-blocking principles emphasize their importance to the internet as we know it. We believe that codifying this principle in the Commission's rules is necessary to protect consumers and internet openness against any ISP's decision in the future to move away from this widely accepted principle. Furthermore, because this principle is so widely accepted, including by ISPs, we anticipate compliance costs will be minimal. We seek comment on this analysis. We seek comment on whether the predictive reasoning underlying the Commission's repeal of the no-blocking rule in 2018 proved accurate. We also seek specific comment regarding any instances of an ISP blocking lawful content, applications, services or non-harmful devices in the years since the Commission repealed the no-blocking rule. Finally, we seek comment on the costs and benefits of a no-blocking rule.

2. Preventing Throttling of Lawful Content, Applications, Services, and Non-Harmful Devices

139. Next, we propose to adopt a rule to prevent ISPs from throttling lawful content, applications, services, and non-harmful devices. As part of the no-blocking rule that the Commission adopted in the *2010 Open Internet Order,* the Commission prohibited ISPs from ''impairing or degrading particular content, applications, services, or non-harmful devices so as to render them effectively unusable (subject to reasonable network management),'' because such conduct ''can have the same effects as outright blocking.'' In 2015, the Commission concluded that a standalone prohibition was required to

prevent ISPs from impairing or degrading lawful internet traffic. The Commission used the term ''throttling'' to refer to such conduct that is not outright blocking, but that inhibited the delivery of particular content, applications, or services, or particular classes of content, applications, or services.

140. We propose to adopt the following no-throttling rule applicable to both fixed and mobile providers of BIAS, which tracks the language of the Commission's *2015 Open Internet Order,* and seek comment on our proposal:

A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not impair or degrade lawful internet traffic on the basis of internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

As in 2015, we intend this rule to prohibit conduct that impairs or degrades lawful traffic to a non-harmful device or class of devices, which includes any conduct by an ISP to impair, degrade, slow down, or render effectively unusable particular content, services, applications, or devices, that is not reasonable network management. We also propose to give the same meaning to ''content, applications, and services'' as we propose in the context of the no-blocking rule, and we seek comment on this proposal. Have there been any technological changes or advancements in network management since 2015 that we should reflect in the proposed rule? As written, does the proposed rule provide clear guidance to ISPs and customers on what is considered prohibited conduct? As in 2015, we propose that transfers of unlawful content or unlawful transfers of content would not be protected by the no-throttling rule. Further, as with our proposed no-blocking rule, we propose to prohibit ISPs from imposing a fee on edge providers to avoid having the edge providers' content, service, or application throttled. We seek comment on these proposals. What other aspects and consequences of a no-throttling rule should we consider?

141. As in 2015, we propose that while a no-throttling rule would address instances in which an ISP targets particular content, applications, services, or non-harmful devices, it would not address the practice of slowing down an end user's connection to the internet based on a choice clearly made by the end user. For example, an ISP may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier. We seek comment on our proposal to maintain this distinction. We do not intend to leave such data plans without oversight, however, and therefore propose to allow the Commission to review the particulars of a certain data plan, as required by sections 201 and 202 of the Act, which prohibit unjust and unreasonable charges and practices, or our proposed general conduct standard, discussed below.

142. As discussed above, because BIAS connections were so essential during the pandemic, we believe ISPs have been under increased scrutiny by the Commission, the media, and the public since March 2020, and therefore have had a strong incentive to follow their voluntary commitments to maintain service consistent with certain conduct rules established in the *2015 Open Internet Order.* We believe that this, coupled with unprecedented consumer demand for BIAS during the pandemic and state regulations addressing ISP conduct, helped to constrain ISPs from engaging in conduct that could harm internet openness. These constraints, however, are neither permanent nor uniform, and we believe that incentives for ISPs to degrade competitors' content, applications, or devices remain; as such, we propose that rules are needed to protect consumers' right to access lawful internet traffic of their choice without impairment or degradation. We seek comment on this proposed analysis, and invite comment on ISPs' incentives to engage in throttling conduct harmful to internet openness. As the Commission recognized in the *RIF Order,* ''[t]he potential consequences of blocking and throttling lawful content on the internet ecosystem are well-documented in the record and in Commission precedent.'' Even after the repeal of the no-throttling rule, ISPs continue to advertise on their websites that they do not throttle traffic except in limited circumstances. As a result, we anticipate that prohibiting throttling of lawful internet traffic will impose a minimal compliance burden on ISPs. Do commenters agree? We seek comment on specific costs or technical concerns that our proposed rule would impose on ISPs, including small providers. We also seek comment on the reasoning underlying the Commission's repeal of the no-throttling rule in 2018. We seek specific comment regarding any instances of an ISP throttling lawful content, applications, services, or non-harmful devices in the years since the no-throttling rule was repealed.

3. No Paid or Affiliated Prioritization

143. We next propose to ban arrangements in which an ISP accepts consideration (monetary or otherwise) from a third party to manage its network in a manner that benefits particular content, applications, services, or devices. Under this proposal, we would also prohibit arrangements in which a provider manages its network in a manner that favors the content, applications, services, or devices of an affiliated entity. The Act defines ''affiliate'' as ''a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.'' In 2015, the Commission adopted a rule banning these type of paid or affiliated prioritization agreements, finding that such practices ''harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment.'' We tentatively conclude that this reasoning remains applicable today. We seek comment on this proposal and the underlying analysis.

144. Tracking the language of the Commission's *2015 Open Internet Order,* we propose to adopt the following definition of ''paid prioritization'' and rule banning such arrangements:

A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. ''*Paid prioritization*'' *refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.*

In adopting a ban on paid prioritization in 2015, the Commission sought to prevent the bifurcation of the internet into a ''fast'' lane for those with the means and will to pay and a ''slow'' lane for everyone else. This development, the Commission reasoned, would introduce artificial barriers to entry, distort the market, harm competition, harm consumers, discourage innovation, undermine public safety and universal service, and harm free expression. The Commission was concerned that preferential treatment arrangements would create a chilling effect, disrupting the internet's virtuous cycle of innovation, consumer demand, and investment, and that the widespread use of paid prioritization practices would cause damage to

internet openness that would be difficult to reverse and challenging to track. We tentatively conclude that these concerns remain valid today, and we seek comment on this conclusion. What are some examples of harms or categories of harms that paid prioritization arrangements might cause to the open internet and to consumers? Does the language of the proposed rule make clear the scope of this proposed prohibition? What other aspects or consequences of a ban on paid prioritization practices should we consider?

145. Previously, the Commission has found it well-established that ISPs have both the incentive and the ability to engage in paid prioritization. In its *Verizon* opinion, the D.C. Circuit noted the powerful incentives ISPs have to accept fees from edge providers in return for excluding their competitors or for granting prioritized access to end users. Some ISPs continue to advertise that they do not engage in paid or affiliated prioritization practices. Even with similar promises from ISPs in 2015, the Commission concluded that the potential harm to the open internet was too significant to rely on mere promises from ISPs because ''the future openness of the internet should not turn on the decision of a particular company.'' We tentatively conclude that this reasoning remains valid today, and we seek comment on this tentative conclusion, and any alternatives we should consider.

146. In choosing to repeal the ban on paid prioritization in 2018, the Commission found that the costs of a ban outweighed the benefits, and that the transparency rule and the enforcement of existing antitrust and consumer protection laws would sufficiently address many of the concerns regarding the dangers of paid prioritization arrangements. We seek comment on that assessment from 2018. In weighing the costs and benefits, the Commission did not identify specific compliance costs, but rather identified the costs in the form of forgone benefits. While we do not dispute that some potential benefits may result from paid prioritization arrangements, we tentatively conclude that the potential harms to consumers and the open internet outweigh any speculative benefits. Do commenters agree? Why or why not? What compliance costs might ISPs incur as a result of such a ban, including small providers? The Commission also found in 2018 that paid prioritization could be a tool in helping to close the digital divide by reducing BIAS subscription prices for consumers. Do commenters agree with this assessment? We tentatively conclude that the Commission's 2018 finding that existing antitrust and consumer protection laws, in conjunction with some form of a transparency rule, offer enough protection against the potential harms caused by paid prioritization arrangements was erroneous. We seek comment on this tentative conclusion.

147. As part of a rule prohibiting paid prioritization arrangements, we also propose to adopt a rule concerning waiver of such a ban that establishes a balancing test. Under our waiver rules, the Commission may waive any rule in whole or in part, ''for good cause shown.'' A general waiver of the Commission's rules is only appropriate if special circumstances warrant a deviation from the general rule and such a deviation will service the public interest. In 2015, the Commission found that it was appropriate to adopt specific rules concerning the factors that it will use to examine a waiver request of the paid prioritization ban. We tentatively conclude that it remains appropriate to accompany a rule prohibiting paid prioritization arrangements with specific guidance on how the Commission would evaluate subsequent waiver requests. We seek comment on this conclusion. Tracking the language of the *2015 Open Internet Order,* we propose to adopt the following rule, and seek comment on this proposal:

The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the internet.

148. Following the framework the Commission established in 2015, we propose to require an applicant seeking a waiver of our proposed rule to prohibit paid prioritization arrangements to make two related showings. First, the applicant would need to demonstrate that the practice will have some significant public interest benefit. The applicant could make such a showing by providing evidence that the practice furthers competition, innovation, consumer demand, or investment. Second, the applicant would need to demonstrate that the practice does not harm the nature of the open internet. This second showing would include, but is not limited to, providing evidence that the practice: (i) does not materially degrade or threaten to materially degrade the BIAS of the general public; (ii) does not hinder consumer choice; (iii) does not impair competition, innovation, consumer demand, or investment; and (iv) does not impede any forms of expression, types of service, or points of view. We seek comment on the continued relevance of these four examples. Should the Commission consider other factors when considering a request to waive our proposed ban on paid prioritization arrangements? Do commenters agree that this language creates a ''high bar'' for potential applicants to meet, ensuring that the Commission would only grant waiver relief in exceptional cases?

4. General Conduct Rule

149. We propose to adopt a general conduct standard, which would prohibit practices that unreasonably interfere with or disadvantage consumers or edge providers. In 2015, the Commission adopted a standard to 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 edge providers to access consumers using the internet. The Commission reasoned that while the bright-line rules against blocking, throttling, and paid prioritization arrangements would act as ''critical cornerstone[s] in protecting and promoting the open internet,'' it also needed a mechanism to respond to ''other current or future practices that cause the type of harms our rules are intended to address.'' The general conduct standard was necessary, in other words, to ensure that ISPs did not find a technical or economic means to evade these bright line bans to wield their gatekeeper power in a way that would compromise the open internet. We agree with the Commission's conclusion in 2015 that it is ''critical that access to a robust, open internet remains a core feature of the communications landscape, but also that there remains leeway for experimentation with innovative offerings.'' We believe that this reasoning continues to support the adoption of a general conduct standard to operate as the catch-all backstop to the three bright-line prohibitions, and we seek comment on this analysis.

150. We propose to adopt a general conduct standard that tracks the language of the *2015 Open Internet Order,* and we seek comment on this proposal:

Any person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband internet access service or the lawful internet content,

applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

In 2015, the Commission found that careful application of this standard would act to not only balance the benefits of innovation against the harms to end users and edge providers, but also act to protect free expression. If adopted, we anticipate that this general conduct standard would accomplish these same goals going forward, and we seek comment on this prediction. Does the proposed language capture the scope of behaviors that the Commission might need to address? Have there been any technical or market developments that should affect our approach? Is there an alternative standard we should adopt to establish a general conduct rule?

151. Consistent with the Commission's 2015 approach, we propose to enforce this standard with a framework and in a manner that would provide certainty and flexibility to the industry and encourage innovation, while best protecting the open internet. First, we propose to follow a case-by-case approach that would consider the totality of the circumstances when analyzing whether conduct satisfies the standard. Second, we propose a non-exhaustive list of factors that we would consider to aid in our analysis. These factors would include: (i) whether a practice allows end-user control and enables consumer choice; (ii) whether a practice has anti-competitive effects in the market for applications, services, content, or devices; (iii) whether a practice affects consumers' ability to select, access, or use lawful broadband services, applications, or content; (iv) the effect a practice has on innovation, investment, or broadband deployment; (v) whether a practice threatens free expression; (vi) whether a practice is application agnostic; and (v) whether a practice conforms to best practices and technical standards adopted by open, broadly representative, and independent internet engineering, governance initiatives, or standards-setting organizations. Do all of these factors remain relevant in today's internet ecosystem? If not, why not? Are there other factors we should consider including in this non-exhaustive list that would aid with industry compliance or Commission enforcement?

152. We believe that the general conduct standard we propose today, mirroring that adopted in the *2015 Open Internet Order,* provides sufficient guidance to ISPs for purpose of compliance, a conclusion affirmed by the D.C. Circuit. Nonetheless, in 2018, the Commission repealed the general conduct standard because it found that it was ''vague and ha[d] created regulatory uncertainty in the marketplace hindering investment and innovation.'' We seek comment on whether there are additional steps we should take to ensure that ISPs understand the types of conduct and practices that might be prohibited under our proposal. Are there any specific practices that would or would not violate this proposed rule, and if so, should we provide examples of those practices? For example, are there any zero rating or sponsored data practices that raise particular concerns under the proposed general conduct standard? What would the compliance costs be for ISPs, particularly small providers? How would our proposed general conduct standard affect current and future ISP business practices? What other aspects or consequences of imposing a general conduct standard should we consider? We seek comment on whether the Commission's prediction in 2018 that eliminating the internet conduct standard will ''benefit consumers, increase competition, and eliminate regulatory uncertainty that has a 'corresponding chilling effect on broadband investment and innovation' '' has been borne out. Is it reasonable to attribute any growth and development in broadband markets and services to elimination of the general conduct rule, or is such a potential connection too attenuated? The *RIF Order* also found that ''the benefits of the internet conduct standard provides approximately zero additional benefits'' when compared to the antitrust and consumer protection enforcement in place through the FTC, while imposing negative benefits in the form of delayed or never-brought-to-market innovations. We seek comment on whether elimination of the general conduct rule has resulted in new innovations which would not have been permissible under the general conduct rule.

153. In the alternative, we seek comment on whether we should instead rely on the ''just and reasonable'' standards in sections 201 and 202 of the Act. In 2015, the Commission explained that the general conduct rule was its interpretation of sections 201 and 202 in the broadband context. We seek comment on whether it remains necessary to enunciate a specific rule, like the proposed general conduct standard described above, by interpreting sections 201 and 202 in the context of broadband, or whether it would be sufficient to rely on sections 201 and 202 alone to address potential harmful practices and behaviors. Would the latter alternative approach provide sufficient certainty and clarity to ISPs regarding what practices would violate the Act's standard? If we choose not to adopt a general conduct rule, are there other ways for us to aid our enforcement efforts related to sections 201 and 202 in the broadband context?

C. Transparency Rule

154. Policymakers have consistently recognized the importance of transparency regarding the terms and service characteristics of broadband offerings, even as certain details of the Commission's transparency requirements have changed over time. This includes not only transparency requirements that have been in place since they originally were adopted in the *2010 Open Internet Order,* but also the broadband label the Commission adopted in 2022, which gives consumers a convenient tool to research and compare broadband offerings. We propose to build upon the foundation of our existing transparency rule, informed by our recent experience in adopting broadband label requirements, and we seek comment on possible modifications or additions to update the transparency rule to ensure that end users, edge providers, the broader internet community, and the Commission have the information they need to assess ISPs' terms and conditions for BIAS in a timely and effective manner.

1. Policy Benefits of Transparency Requirements

155. We anticipate transparency requirements are likely to continue playing a key role in the broadband marketplace. In the *2010 Open Internet Order,* the Commission adopted its original BIAS transparency rule, explaining that ''[e]ffective disclosure of broadband providers' network management practices and the performance and commercial terms of their services promotes competition—as well as innovation, investment, end-user choice, and broadband adoption.'' The Commission echoed this policy judgment in the *2015 Open Internet Order,* going on to adopt additional clarifications and enhancements to the transparency rule—along with a broadband label safe harbor—to ''better enable end-user consumers to make informed choices about broadband services by providing them with timely information tailored more specifically to their needs,'' and to ''provide edge providers with the information necessary to develop new content,

applications, services, and devices that promote the virtuous cycle of investment and innovation.'' In discussing transparency in the *RIF Order,* the Commission noted that ''[d]isclosure supports innovation, investment, and competition by ensuring that entrepreneurs and other small businesses have the technical information necessary to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects.'' In that *Order,* however, the Commission elected to ''return, with minor adjustments, to the transparency rule adopted in the *2010 Open Internet Order,*'' under the theory that such an approach would ''provide[ ] consumers and the Commission with essential information while minimizing the burdens imposed on ISPs.'' We seek comment on how the Commission can ensure that its transparency rule most effectively advances these longstanding policy goals.

156. In 2021, Congress enacted and the President signed the Infrastructure Act, which, in relevant part, directs the Commission ''to promulgate regulations to require the display of broadband consumer labels,'' using as an initial point of reference the broadband label established in connection with the enhanced transparency rule adopted in the *2015 Open Internet Order.* The Infrastructure Act recognizes the benefits of a label ''to disclose to consumers information regarding broadband internet access service plans,'' further observing that consumers need the ability to ''evaluate broadband internet access service plans'' through information that is ''available, effective, and sufficient'' to meet that need. In November 2022, the Commission adopted the broadband consumer label rules and sought further comment in the accompanying *Broadband Label Further Notice.* These broadband label requirements promote ''consumer access to clear, easy-to-understand, and accurate information about the cost for broadband services and will empower consumers to choose services that best meet their needs and match their budgets and ensures that they are not surprised by unexpected charges or service quality that falls short of their expectations.'' We seek comment on the interplay between the broadband label requirements adopted in the *Broadband Label Order,* the possible amendments raised in the *Broadband Label Further Notice,* and any modifications to the transparency rule that we might adopt here. For example, to the extent that the content of the required disclosures under the two requirements diverge, how can we avoid any undue duplication of effort in making each required disclosure, particularly for small providers? Should the broadband label requirements and the transparency rule as it might be modified here be legally distinct, or legally interrelated, requirements?

2. Content of Required Disclosures

157. We seek comment on what, if any, additional disclosures should be required under the transparency rule. As a starting point, we believe that the disclosures required under the current transparency rule are an appropriate baseline, and we propose to retain them in the transparency rule going forward. We seek comment on this proposal. As the Commission recently explained when adopting broadband label requirements, ''the transparency rule seeks to enable a deeper dive into details of broadband internet service offerings, which could be relevant not only for consumers as a whole, but also for consumers with particularized interests or needs, as well as a broader range of participants in the internet community—notably including the Commission itself.'' Are the current requirements of the transparency rule sufficient to enable that deeper dive into details of broadband internet service offerings?

158. We seek comment on whether enhancements to the content of disclosures required by the transparency rule under the *2015 Open Internet Order* should be incorporated in a revised transparency rule here. With respect to required disclosure of commercial terms, the *2015 Open Internet Order* provided additional specifications regarding ISPs' disclosures about price and related terms and their relationship with disclosures regarding privacy and redress options. Regarding the disclosure of performance characteristics, the *2015 Open Internet Order* provided additional specifications regarding the disclosure of network performance and network practices. The *RIF Order* eliminated those enhancements under the theory that their burdens to ISPs exceeded their benefits. The *Broadband Label Order,* on the other hand, required ISPs to disclose in the broadband labels their typical upload and download speeds and typical latency metrics associated with their broadband services, noting that speed in particular ''remains the network performance metric of greatest interest to the consumer.'' The Commission similarly found that low delay or latency is important to any application involving users interacting with each other, a device, or an application. We seek comment on these assessments, including updated evidence regarding the relative costs and benefits of the transparency enhancements based on experience following the *RIF Order.* To the extent that the transparency requirements were intended to provide needed information not only to consumers but also edge providers, the broader internet community, and the Commission, how should that affect our assessment of the overall benefits of the enhanced transparency requirements? Would the enhancements to the transparency rule adopted in the *2015 Open Internet Order,* or other modifications to the current transparency rule, assist the Commission in monitoring and enforcing compliance with the conduct rules proposed here? Are there any metrics that are particularly important to some subset of consumers that we should consider including despite those metrics not being of significant value to the average consumer?

159. In addition, we seek comment on other considerations relevant to possible changes to the content ISPs may be required to disclose under the transparency rule. For one, we seek comment on whether we should revise the transparency rule to incorporate the Commission's clarifications and guidance regarding prior versions of the transparency rule. For example, a 2011 Public Notice (*2011 Advisory Guidance*) provided ''examples of approaches to disclosure that would satisfy the transparency rule,'' discussing point-of-sale disclosures, service descriptions, the extent of required disclosures, disclosures for the benefit of edge providers, and disclosures regarding security measures. A 2014 Public Notice (*2014 Advisory Guidance*) summarized the applicability and requirements of the transparency rule and the potential enforcement consequences if it were violated, and emphasized the importance of consistency between ISPs' disclosures under the transparency rule and their advertising claims or other public statements. And a 2016 Public Notice (*2016 Advisory Guidance*) provided guidance regarding acceptable methodologies for disclosure of network performance information and point-of-sale disclosures consistent with the *2015 Open Internet Order.* The *RIF Order* subsequently eliminated the enhancements adopted in 2015, and the clarifications in the *2016 Advisory Guidance* along with it. The *RIF Order* endorsed the clarifications in the *2011 Advisory Guidance,* but neither endorsed nor disclaimed the

clarifications in the *2014 Advisory Guidance.* We seek comment on whether and to what extent the Commission should reaffirm, reject, or elaborate on any of that prior guidance in connection with any modification of the transparency rule here. Are there other areas where additional clarification or guidance would be beneficial either under the existing transparency rule or a revised transparency rule?

160. We also seek comment on the availability of information that ISPs can or should use to comply with the content of disclosures required under the current or modified transparency rule. For example, the *RIF Order* allowed fixed ISPs participating ''in the Measuring Broadband America (MBA) program [to] disclose their results as a sufficient representation of the actual performance their customers can expect to experience.'' Should we continue that approach here, or make use of the MBA program in some other way? To what extent can or should we allow ISPs to use other specific information sources or measurement approaches to provide transparency disclosures? Should we clarify that certain sources of information are permissible to rely on in making the required disclosures? Or should we go further in particular cases and require the use of certain data sources for reasons of uniformity, reliability, or otherwise? Should the Commission require ISPs to include additional information in transparency disclosures regarding their measurement methodologies and practices?

161. Finally, we seek comment on any other considerations relevant to our evaluation of the appropriate content of required disclosures under the transparency rule. Is there additional content that we should require? For example, the *2015 Open Internet Order* considered, but ultimately did not adopt, additional disclosure requirements regarding ''the source, location, timing, or duration of network congestion,'' packet corruption and jitter, and ''disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage.'' In light of subsequent experience, should we revisit the decisions not to require such disclosures? Should the Commission consider requiring more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps, and if so, how? We also seek comment on whether different content disclosures should be required for mobile ISPs than for fixed ISPs.

3. Means of Disclosure

162. We seek comment on how best to ensure that the content of the required disclosures is made available in a timely and effective manner without undue burdens on ISPs, both as a general matter and in the specific respects discussed below. In the *RIF Order,* the Commission allowed providers to make the required disclosures either ''on a publicly available, easily accessible website,'' or by ''transmit[ting] their disclosures to the Commission,'' which would then make them ''available on a publicly available, easily accessible website.'' We seek comment on practical experiences with that approach, and whether that approach should be retained in its current form, modified, or eliminated in favor of disclosures required specifically on provider websites—as had been the case under prior versions of the transparency rule. When the Commission recently adopted broadband label rules, it required ISPs to display labels on their websites, as well as at other points of sale. While it ''aim[ed] to give providers flexibility in how they display labels,'' the Commission also sought ''to ensure that the labels are prominently displayed on any device on which the consumer accesses and views the labels, including mobile devices'' and in a uniform format that will best assist consumers in comparing pricing, fees, performance characteristics, and data allowances across different providers. Are there lessons from the Commission's recent experience crafting broadband label requirements that should inform our approach to the manner of making disclosures under the transparency rule?

163. We also seek comment on whether any additional requirements are warranted regarding ISPs' website disclosures under the transparency rule. For ISPs electing to make the required disclosures on a ''publicly available, easily accessible website,'' the *RIF Order* ''reaffirm[ed] the means of disclosure requirement from the [*2010*] *Open Internet Order* and the clarification found in the *2011 Advisory Guidance.*'' Should the approach reflected in the current transparency rule, as informed by the *2010 Open Internet Order* and *2011 Advisory Guidance,* be retained or modified? Should we require the disclosures to be in machine-readable format, akin to the Commission's recently-adopted approach for broadband consumer labels?

164. We also seek comment on whether disclosures under the transparency rule should be required in additional locations. For instance, are there places on an ISP's website besides a point of sale where disclosures should be made?

165. Ensuring that disclosures under the transparency rule are accessible to individuals with disabilities is a priority. The *RIF Order* explained that ISPs making website disclosures under the transparency rule must make them ''in a manner accessible by people with disabilities.'' Has this direction been adequate, or are additional requirements warranted to ensure that disclosures under the transparency rule are accessible to individuals with disabilities? For example, should we encourage or require that website disclosures under the transparency rule follow guidance developed by the Web Accessibility Initiative? Most recently, the Commission required ISPs to post broadband label information on their websites in an accessible format, and strongly encouraged them to use the most current version of the Web Content Accessibility Guidelines (WCAG). In the *Broadband Label Further Notice,* it sought comment on whether to adopt specific criteria, based on the WCAG standard. Are there other industry guidelines that providers should be encouraged or required to follow? To the extent that we ultimately require transparency disclosures in locations other than websites and in alternative formats besides websites, is there additional guidance or requirements we should adopt to ensure accessibility to individuals with disabilities?

166. Further, we seek comment on possible ''direct notification'' requirements, including the costs and benefits of such requirements. The *2015 Open Internet Order* had imposed such an obligation, but the *RIF Order* eliminated that requirement. The Commission also recently declined to adopt a direct notification requirement in the context of its broadband label rules, finding that the broadband labels are specifically intended to inform consumers at the time of purchase. We note, however, the broader purpose of the transparency rule compared to the broadband labels. We therefore seek further comment and updated information on the benefits and burdens of such a requirement in the specific context of the transparency rule, in light of this more recent experience.

167. Finally, we seek comment on any other changes to our transparency rule regarding the means of disclosure. Are there additional requirements regarding the means of disclosure under the transparency rule that the Commission should adopt to ensure that information is available in a timely and effective

manner? Conversely, are there existing requirements regarding the means of disclosure that commenters believe impose burdens that outweigh their benefits, and thus should be eliminated?

4. Implementation and Other Issues

168. We seek comment on any implementation issues associated with potential modifications to the transparency rule, and whether we should consider additional time for compliance by small providers.

169. We also seek comment on whether the Commission should adopt new safe harbors for compliance with the transparency rule. Are there particular data sources or methodologies for complying with particular elements of the transparency rule, whether in its current form or as it may be modified, that the Commission should treat as a safe harbor or otherwise presumptively reasonable? Are there safe harbors the Commission should adopt for compliance with the transparency rule as a whole, akin to the broadband label safe harbor adopted in the *2015 Open Internet Order?*

170. Further, we seek comment on whether we should adopt recordkeeping requirements governing the types of information or records ISPs rely upon to support the content of their disclosures made under the transparency rule. Would such a requirement be helpful to our enforcement of the transparency rule by enabling us to evaluate the reasonableness of ISPs' claims? Would such requirements help inform our evaluation of the effectiveness of the rule and the need for changes over time? This requirement could, for example, help to identify and account for particular data sources or methodologies that prove to be especially reliable or unreliable. In the *Broadband Label Order,* the Commission required ISPs to maintain an archive of all labels no longer posted on their websites and at alternate sales channels, along with evidence sufficient to support the accuracy of the labels' content. Given that ISPs must have a basis for the claims made in their disclosures under the transparency rule, are there particular ways of retaining that information that could minimize the burden on ISPs? If we elect to adopt recordkeeping requirements, what period of time would best balance the benefits to the Commission from having the information available against the compliance burden for ISPs?

171. In addition, we seek comment on the overall cost effectiveness of modifications we might adopt to the transparency rule. What are the most cost-effective ways of ensuring that consumers and edge providers receive the information they need in a timely and effective manner? How can we minimize implementation and compliance burdens for ISPs, consistent with those goals?

D. Scope of Open Internet Rules

172. *Internet Traffic Exchange.* We propose to decline to apply any open internet rules to internet traffic exchange. We tentatively conclude, consistent with the *2015 Open Internet Order* and as discussed further below, that case-by-case review under sections 201 and 202 is ''an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and CDNs, that act on behalf of smaller edge providers.'' We believe that the best approach with respect to internet traffic exchange is to ''watch, learn, and act as required'' but to not intervene with prescriptive rules. We seek comment on our proposed approach.

173. *Reasonable Network Management.* We also propose that reasonable network management would not be considered a violation of prohibitions on blocking and throttling, or the general conduct rule, and seek comment on our proposal. In 2015, the Commission concluded that a reasonable network management exception to the conduct rules was necessary for ISPs to optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over their networks. We tentatively conclude this analysis remains equally applicable today and seek comment on this tentative conclusion. Is excluding reasonable network management practices still both necessary and advisable? In the *RIF Order,* the Commission defined ''reasonable network management'' to mean ''a practice 'appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband internet access service,' '' returning to the definition the Commission adopted in the *2010 Open Internet Order.* In 2015, the Commission had slightly modified that definition, adding that ''a network management practice is a practice that has a primarily technical network management justification, but does not include other business practices.'' We seek comment on how we should define ''reasonable network management'' for the purposes of our proposed open internet rules, and invite commenters to provide examples of how this term is best interpreted with regard to management of today's broadband networks. Is it necessary for the Commission to provide further guidance on the reasonable network management exception to provide certainty for ISPs? How can we ensure that the reasonable network management exception is not used to circumvent the proposed rules, while also providing regulatory certainty to ISPs and enabling them to appropriately manage their networks?

E. Enforcement of Open Internet Rules

174. We seek comment on the best framework for enforcing any potential open internet rules. Our aims are to enable effective and timely conflict resolution and to provide clear guidance on allowed and prohibited practices. We seek comment on what enforcement regime will be most efficient and least burdensome for customers, edge providers, and ISPs, including small entities.

175. In 2010, the Commission adopted a multipart framework to ensure prompt and effective enforcement of the open internet rules and encouraged informal and private resolution of matters. The first component involved informal complaints filed under § 1.41 of the Commission's rules. The Commission noted that this vehicle was ''already available'' and that ''no filing fee is required.'' ''Although individual informal complaints will not typically result in written Commission orders,'' the Commission explained that the Enforcement Bureau ''will examine trends or patterns in [informal] complaints to identify potential targets for investigation and enforcement action.'' Should informal or other means fail to resolve a dispute, the Commission adopted new procedures for filing formal complaints that would ''permit anyone—including individual end users and edge providers—to file a claim alleging that another party has violated a statute or rule, and asking the Commission to rule on the dispute.'' The Commission opted to base the formal complaint rules on the Part 76 cable access complaint rules, finding that those rules are ''more streamlined and thus preferable.'' Citing sections 403 and 503(b) of the Act, the Commission further observed that it has the authority to initiate enforcement actions on its own motion, including the issuance of forfeitures.

176. *Advisory Opinions and Enforcement Advisories.* In 2015, the Commission concluded that the use of advisory opinions, similar to those issued by DOJ's Antitrust Division,

would be in the public interest and had the potential to provide clarity, guidance, and predictability concerning the Commission's open internet rules. The *RIF Order* eliminated the advisory opinion process established in the *2015 Open Internet Order,* reasoning that without conduct rules, advisory opinions were no longer necessary, and concluding that the advisory opinion process did not diminish regulatory uncertainty, particularly for small providers, but rather added costs, caused uncertain timelines, and inhibited innovations. The elimination of the advisory opinion process was based on predictive comments in the record because no ISP had yet requested an advisory opinion through the Commission's process. When the D.C. Circuit in *USTA* rejected the challenge to the *2015 Open Internet Order*'s general conduct standard as being unconstitutionally vague, the Court relied in part on the advisory opinion process the Commission had created in that *Order.* The D.C. Circuit found that the opportunity for parties to obtain prospective guidance through the advisory opinion process ''provide[d] regulated entities with relief from [remaining] uncertainty.''

177. In light of the D.C. Circuit's reasoning in *USTA,* and to advance our goal of legal certainty in the enforcement of any potential open internet rules, we propose to adopt an advisory opinion process if we adopt a general conduct standard. We seek comment on this proposal. In practice, we believe that advisory opinions have the potential to lower costs for providers by creating certainty up front, rather than risking potentially costly formal complaint litigation, remediation, or fines after the fact. Do commenters agree? Are there examples of other federal or state advisory opinion processes from which the Commission could learn? Are there specific barriers that would prevent smaller ISPs from engaging with the advisory opinion process, and if so, how could we address them? We seek comment on whether we should adopt the mechanisms delineated in the *2015 Open Internet Order* for the issuance of advisory opinions and enforcement advisories. What changes, if any, should we make to the process the Commission established in the *2015 Open Internet Order?* As an alternative to adopting an advisory opinion process, would a detailed explanation of the factors the Commission would use when analyzing potential violations of the general conduct standard be sufficient under the D.C. Circuit's reasoning to provide fair warning to regulated entities of what the standard requires?

F. Investigations and Complaints

178. We next seek comment on whether it would be beneficial to re-establish a formal complaint process for complaints arising under our open internet rules, as the Commission did in 2015. In 2015, the Commission preserved the three avenues for enforcement of its open internet rules that the Commission had created in the *2010 Open Internet Order:* (i) parties could file informal complaints under § 1.41 of the Commission's existing rules; (ii) parties could file formal complaints under a new process that the Commission had created for this purpose; or (iii) the Commission could initiate enforcement actions on its own motion. While the informal complaint process under § 1.41 of the Commission's rules would remain available to parties with respect to any concerns arising out of any open internet rules that may be ultimately adopted, we seek comment on whether we should also adopt a formal complaint process. Is there value in providing parties with both of these options? Is our formal complaint process established pursuant to section 208 of the Act sufficient for this purpose, or is it necessary to establish a standalone formal complaint process? The Commission eliminated the open internet-specific formal complaint process in 2018. If we were to adopt a formal complaint process, should we implement one that returns to the rules the Commission adopted in the *2010 Open Internet Order* and preserved in the *2015 Open Internet Order*? If not, what alternatives do commenters recommend? The section 208 formal complaint rules were modified in 2018 and consolidated with the Commission's pole attachment rules. Should we use these existing rules for open internet disputes? We also seek comment on whether the Commission's informal complaint mechanism would be sufficient to resolve disputes under our proposed open internet rules.

G. Legal Authority

179. We seek comment on our authority to adopt open internet rules, including both the proposed conduct rules and any revised transparency rules. With respect to our proposed conduct rules, we propose to rely on the same sources of authority that the Commission relied upon when it adopted rules in the *2015 Open Internet Order.* As discussed below, we propose to return to our prior interpretation, upheld by the D.C. Circuit, that sections 706(a) and (b) of the 1996 Act are grants of regulatory authority and rely on that as a basis for our open internet rules. We also propose to rely on our authority under Title II of the Act with forbearance where appropriate under section 10 of the Act, insofar as we reclassify BIAS as a Title II service. And we propose to once again rely on our broad spectrum management authority under Title III of the Act as additional authority specifically in the case of mobile providers. With respect to any modifications to the transparency rule, we propose to rely on those same sources of authority along with section 257 (and associated authority now in section 13) of the Act, consistent with the reasoning of the *2010 Open Internet Order* and the *RIF Order.* We seek comment on those proposals, and any additional sources of authority for our proposed open internet rules, both as a general matter and in the specific respects discussed below. We also seek comment on how policy goals enumerated in the Act or other federal statutes should inform our exercise of regulatory authority here.

1. Section 706 of the 1996 Act

180. We seek comment on returning to an interpretation of section 706 of the 1996 Act as granting the Commission regulatory authority and, in turn, relying on that authority as a basis for open internet rules. In particular, although the *RIF Order* departed from the Commission's prior interpretation of section 706 and instead concluded that the provision was merely hortatory, we propose to return to the Commission's prior view and interpret sections 706(a) and (b) of the 1996 Act as grants of regulatory authority. We propose to do so in light of the considerations that persuaded the Commission to adopt such interpretations in the past, and that persuaded courts to affirm those interpretations. Consistent with that prior approach, we propose to rely on section 706(a) as part of our authority for open internet rules. We also propose to rely on section 706(b), in the event that the Commission were to conclude under section 706(a) that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion. We seek comment on those proposals generally.

181. First, we seek comment on the grounds for returning to the prior judicially affirmed interpretations of sections 706(a) and (b) of the 1996 Act as granting the Commission regulatory authority. The *RIF Order* principally grounded its rationale for changing the interpretation of section 706 on its view that section 706 was better interpreted

as hortatory, rather than as a grant of regulatory authority. To the extent that we instead believe that interpreting sections 706(a) and (b) as grants of regulatory authority represent the better reading of the statute, we believe that likewise should provide a basis for us to change our interpretation. We seek comment on this view. In addition, we seek comment on any other arguments bearing on whether and to what extent we should return to the prior interpretation of sections 706(a) and (b) as grants of regulatory authority.

182. Second, we seek comment on specific rationales for interpreting sections 706(a) and (b) of the 1996 Act as grants of regulatory authority. In the *2010 Open Internet Order,* the Commission explained why sections 706(a) and (b) each represent a grant of regulatory authority to the Commission after considering the statutory text, regulatory and judicial precedent, and legislative history, and rejecting objections to that interpretation. In addition, in the *2015 Open Internet Order,* the Commission built on the foundation of its explanations in the *2010 Open Internet Order,* rejecting various objections to the interpretation of sections 706(a) and (b) as grants of regulatory authority and elaborating on the Commission's authority to adopt rules implementing that provision, and to enforce those rules. We seek comment on that reasoning and conclusions regarding the interpretation and implementation of section 706, and on the extent to which we should rely on that today. We also seek comment on whether and to what extent we also should draw upon the reasoning of court decisions affirming the Commission's interpretation of section 706 of the 1996 Act as granting regulatory authority—in particular, the D.C. Circuit's 2014 decision in *Verizon* and its 2016 decision in *USTA,* as well as the Tenth Circuit's 2014 decision in *In re FCC 11–161.*

183. Third, to the extent that we interpret sections 706(a) and (b) of the 1996 Act as grants of regulatory authority, we propose to use that authority to adopt open internet rules here. The Commission previously concluded in the *2015 Open Internet Order* and *2010 Open Internet Order* that open internet rules were a reasonable way to implement Commission authority under sections 706(a) and (b), and the nexus between open internet rules and the directives in sections 706(a) and (b) was affirmed by the D.C. Circuit in *Verizon.* For those same reasons, we believe the open internet rules we seek comment on here would be a reasonable exercise of section 706(a) authority. We likewise believe that, in the event that the Commission concludes that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion under section 706(b), the open internet rules we seek comment on here would be a reasonable exercise of authority under that provision as well.

184. Finally, we seek comment on any other issues bearing on our interpretation and implementation of section 706 of the 1996 Act here, including possible objections to the interpretation of sections 706(a) and (b) as grants of regulatory authority. For example, when the D.C. Circuit concluded that the *RIF Order* permissibly reinterpreted section 706 as hortatory, rather than as a grant of regulatory authority, the court focused on the recognized ambiguity of the statutory language and the Commission's justification ''that Section 706 lacks details 'identify[ing] the providers or entities whose conduct could be regulated,' whereas other provisions of the Act that unambiguously grant regulatory authority do specify such details.'' We seek comment on that rationale. How is section 706 of the 1996 Act distinct in this regard from other provisions understood as grants of authority in the Telecommunications Act of 1996, the Communications Act of 1934, or other federal statutes? The *RIF Order* itself recognized that, in relying on section 257 of the Act as authority for the transparency rule, it was interpreting that provision as a grant of authority notwithstanding its lack of any identified universe of entities from which information could be obtained, explaining that ''other aspects of section 257 persuade us that our interpretation of that provision as a grant of authority.'' To what extent do other aspects of section 706 bear on the reasonableness of interpreting sections 706(a) and (b) as grants of authority?

185. We also seek comment on other theories discussed in the *RIF Order* as a basis for why section 706 of the 1996 Act not just permissibly could, but affirmatively should, be interpreted as merely hortatory, rather than a grant of regulatory authority to the Commission. For example, the *RIF Order* contended that interpreting sections 706(a) and (b) as grants of regulatory authority would allow the Commission ''to impose duties or adopt regulations equivalent to those directly addressed by the provisions of the Communications Act focused on promoting competition and/or deployment that go beyond the entities, contexts, and circumstances that bounded the Communications Act provisions.'' The *RIF Order* also argued that if sections 706(a) and (b) were interpreted as grants of regulatory authority that would enable the internet and information services to be heavily regulated in a manner inconsistent with policy goals reflected in the Act. We seek comment on those theories. The *RIF Order* acknowledged that the Commission's prior interpretation of section 706 was, by its own terms, constrained to be consistent with the Act, but claimed that such constraints did not adequately address the *Order*'s statutory concerns. In the view of the *RIF Order,* seemingly the only outcomes of interpreting section 706 as granting regulatory authority would be extreme results where those constraints had little meaning and left the Commission with essentially unbounded authority or were such severe limitations as to render section 706 of little possible use. We tentatively conclude that this view is unfounded and invite more robust analysis of these issues in the record here, along with any related arguments.

186. The *RIF Order* also cited concerns about the Commission's ability to enforce rules implementing section 706 of the 1996 Act as further grounds for interpreting it as merely hortatory. The *Order* did not reject the theory that section 706 could be read to include implicit enforcement authority, but contended that such implicit authority ''might enable actions like declaratory rulings or cease-and-desist orders, but would not appear to encompass authority to impose penalties given the absence of statutory language clearly granting that authority.'' We seek comment on this understanding of the scope of potential enforcement authority that could be implicit in section 706. Even assuming *arguendo* that scope of enforcement authority were accurate, why should we conclude that the resulting scope of our enforcement authority is so insignificant as to counsel against interpreting sections 706(a) and (b) as grants of regulatory authority? Further, the *RIF Order* rejected the view that the use of section 4(i) of the Act to adopt rules implementing section 706 of the 1996 Act would be sufficient to bring those rules within the purview of the Commission's enforcement authority under section 503 of the Act. The *RIF Order* reasoned that enforcement authority under section 503 is limited to rules based on substantive regulatory authority under the Act itself, rather than the rulemaking authority in section 4(i). We seek comment on the merits of this interpretation.

2. Title II of the Act With Forbearance

187. As in the *2015 Open Internet Order,* we propose again to rely on sections 201, 202, and 208 of the Act, along with the related enforcement authorities of sections 206, 207, 209, 216, and 217, as additional legal authority for the proposed open internet rules. And consistent with the *2010 Open Internet Order* and the *RIF Order,* and as affirmed by the D.C. Circuit in *Mozilla,* we propose also to rely on section 257 of the Act (now in conjunction with section 13 of the Act) as additional legal authority for the transparency rule, as we may modify it. We seek comment on these proposals.

188. We also seek comment on any additional sources of authority under Title II of the Act that could serve as authority for open internet rules. For example, the *RIF Order* cataloged arguments about other possible sources of Title II authority for open internet rules in sections 251(a), 256, and 275 of the Act identified in the record there. The Commission at the time ultimately declined to rely on those sources of authority due to perceived shortcomings in the record regarding the justification for their use, and also took the view that they would not, even in the aggregate, provide authority for the Commission to adopt open internet rules addressing the full array of ISPs. We seek comment on those possible sources of authority, including both more-developed explanations for how and when they could serve as regulatory authority for open internet rules and whether there would be grounds for exercising that authority under the regulatory approach we propose here.

3. Title III of the Act for Mobile Providers

189. As in the *2015 Open Internet Order,* we propose to rely on our broad legal authority under Title III of the Act to protect the public interest through spectrum licensing and regulations—including sections 303 and 316 of the Act—as additional legal authority for the proposed open internet rules in the case of mobile BIAS. The *RIF Order* conceded the viability of Title III authority in this regard, but declined to exercise that authority because it would be limited to rules for mobile ISPs, rather than providing authority for rules governing all ISPs. We do not believe that concern of the *RIF Order* is likely to arise under our proposed regulatory approach here, and we seek comment on that understanding. We recognize that the D.C. Circuit's *Mozilla* decision includes a brief statement as part of its review of the *RIF Order*'s preemption decision stating that BIAS is not ''radio transmission,'' so Title III does not apply. But the *RIF Order* did not attempt to apply (or justify applying) Title III, and the *Mozilla* decision did not develop any reasoning in support of that assertion. Particularly given that backdrop, we do not believe the court's statement should be read to call into question the Commission's prior recognition that mobile BIAS falls within the scope of Title III. We seek comment on these views and on any additional provisions in Title III of the Act that could serve as authority for open internet rules in the case of mobile BIAS or otherwise.

4. Other Possible Sources of Legal Authority

190. We seek comment on any other possible sources of legal authority for open internet rules. For example, the *2010 Open Internet Order* relied on additional sources of authority apart from section 706 of the 1996 Act and Titles II and III of the Act—in particular, sources under Title VI of the Act. The *RIF Order* expressly declined to rely on those sources of authority given what that *Order* identified as limitations regarding the justification for the use of those authorities, as well as the *RIF Order*'s view that they would not, even in the aggregate, provide authority for the Commission to adopt open internet rules addressing the full array of ISPs. We seek more developed comment on that possible Title VI authority and on any other possible sources of authority under the Act.

191. In addition, we seek comment on additional sources of authority outside the Act. For example, the recent bipartisan Infrastructure Act built upon the foundation of the transparency rule and broadband label requirements from the *2015 Open Internet Order* to require the Commission to adopt new broadband label rules. Does that law provide additional authority for rules here, particularly as it relates to possible modifications of the transparency rule?

192. We also seek comment on whether the Commission should rely on ancillary authority in conjunction with other primary sources of legal authority in adopting open internet rules in any respects. To the extent that commenters advocate such an approach, they should explain how the prerequisites for ancillary authority would be met, particularly by explaining why the action would help effectuate regulatory authority granted to the Commission under other statutory provisions. To exercise ancillary authority ''two conditions [must be] satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.''

H. Other Laws and Considerations

193. The *2015 Open Internet Order* discussed the relationship between the open internet rules adopted there and ISPs' rights or obligations with respect to other laws, safety and security considerations, or the ability of ISPs to make reasonable efforts to address transfers of unlawful content and unlawful transfers of content. We propose continuing that approach in the case of the rules upon which we seek comment here, and seek comment on that proposal, along with specific language for open internet rules intended to achieve the objectives discussed below, and any additional ways in which we should account for similar interests in the codified rules.

194. Consistent with the *2015 Open Internet Order,* we propose that the open internet rules upon which we seek comment here would not expand or contract ISPs' rights or obligations with respect to other laws or preclude them from responding to safety and security considerations—including the needs of emergency communications and law enforcement, public safety, and national security authorities. The *2015 Open Internet Order* specifically highlighted examples of other laws imposing requirements in these respects, such as the Communications Assistance for Law Enforcement Act, the Foreign Intelligence Surveillance Act, and the Electronic Communications Privacy Act, and we again seek comment as to those specific laws along with any others that should inform our analysis. We propose to adopt the same rule language in this regard as was adopted in the *2015 Open Internet Order:*

> *Nothing in this part supersedes any obligation or authorization a provider of broadband internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.*

We seek comment on this approach and on alternative approaches to protecting these interests, including whether the rule should capture other possible emergency communications and safety and security scenarios. For example, the 2015 Open Internet Order elected not to expand the application of its rule in this regard to public utilities and other critical infrastructure

operators, reasoning that those interests otherwise were protected under the approach it adopted. Is that same approach appropriate here, or should we address safety and security interests related to public utilities and other critical infrastructure operators in some other way in any rules we may adopt here? Should our rules go further to affirmatively require ISPs to take certain steps to address the needs of emergency communications or law enforcement, public safety, or national security authorities? For example, should the rules go further in addressing the categories of concerns raised before the Commission on remand of the RIF Order, such as the needs of public safety personnel; concerns about particular harms to public safety that could result from blocking, throttling, or paid prioritization; concerns about public safety needs for individuals with disabilities; or concerns related to critical infrastructure?

195. Also consistent with the *2015 Open Internet Order,* we propose that the open internet rules upon which we seek comment here would protect only lawful content, and would not be intended to inhibit efforts by ISPs to address unlawful transfers of content or transfers of unlawful content. We propose to adopt the same rule language in this regard as was adopted in the *2015 Open Internet Order:*

Nothing in this part prohibits reasonable efforts by a provider of broadband internet access service to address copyright infringement or other unlawful activity.

We seek comment on that approach and on alternative approaches to protecting these interests, including whether the rule should capture other possible scenarios where ISPs might seek to address unlawful transfers of content or transfers of unlawful content.

196. We also seek comment on whether there are other categories of otherwise-applicable laws or legal requirements that should be addressed through comparable rules as those we propose to address emergency communications and safety and security scenarios and efforts by ISPs to address unlawful transfers of content or transfers of unlawful content. For example, the *RIF Remand Order* noted comments expressing concern about the possible interplay between ISPs' practices and laws protecting individuals with disabilities. Given that the regulatory approach proposed here differs significantly from the one at issue in the *RIF Remand Order,* would such concerns still be relevant here? If so, would it be appropriate to address them through a rule specifically focused on those categories of laws? Are there additional otherwise-existing legal requirements imposed on ISPs that we should expressly accommodate in any rules we adopt?

IV. Constitutional Considerations

197. Consistent with the constitutional considerations the Commission has evaluated in connection with its regulatory approach to BIAS in the past, we seek comment on First Amendment speech issues and Fifth Amendment takings issues. In addition, we also seek comment on any other constitutional considerations that should inform our evaluation of the issues raised in this proceeding.

A. First Amendment

198. We seek comment on any First Amendment implications of the issues raised in this proceeding, both as a general matter and in the specific respects discussed below. Consistent with prior Commission analyses, we believe our open internet conduct rule proposals and any modifications to the transparency rule are permissible exercises of authority under the First Amendment.

1. Free Speech Rights

199. We anticipate that our proposals would withstand any review under the First Amendment for the same reasons explained by the Commission in the *2015 Open Internet Order.* In particular, as explained in that *Order,* and ultimately affirmed by the D.C. Circuit in *USTA,* under traditional First Amendment doctrine there are no First Amendment concerns raised by the conduct regulation of common carriers. We think the same reasoning is likely to apply here, and seek comment on that view.

200. Even if a court departed from the traditional common carrier First Amendment precedent, we believe that our proposed conduct rules are likely to satisfy First Amendment scrutiny for the same reasons further identified in the *2015 Open Internet Order.* Consistent with the explanation there, we believe the conduct rules are likely to be seen as content-neutral and thus subject to intermediate First Amendment scrutiny in this scenario. We also find it likely that the proposed rules readily could survive that level of scrutiny—advancing an important or substantial government interest unrelated to limiting speech without burdening more speech than necessary—based on the same governmental interests and nexus to the conduct rules identified by the Commission in the *2015 Open Internet Order.* We seek comment on that view and on any additional evidence and arguments bearing on the potential application of the First Amendment in the case of the conduct rules proposed here.

201. Because the *2015 Open Internet Order* was limited to offers of ''mass-market'' broadband access to ''all or substantially all internet endpoints,'' it would not have applied to offerings that were clearly as advertised as providing only ''filtered'' internet access catering to a particular audience or as providing access only to curated content. We propose to adopt the same approach here and we seek comment on this proposal. We also seek comment on whether or to what extent ISPs engage in content moderation, curation, or otherwise limit or exercise control over what third-party content their users are able to access on the internet. We are aware that some social media platforms and other edge providers purport to engage in various forms of content moderation or editorial control over content they host or transmit, and typically announce that they engage in such practices in their terms of service of user agreements; is there any record of ISPs announcing and engaging in comparable activity?

202. We also seek comment on the competing First Amendment views expressed by judges in separate opinions accompanying the D.C. Circuit's denial of requests to rehear the *USTA* case *en banc.* On one hand, then-Judge Kavanaugh's dissent expressed First Amendment concerns with the *2015 Open Internet Order* on the theory that ''the First Amendment bars the Government from restricting the editorial discretion of internet service providers, absent a showing that an internet service provider possesses market power in a relevant geographic market''—a showing that the Commission had not made there. On the other hand, Judges Srinivasan and Tatel, concurring in the denial of rehearing *en banc,* responded to the dissent by arguing that ''no Supreme Court decision supports the counterintuitive notion that the First Amendment entitles an ISP to engage in the kind of conduct barred by the net neutrality rule—*i.e.,* to hold itself out to potential customers as offering them an unfiltered pathway to any web content of *their* own choosing, but then, once they have subscribed, to turn around and limit their access to certain web content based on the *ISP's* own commercial preferences.'' We seek comment on those views.

203. Referencing statements in the First Amendment analysis in Judges Srinivasan's and Tatel's concurrence,

the *RIF Order* contended that the *2015 Open Internet Order* ''allows ISPs to offer curated services, which would allow ISPs to escape the reach of the [*2015 Open Internet Order*] and to filter content on viewpoint grounds.'' We seek comment on the accuracy of that characterization and how it should inform our analysis and approach here.

2. Compelled Disclosure

204. We also believe that any modifications to the transparency rule are likely to satisfy the First Amendment for the same reasons relied on by the Commission in its justification of the transparency rules at issue in the *2015 Open Internet Order* and the *RIF Order.* As a threshold matter, as explained in the *RIF Order,* we believe the speech addressed by our transparency rule is likely to be limited to commercial speech. We seek comment on that view.

205. We also believe that our transparency rule, as we may modify it, is likely to be understood by a court as limited to compelling the disclosure of factual, noncontroversial information under circumstances that fall within the *Zauderer* First Amendment framework, consistent with the Commission's analysis in the *2015 Open Internet Order.* Also consistent with the analysis in the *2015 Open Internet Order,* we believe any modifications to the transparency rule are likely to be a reasonable way of advancing government interests in preventing consumer deception, among other things, and thus would satisfy the *Zauderer* standard. We believe any modifications to the disclosures in our transparency rule would be the sort of ''purely factual and uncontroversial information about the terms under which . . . services will be available'' to which *Zauderer* applies. We seek comment on the continued applicability of that analysis from the *2015 Open Internet Order.*

206. Alternatively, to the extent that a court evaluated any modifications to the transparency rule under the *Central Hudson* framework, which applies generally to commercial speech, we believe it also likely would satisfy First Amendment scrutiny under that standard for the same reasons given in that regard in the *RIF Order.* We believe any modifications to the transparency rule are likely to directly advance substantial government interests and be no more extensive than necessary, for reasons such as those identified in the *RIF Order.* We seek comment on these views and any other First Amendment considerations.

B. Fifth Amendment Takings

207. Consistent with the conclusions in the *2015 Open Internet Order,* we do not believe the proposals in this Notice—either the proposed classification decisions or the proposed rules—are likely to result in *per se* takings because we do not anticipate that they would grant third parties a right to physical occupation of the ISPs' property. And as the *2015 Open Internet Order* recognized, where private parties voluntarily open their networks to end users and edge providers, reasonable regulation of the use of their property poses no takings issue. We seek comment on the continued applicability of those analyses here and any other considerations relevant to possible *per se* takings arguments.

208. Also consistent with the conclusions in the *2015 Open Internet Order,* we do not believe the proposals in this Notice—either the proposed classification decisions or the proposed rules—are likely to result in regulatory takings. Outside of *per se* takings cases, courts analyze putative government takings through ''essentially ad hoc, factual inquiries'' into a variety of unweighted factors such as the ''economic impact of the regulation,'' the degree of interference with ''investment-backed expectations,'' and ''the character of the government action.'' The *2015 Open Internet Order* weighed these factors and concluded that the actions taken there did not constitute regulatory takings, and we believe the same is likely to be true of our proposals here. We seek comment on these views.

V. Procedural Matters

209. *Ex Parte Rules.* This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

210. *Initial Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this *NPRM.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM.* The Commission's Office of the Secretary, Reference Information Center, will send a copy of the *NPRM,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

211. *Paperwork Reduction Act of 1995 Analysis.* This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

VI. Initial Regulatory Flexibility Analysis

212. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rules proposed in the *Notice of Proposed Rulemaking* (*Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *Notice*. The Commission will send a copy of the *Notice,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

213. In the *Notice,* we propose to reestablish the Commission's authority over broadband internet access service (BIAS) by classifying BIAS as a telecommunications service under Title II of the Communications Act of 1934, as amended (Act). We further propose to reclassify mobile BIAS as a commercial mobile service. The COVID–19 pandemic showed how essential BIAS connections are for consumers' participation in today's society and economy, for work, health, education, community, and everyday life. In light of this reality, we believe that looking anew at the classification of BIAS is necessary and timely given the critical importance of ensuring the Commission's authority to fulfill policy objectives and responsibilities to protect this vital service. Notable among these is enabling the Commission to safeguard the fair and open internet though a national regulatory approach. The Commission also has an important statutory mandate to protect ''life and property'' by supporting national security and public safety.

214. Restoring Title II authority will allow the Commission to safeguard and secure the open internet in three significant ways. First, this authority will allow the Commission to protect consumers, including by issuing straightforward, clear rules to prevent internet service providers from engaging in practices harmful to consumers, competition, and public safety, and by establishing a national regulatory approach rather than disparate requirements that vary state-by-state. Second, reclassification will strengthen the Commission's ability to secure communications networks and critical infrastructure against national security threats. Third, the reclassification will enable the Commission to protect public safety during natural disasters and other emergencies. We also anticipate that the proper classification of BIAS as a telecommunications service will enhance the Commission's ability to advance other important interests, including protection of consumers' privacy and data security interests and consumers' ability to access BIAS. Beyond these areas, we believe that classification of BIAS as a telecommunications service represents the best reading of the text of the Act in light of the marketplace reality of how the service is offered and perceived today.

215. To protect the openness of the internet, we propose to return to the basic framework the Commission adopted in 2015 by reinstating straightforward, clear rules that are designed to prevent internet service providers (ISPs) from engaging in practices harmful to consumers, competition, and public safety, and that would provide the basis for a national regulatory approach toward BIAS, consistent with the Commission's longstanding policy approach to protect internet openness prior to the *RIF Order.* We first propose to reinstate the rules adopted in the *2015 Open Internet Order* that prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We similarly propose to reinstate the general conduct standard adopted in the *2015 Open Internet Order,* which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Finally, with regard to transparency, we propose to retain the current disclosures, and we seek comment on the means of disclosure, the interplay between the transparency rule and the broadband label requirements, and any additional enhancements or changes we should consider. We believe that the rules we propose today will establish a baseline that the Commission can use to prevent and address conduct that harms consumers and competition when it occurs.

B. Legal Basis

216. The proposed action is authorized pursuant to sections 1, 2, 4(i)–(j), 13, 201, 202, 208, 257, 303, and 316, of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 152, 154(i)–(j), 163, 201, 202, 208, 257, 303, 316, and 1302.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Would Apply

217. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small-business concern'' under the Small Business Act. A ''small-business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

1. Total Small Entities

218. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 33.2 million businesses.

219. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

220. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census

Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

2. Wired Broadband Internet Access Service Providers

221. *Wired Broadband Internet Access Service Providers (Wired ISPs).* Providers of wired broadband internet access service include various types of providers except dial-up internet access providers. Wireline service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission's rules. Wired broadband internet services fall in the Wired Telecommunications Carriers industry. The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees.

222. Additionally, according to Commission data on internet access services as of June 30, 2019, nationwide there were approximately 2,747 providers of connections over 200 kbps in at least one direction using various wireline technologies. The Commission does not collect data on the number of employees for providers of these services, therefore, at this time we are not able to estimate the number of providers that would qualify as small under the SBA's small business size standard. However, in light of the general data on fixed technology service providers in the Commission's *2022 Communications Marketplace Report,* we believe that the majority of wireline internet access service providers can be considered small entities.

3. Wireline Providers

223. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including Voice-over Internet Protocol (VoIP) services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.

224. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 4,590 providers that reported they were engaged in the provision of fixed local services. Of these providers, the Commission estimates that 4,146 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

225. *Incumbent Local Exchange Carriers* (*Incumbent LECs*). Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 1,212 providers that reported they were incumbent local exchange service providers. Of these providers, the Commission estimates that 916 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

226. *Competitive Local Exchange Carriers (Competitive LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 3,378 providers that reported they were competitive local exchange service providers. Of these providers, the Commission estimates that 3,230 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

227. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA have developed a small business size standard specifically for Interexchange Carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 127 providers that reported they were engaged in the provision of interexchange services. Of these providers, the Commission estimates

that 109 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of providers in this industry can be considered small entities.

228. *Operator Service Providers* (*OSPs*). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The closest applicable industry with an SBA small business size standard is Wired Telecommunications Carriers. The SBA small business size standard classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 20 providers that reported they were engaged in the provision of operator services. Of these providers, the Commission estimates that all 20 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, all of these providers can be considered small entities.

229. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 90 providers that reported they were engaged in the provision of other toll services. Of these providers, the Commission estimates that 87 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

4. Wireless Providers—Fixed and Mobile

230. The broadband internet access service provider category covered by this *Notice* may cover multiple wireless firms and categories of regulated wireless services. Thus, to the extent the wireless services listed below are used by wireless firms for broadband internet access services, the proposed actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

231. *Wireless Broadband internet Access Service Providers (Wireless ISPs or WISPs).* Providers of wireless broadband internet access service include fixed and mobile wireless providers. The Commission defines a WISP as ''[a] company that provides end-users with wireless access to the internet[.]'' Wireless service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission's rules. Neither the SBA nor the Commission have developed a size standard specifically applicable to Wireless Broadband internet Access Service Providers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite). The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees.

232. Additionally, according to Commission data on internet access services as of June 30, 2019, nationwide there were approximately 1,237 fixed wireless and 70 mobile wireless providers of connections over 200 kbps in at least one direction. The Commission does not collect data on the number of employees for providers of these services, therefore, at this time we are not able to estimate the number of providers that would qualify as small under the SBA's small business size standard. However, based on data in the Commission's *2022 Communications Marketplace Report* on the small number of large mobile wireless nationwide and regional facilities-based providers, the dozens of small regional facilities-based providers and the number of wireless mobile virtual network providers in general, as well as on terrestrial fixed wireless broadband providers in general, we believe that the majority of wireless internet access service providers can be considered small entities.

233. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

234. *Wireless Communications Services.* Wireless Communications Services (WCS) can be used for a variety of fixed, mobile, radiolocation, and digital audio broadcasting satellite services. Wireless spectrum is made available and licensed for the provision of wireless communications services in several frequency bands subject to part 27 of the Commission's rules. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer

than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

235. The Commission's small business size standards with respect to WCS involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in WCS. When bidding credits are adopted for the auction of licenses in WCS frequency bands, such credits may be available to several types of small businesses based on average gross revenues (small, very small, and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in the designated entities section in part 27 of the Commission's rules for the specific WCS frequency bands.

236. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

237. *Wireless Resellers.* Neither the Commission nor the SBA have developed a small business size standard specifically for Wireless Resellers. The closest industry with an SBA small business size standard is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications and they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under the SBA size standard for this industry, a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services during that year. Of that number, 1,375 firms operated with fewer than 250 employees. Thus, for this industry under the SBA small business size standard, the majority of providers can be considered small entities.

238. *1670–1675 MHz Services.* These wireless communications services can be used for fixed and mobile uses, except aeronautical mobile. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

239. According to Commission data as of November 2021, there were three active licenses in this service. The Commission's small business size standards with respect to 1670–1675 MHz Services involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For licenses in the 1670–1675 MHz service band, a ''small business'' is defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' is defined as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years. The 1670–1675 MHz service band auction's winning bidder did not claim small business status.

240. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

241. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite). The size standard for this industry under SBA rules is that a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 331 providers that reported they were engaged in the provision of cellular, personal communications services, and specialized mobile radio services. Of these providers, the Commission estimates that 255 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

242. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum encompasses services in the 1850–1910 and 1930–1990 MHz bands. The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

243. Based on Commission data as of November 2021, there were approximately 5,060 active licenses in the Broadband PCS service. The Commission's small business size standards with respect to Broadband PCS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. In auctions for these licenses, the Commission defined ''small business'' as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling interests, has had

average annual gross revenues not exceeding $15 million for the preceding three years. Winning bidders claiming small business credits won Broadband PCS licenses in C, D, E, and F Blocks.

244. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

245. *Specialized Mobile Radio Licenses.* Special Mobile Radio (SMR) licenses allow licensees to provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz spectrum bands on a commercial basis including but not limited to services used for voice and data communications, paging, and facsimile services, to individuals, Federal Government entities, and other entities licensed under Part 90 of the Commission's rules. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 95 providers that reported they were of SMR (dispatch) providers. Of this number, the Commission estimates that all 95 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, these 119 SMR licensees can be considered small entities.

246. Based on Commission data as of December 2021, there were 3,924 active SMR licenses. However, since the Commission does not collect data on the number of employees for licensees providing SMR services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard. Nevertheless, for purposes of this analysis the Commission estimates that the majority of SMR licensees can be considered small entities using the SBA's small business size standard.

247. *Lower 700 MHz Band Licenses.* The lower 700 MHz band encompasses spectrum in the 698–746 MHz frequency bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

248. According to Commission data as of December 2021, there were approximately 2,824 active Lower 700 MHz Band licenses. The Commission's small business size standards with respect to Lower 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For auctions of Lower 700 MHz Band licenses the Commission adopted criteria for three groups of small businesses. A very small business was defined as an entity that, together with its affiliates and controlling interests, has average annual gross revenues not exceeding $15 million for the preceding three years, a small business was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and an entrepreneur was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses, twenty-six winning bidders claiming a small business classification won 214 licenses, and three winning bidders claiming a small business classification won all five auctioned licenses.

249. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

250. *Upper 700 MHz Band Licenses.* The upper 700 MHz band encompasses spectrum in the 746–806 MHz bands. Upper 700 MHz D Block licenses are nationwide licenses associated with the 758–763 MHz and 788–793 MHz bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

251. According to Commission data as of December 2021, there were approximately 152 active Upper 700 MHz Band licenses. The Commission's small business size standards with respect to Upper 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with its affiliates and

controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.

252. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

253. *700 MHz Guard Band Licensees.* The 700 MHz Guard Band encompasses spectrum in 746–747/776–777 MHz and 762–764/792–794 MHz frequency bands. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

254. According to Commission data as of December 2021, there were approximately 224 active 700 MHz Guard Band licenses. The Commission's small business size standards with respect to 700 MHz Guard Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, five winning bidders claiming one of the small business status classifications won 26 licenses, and one winning bidder claiming small business won two licenses. None of the winning bidders claiming a small business status classification in these 700 MHz Guard Band license auctions had an active license as of December 2021.

255. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

256. *Air-Ground Radiotelephone Service.* Air-Ground Radiotelephone Service is a wireless service in which licensees are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft. A licensee may provide any type of air-ground service (*i.e.,* voice telephony, broadband internet, data, etc.) to aircraft of any type, and serve any or all aviation markets (commercial, government, and general). A licensee must provide service to aircraft and may not provide ancillary land mobile or fixed services in the 800 MHz air-ground spectrum.

257. The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

258. Based on Commission data as of December 2021, there were approximately four licensees with 110 active licenses in the Air-Ground Radiotelephone Service. The Commission's small business size standards with respect to Air-Ground Radiotelephone Service involve eligibility for bidding credits and installment payments in the auction of licenses. For purposes of auctions, the Commission defined ''small business'' as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years. In the auction of Air-Ground Radiotelephone Service licenses in the 800 MHz band, neither of the two winning bidders claimed small business status.

259. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, the Commission does not collect data on the number of employees for licensees providing these services therefore, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

260. Advanced Wireless Services (AWS)—(1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3); 2000–2020 MHz and 2180–2200 MHz (AWS–4). Spectrum is made available and licensed in these bands for the provision of various wireless communications services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

261. According to Commission data as December 2021, there were

approximately 4,472 active AWS licenses. The Commission's small business size standards with respect to AWS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of AWS licenses, the Commission defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. Pursuant to these definitions, 57 winning bidders claiming status as small or very small businesses won 215 of 1,087 licenses. In the most recent auction of AWS licenses 15 of 37 bidders qualifying for status as small or very small businesses won licenses.

262. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

263. *3650–3700 MHz band.* Wireless broadband service licensing in the 3650–3700 MHz band provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.,* 3650–3700 MHz). Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis. Wireless broadband services in the 3650–3700 MHz band fall in the Wireless Telecommunications Carriers (*except* Satellite) industry with an SBA small business size standard that classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

264. The Commission has not developed a small business size standard applicable to 3650–3700 MHz band licensees. Based on the licenses that have been granted, however, we estimate that the majority of licensees in this service are small internet access service providers. As of November 2021, Commission data shows that there were 902 active licenses in the 3650–3700 MHz band. However, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

265. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Upper Microwave Flexible Use Service (UMFUS), Millimeter Wave Service (70/80/90 GHz), Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), 24 GHz Service, Multiple Address Systems (MAS), and Multichannel Video Distribution and Data Service (MVDDS), where in some bands licensees can choose between common carrier and non-common carrier status. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

266. The Commission's small business size standards with respect to fixed microwave services involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in fixed microwave services. When bidding credits are adopted for the auction of licenses in fixed microwave services frequency bands, such credits may be available to several types of small businesses based on average gross revenues (small, very small, and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in Part 101 of the Commission's rules for the specific fixed microwave services frequency bands.

267. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

268. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). Wireless cable operators that use spectrum in the BRS often supplemented with leased channels from the EBS, provide a competitive alternative to wired cable and other multichannel video programming distributors. Wireless cable programming to subscribers resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels.

269. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

270. According to Commission data as December 2021, there were approximately 5,869 active BRS and EBS licenses. The Commission's small business size standards with respect to BRS involves eligibility for bidding credits and installment payments in the

auction of licenses for these services. For the auction of BRS licenses, the Commission adopted criteria for three groups of small businesses. A very small business is an entity that, together with its affiliates and controlling interests, has average annual gross revenues that exceed $3 million and did not exceed $15 million for the preceding three years, a small business is an entity that, together with its affiliates and controlling interests, has average gross revenues that exceed $15 million and did not exceed $40 million for the preceding three years, and an entrepreneur is an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won four licenses, one bidder claiming the very small business status won three licenses, and two bidders claiming entrepreneur status won six licenses. One of the winning bidders claiming a small business status classification in the BRS license auction has an active license as of December 2021.

271. The Commission's small business size standards for EBS define a small business as an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues that are not more than $55 million for the preceding five (5) years, and a very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues that are not more than $20 million for the preceding five (5) years. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

5. Satellite Service Providers

272. *Satellite Telecommunications.* This industry comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $38.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

273. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (*e.g.* dial-up ISPs) or VoIP services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Based on this data, the Commission estimates that the majority of ''All Other Telecommunications'' firms can be considered small.

6. Cable Service Providers

274. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (*e.g.,* limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA small business size standard for this industry classifies firms with annual receipts less than $41.5 million as small. Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year. Of that number, 149 firms operated with revenue of less than $25 million a year and 44 firms operated with revenue of $25 million or more. Based on this data, the Commission estimates that a majority of firms in this industry are small.

275. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Based on industry data, there are about 420 cable companies in the U.S. Of these, only seven have more than 400,000 subscribers. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Based on industry data, there are about 4,139 cable systems (headends) in the U.S. Of these, about 639 have more than 15,000 subscribers. Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

276. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, contains a size standard for a ''small cable operator,'' which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 677,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator based on the cable subscriber count established in a 2001 Public Notice. Based on industry data, only six cable system operators have more than 677,000 subscribers. Accordingly, the Commission estimates that the majority of cable system

operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

7. Other

277. *Electric Power Generators, Transmitters, and Distributors.* The U.S. Census Bureau defines the utilities sector industry as comprised of ''establishments, primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.'' This industry group is categorized based on fuel source and includes Hydroelectric Power Generation, Fossil Fuel Electric Power Generation, Nuclear Electric Power Generation, Solar Electric Power Generation, Wind Electric Power Generation, Geothermal Electric Power Generation, Biomass Electric Power Generation, Other Electric Power Generation, Electric Bulk Power Transmission and Control, and Electric Power Distribution.

278. The SBA has established a small business size standard for each of these groups based on the number of employees which ranges from having fewer than 250 employees to having fewer than 1,000 employees. U.S. Census Bureau data for 2017 indicate that for the Electric Power Generation, Transmission and Distribution industry there were 1,693 firms that operated in this industry for the entire year. Of this number, 1,552 firms had less than 250 employees. Based on this data and the associated SBA size standards, the majority of firms in this industry can be considered small entities.

279. *All Other Information Services.* This industry comprises establishments primarily engaged in providing other information services (except news syndicates, libraries, archives, internet publishing and broadcasting, and Web search portals). The SBA small business size standard for this industry classifies firms with annual receipts of $30 million or less as small. U.S. Census Bureau data for 2017 show that there were 704 firms in this industry that operated for the entire year. Of those firms, 556 had revenue of less than $25 million. Consequently, we estimate that the majority of firms in this industry are small entities.

280. *internet Service Providers (Non-Broadband).* internet access service providers using client-supplied telecommunications connections (*e.g.,* dial-up ISPs) as well as VoIP service providers using client-supplied telecommunications connections fall in the industry classification of All Other Telecommunications. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. For this industry, U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Consequently, under the SBA size standard a majority of firms in this industry can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

281. In the *Notice,* we largely seek to reestablish the framework the Commission previously adopted in the *2015 Open Internet Order*. We first propose to reclassify BIAS as a telecommunications service under Title II of the Act and to reclassify mobile BIAS as a commercial mobile service. We also propose to reestablish rules to prevent ISPs from engaging in practices harmful to consumers, competition, and public safety and that provide the foundation for a national regulatory approach toward BIAS. Specifically, we propose to adopt rules to prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We further propose to reinstate the general conduct standard adopted in the *2015 Open Internet Order,* which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Additionally, we propose to retain current disclosure obligations for ISPs, and seek comment on the means of disclosure, the interplay between the transparency rule and current broadband label requirements, as well as any additional enhancements or changes the Commission should consider. While we expect the proposals in the *Notice* will impose new or additional reporting, recordkeeping and/or other compliance obligations on small and other entities, we also anticipate that the burden for small and other entities to comply with the reclassification and rules will be minimal, as they will be entering a regulatory framework with which they are already and recently familiar. At this time however, the Commission is not in a position to determine whether, if adopted, our proposals and the matters upon which we seek comment will require small entities to hire professionals to comply with the proposed rules in the *Notice,* and cannot quantify the cost of compliance with the potential rule changes discussed herein. We seek comment from small entities that have concerns about potential hardships or other matters related to our proposed rules, and with compliance, should they be adopted.

282. Certain compliance obligations regarding the content of transparency disclosures that we discuss in the *Notice* and seek comment on are beyond those that currently exists. For instance, we seek comment on additional disclosure specifications that were established in the *2015 Open Internet Order* and repealed by the *RIF Order,* including commercial terms about price and related terms and their relationship with disclosures regarding privacy and redress options, and about performance characteristics related to network performance and network practices. We also seek comment on whether ISPs should disclose additional information regarding their performance measurement methodologies and practices. We discuss additional disclosure requirements that were not adopted in the 2015 *Open Internet Order,* such as those regarding the source, location, timing, or duration of network congestion, packet corruption and jitter, or disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage. We also ask if ISPs should be required to make more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps. Further, we seek comment on whether to incorporate into the transparency rule the Commission's clarifications and guidance regarding prior versions of the transparency rule, such as point-of-sale disclosures, service descriptions, disclosures for the benefit of edge providers, disclosures regarding security measures, and consistency between ISPs' disclosures under the transparency rule and their advertising claims or other public statements. We also discuss how providers would make the required

disclosures, such as via a publicly available website, by transmitting disclosures directly to the Commission, and by additional locations or means. Additionally, we seek comment on whether such disclosures should be in a machine-readable format and regarding the accessibility of such disclosures to individuals with disabilities. Lastly, we explore what, if any, recordkeeping requirements we should implement as a means for ISPs to provide the types of information or records needed to support the content of their disclosures.

283. The Commission seeks comment on all of the above proposals to evaluate whether compliance with these requirements would cause an undue burden on small or other entities, if adopted. We therefore expect the information we receive in comments, including cost and benefit data, to help the Commission further identify and evaluate relevant matters for small entities, such as compliance costs, and other burdens that may result from the proposals and inquiries we make in the *Notice.*

E. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

284. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

285. At the outset of the reclassification discussion, we request information on the benefits and burdens of the proposed reclassification, and specifically request feedback on the impact on small businesses and small ISPs. We also request feedback on the proposed conduct rules prohibiting ISPs from blocking or throttling the information transmitted over their networks, or engaging in paid or affiliated prioritization arrangements, and the general conduct rule, all of which, as we discuss in the *Notice,* track the specific language from the *2015 Open Internet Order.* We believe our proposal to reestablish the framework from the Commission's 2015 decision could minimize the economic impact for small entities that already have experience operating under, and complying with, the *2015 Open Internet Order.*

286. We also believe and tentatively conclude that the proposed reclassification of BIAS as a telecommunications service will enhance the Commission's ability to continue to advance national security and preserve public safety by protecting the nation's communications networks from potential entities, equipment, and services that pose threats to national security and law enforcement. However, in the alternative to reclassification, we consider, inquire, and seek comment on whether there is other authority that can be used by the Commission that would allow it to protect the nation's communications networks against ISPs that pose threats national security and law enforcement. To the extent there is such an alternative available to the Commission, in the *Notice,* we request that commenters specify the statutory authority, and how this authority can be used by the Commission to address national security and law enforcement concerns. We believe reclassification also will protect the information of small and other telecommunications carriers, equipment manufacturers, and other entities that interact with ISPs that are potential national security threats, or are owned or controlled by, or subject to the jurisdiction or direction of foreign adversaries. Accordingly, we seek comment on how reclassification of BIAS will affect ISPs as well as telecommunications carriers and equipment manufacturers, and other entities that interact with ISPs, if adopted.

287. In the *Notice,* we indicate that as part of our proposal to reinstate the reclassification of BIAS as a telecommunications service, we will continue to define BIAS as defined in part 8 of the Commission's rules and ''mass market'' as defined in the *2015 Open Internet Order* and *RIF Order.* We consider whether there are reasons for the Commission to modify these definitions. Similarly, we consider whether there is any reason to depart from our tentative conclusion that BIAS is a telecommunications service and our supporting analysis. Further, while we propose to reinstate the classification of mobile BIAS as a commercial mobile service as adopted in the *2015 Open Internet Order,* alternatively, we propose to find that mobile BIAS is the functional equivalent of a commercial mobile service and, therefore, not private mobile service, even if mobile BIAS does not meet the definition of ''commercial mobile service.'' The *Notice* seeks comment on these matters.

288. The specific conduct rules we propose in the *Notice* would prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. In the alternative, we consider whether the need to prohibit any of these practices has been eliminated by any new technical advancements or market developments. We also consider whether our proposed no-blocking rule which tracks the language of the rule we adopted *2015 Open Internet Order,* and would apply to both fixed and mobile ISPs, continues to be the best no-blocking principle for ISPs. The no-blocking rule is a broadly accepted principle in the industry, including by ISPs, and many ISPs continue to advertise a commitment to open internet principles on their websites, which includes commitments not to block traffic except in certain circumstances, notwithstanding the 2017 repeal of the no-blocking rule. Similarly, after the repeal of the no-throttling rule, ISPs continue to advertise on their websites that they do not throttle traffic except in limited circumstances. As a result, we believe the economic impact on, and costs to comply with the proposed no-blocking rule, and the no throttling of lawful internet traffic rule, will be minimal for small ISPs. We however seek information on specific costs and burdens these rules would impose for small ISPs.

289. Regarding our proposed ban on paid prioritization practices, we take steps to minimize the economic impact for small ISPs by requesting information on the compliance costs small ISPs would incur as a result of such a ban, and by exploring whether there are alternatives we can take to protect consumers, and the open internet from the harms of paid prioritization practices that should be considered as an alternative to a flat ban. Similarly, we consider whether there is another standard we should adopt to establish a general conduct rule, as an alternative to the general conduct standard for ISPs we propose in the *Notice* that tracks the *2015 Open Internet Order.* We specifically inquire whether we should instead rely on the ''just and reasonable'' and ''unreasonable discrimination'' standards in sections 201 and 202 of the Act. The *Notice* seeks comment on these matters.

290. We further propose to build upon the foundation of our existing transparency requirement adopted in the *2010 Open Internet Order,* and the new broadband label requirements the Commission put in place to give

consumers a convenient tool to research and compare broadband offerings. We propose possible modifications or additions to the requirements pertaining to the content of required disclosure and the means of disclosure to update the transparency rule, to ensure that sufficient information is made available to end users, edge providers, the broader internet community, and the Commission, which allows for the timely and effective assessment of ISPs' terms and conditions for BIAS. Specific disclosure modification alternatives we consider, and seek comment on include whether to: (1) require disclosures regarding the source, location, timing, or duration of network congestion, packet corruption and jitter, or disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage, (2) require more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps; (3) require specific content of particular relevance to edge providers, the broader internet community, or the Commission, and (4) require different disclosures tailored to different audiences, and specifically, whether different content disclosures should be required for mobile ISPs than for fixed ISPs. Further, as an alternative to modifications that only add disclosure requirements, we inquire, and seek comment on whether under the current transparency rule there is certain content that is required to be disclosed that should no longer be required after weighing the relevant policy considerations at stake.

291. As we discuss in the *Notice,* our objectives for proposing modifications to the means of disclosure requirements for ISPs is to ensure that we are taking the appropriate steps to facilitate the availability of the content of the required disclosures in a timely and effective manner, without undue burdens on ISPs. Thus, while we consider and seek comment on alternatives to modify the means of disclosure requirements for ISPs such as, (1) whether any additional requirements are warranted regarding ISPs' website disclosures under the transparency rule, (2) whether disclosures under the transparency rule should be required in additional locations, and (3) possible direct notification requirements, we also consider whether there are existing means of disclosure requirements that should be eliminated because the burdens imposed by these requirements outweigh their benefits. We believe that to the extent that there are content and/or means of disclosure requirements that can be removed, removal of these requirements could reduce the impact for small entities of any additional requirements that may be adopted.

292. Our assessment of how to implement any rules we may adopt relating to the transparency rule seeks to identify any implementation issues for small and other ISPs that may be associated with potential modifications. We specifically seek to understand the impacts for small ISPs, such as whether smaller ISPs need extra time to implement any modifications to the transparency rule.

293. More generally we consider implementation alternatives that include, (1) whether the Commission should adopt new safe harbors for compliance with the transparency rule, (2) whether there are safe harbors the Commission should adopt for compliance with the transparency rule as a whole, similar to the broadband label safe harbor adopted in the *2015 Open Internet Order,* and (3) whether the Commission should adopt recordkeeping requirements governing the types of information or records ISPs rely upon to support the content of their disclosures made under the transparency rule. With regard to any recordkeeping requirements, we seek information on specific ways information could be retained that could minimize the burden on small and other ISPs, and what recordkeeping timeframe would best balance the benefits to the Commission of having the required information available against the compliance burden for small and other ISPs. Overall, the Commission's objective is to determine the most cost-effective ways of ensuring that consumers, and edge providers receive the information they need in a timely and effective manner, while minimizing the implementation and compliance burdens for small and other ISPs, consistent with these goals.

294. In the *Notice* and summarized above, we discuss the potential effects our rule proposals and alternatives could have on small entities, and seek comment on these matters. We also discuss that the Commission envisions the proposed BIAS reclassification as a means to provide the basis for a national regulatory approach rather than a patchwork of state requirements, which could help streamline and minimize regulatory requirements for small entities. Further, we propose broad forbearance from statutory requirements and Commission regulations for ISPs, and note that the proposed forbearance could substantially lessen the economic impact of the proposed actions on small entities. Accordingly, before reaching final conclusions, and taking action in this proceeding, the Commission expects to further consider the economic impact on small entities, and additional alternatives that are consistent with its goal of safeguarding and securing the open internet, while also imposing minimal burdens on small entities, based on comments filed in response to the *Notice* and this IRFA.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

295. None.

VII. Ordering Clauses

296. Accordingly, *it is ordered,* pursuant to the authority contained in sections 1, 2, 3, 4(i)–(j), 10, 13, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, and 548 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 152, 153, 154(i)–(j), 160, 163, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, 548, and 1302, that this Notice of Proposed Rulemaking *is adopted.*

297. *It is further ordered* that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the Notice of Proposed Rulemaking on or before December 14, 2023, and reply comments on or before January 17, 2024.

298. *It is further ordered* that the Office of the Secretary, Reference Information Center *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 8 and 20

Communications, Common carriers, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 8 and 20 as follows:

PART 8—[AMENDED]

■ 1. The authority citation for part 8 is revised to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 160, 163, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, 548, 1302, 1753.

■ 2. Amend part 8 by revising the part heading to read as follows:

PART 8—SAFEGUARDING AND SECURING THE OPEN INTERNET

■ 3. Add § 8.2 to read as follows:

§ 8.2 Conduct-based rules.

(a) *Definitions.* For purposes of this section:

(1) *Broadband internet access service* means a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.

(2) *Edge provider* means any individual or entity that provides any 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.

(3) *End user* means any individual or entity that uses a broadband internet access service.

(4) *Reasonable network management* means a network management practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband internet access service.

(b) *No blocking.* A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

(c) *No throttling.* A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not impair or degrade lawful internet traffic on the basis of internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

(d) *No paid prioritization.* (1) A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. ''Paid prioritization'' refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either:

(i) In exchange for consideration (monetary or otherwise) from a third party, or

(ii) To benefit an affiliated entity.

(2) The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the internet.

(e) *General conduct standard.* (1) Any person engaged in the provision of broadband internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage:

(i) End users' ability to select, access, and use broadband internet access service or the lawful internet content, applications, services, or devices of their choice, or

(ii) Edge providers' ability to make lawful content, applications, services, or devices available to end users.

(2) Reasonable network management shall not be considered a violation of this rule.

(f) *Effect on other obligations or authorizations.* Nothing in this part supersedes any obligation or authorization a provider of broadband internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so. Nothing in this part prohibits reasonable efforts by a provider of broadband internet access service to address copyright infringement or other unlawful activity.

PART 20—COMMERCIAL MOBILE SERVICES

■ 4. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 155, 157, 160, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 610, 615, 615a, 615b, and 615c, unless otherwise noted.

■ 5. In § 20.3 amend paragraph (b) by revising the definitions of ''*Commercial mobile radio service*'' and ''*Public Switched Network*'' to read as follows:

§ 20.3 Definitions.

* * * * *

Commercial mobile radio service. A mobile service that is:

(1)(i) Provided for profit, *i.e.,* with the intent of receiving compensation or monetary gain;

(ii) An interconnected service; and

(iii) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or

(2) The functional equivalent of such a mobile service described in paragraph (1) of this definition, including a mobile broadband internet access service as defined in § 8.2 of this chapter.

(3) A variety of factors may be evaluated to make a determination whether the mobile service in question is the functional equivalent of a commercial mobile radio service, including: Consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service, would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review.

(4) Unlicensed radio frequency devices under part 15 of this chapter are excluded from this definition of Commercial mobile radio service.

* * * * *

Public Switched Network. The network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.

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