



Insight

Biden Administration's Plans To Ban Digital Discrimination Will Widen the Digital Divide

JEFFREY WESTLING | OCTOBER 31, 2023

Executive Summary

- The Federal Communications Commission (FCC) will soon vote on an order that would prohibit digital discrimination, which the agency defines, using a disparate impact standard, as policies or practices that differentially impact consumers' access to broadband based on their income, race, ethnicity, color, religion, or national origin.
- While Congress required the FCC to pass rules that would facilitate equal access, the agency's disparate impact approach could result in decreased investment in broadband projects and a worsening of the divide between those who have access to broadband and those who don't.
- Congress has the opportunity to step in and either overturn the FCC rules using the Congressional Review Act or pass a new law making clear that the rules should target cases where broadband providers intentionally discriminate based on the specific criteria.

Introduction

The Federal Communications Commission (FCC) will soon [vote on rules designed to facilitate equal access to broadband](#) by prohibiting digital discrimination. While a laudable goal, and one mandated by Congress, the FCC defines digital discrimination without consideration of the broadband provider's intent and instead only consider whether any policies or practices had a [differential impact](#) on specific consumers based on their income level, race, ethnicity, color, religion or national origin. While the FCC does include a caveat for policies or practices that can be justified by genuine issues of technical or economic feasibility, the FCC fails to provide sufficient guidance regarding what will and will not violate the rules.

Broadband providers are constantly investing in new deployments, upgrades, and maintenance for their networks. But the new FCC rules will likely have a chilling effect on investment in low-return areas, as if a decision to deploy broadband to one community and not another has any disparate impact, the FCC could find the provider in violation of the rules. Thus, if the potential [return on investment is already low in an area](#), the provider may choose to forgo these investments—even if the broadband provider's decision was economically justifiable—as defending the decision against FCC scrutiny would add additional risk to future investment decisions.

In cases where broadband providers are intentionally discriminating against consumers based on the enumerated criteria, the FCC should seek to ban those practices. Yet imposing broad liability for disparate impact regardless of intent goes beyond the authority granted by Congress and will harm future investment in broadband networks. Congress can act, however, and either strike down the rules through the Congressional Review Act (CRA) or pass legislation to make clear that digital discrimination refers to the intentional decision to discriminate based on protected criteria. Considering the investment Congress has already made in connecting

unserved Americans with the [\\$42.5 billion Broadband Equity Access and Deployment program](#), actions that will limit investment make little sense.

This insight walks through the FCC's order, its potential negative impacts on facilitating equal access, and the steps Congress can take to provide better direction for the agency.

FCC Order

The FCC's draft order adopts a [disparate impact standard](#), specifically defining digital discrimination as “the policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion or national origin.” This broad definition applies specifically to policies or practices, but the FCC fails to define these terms. Liability could stem from an intentional policy not to provide coverage to a minority population, in which case the FCC has cause to act, but it could also result from the practice of upgrading networks where a return on investment is most likely, which could harm needed investment.

The FCC attempts to limit the broad applicability by including “genuine technical and economic feasibility” as a consideration, but the agency interprets this exception to mean only “reasonably achievable” – as evidenced by prior cases – a fairly high standard. Notably, the FCC will determine what is or isn't reasonably achievable on a case-by-case basis, meaning providers may not know whether their practices violate the rules until they are forced to defend the decision to the FCC. Further, claiming a decision not to deploy was one of genuine technical or economic feasibility will be an affirmative defense, meaning the entity under investigation will have the burden of proving to the FCC that the action is justified by genuine issues of technical or economic feasibility.

Finally, the FCC decided not to adopt any safe harbors, such as cable operators providing service in their franchise area, for broadband providers. The agency could revisit this decision in the future, but for now, broadband providers will have little certainty regarding whether their conduct will lead to a violation of FCC rules.

Impact on Broadband Deployment

Many consumers, especially in lower-income areas, lack the same access to broadband that other communities have. Yet by adding risk to investment, the FCC's approach may increase the gaps between those with broadband and those without. Broadband providers base investment decisions on the potential return on investment, so areas that lack a potential return or come with increased risk will see less deployment, upgrades, and maintenance of broadband networks.

The FCC is attempting to alleviate this concern by carving out policies or practices not justified by genuine issues of technical or economic feasibility, but the agency's broad “reasonably achievable” standard does not provide sufficient clarity as to what, exactly, will meet this standard. Does the additional risk of building in a low-return area qualify as a “genuine issue of economic feasibility,” or does the simple fact that a provider may see a return on that investment mean it now must make that investment or violate the FCC rules?

It is also unclear why the FCC must take this drastic step at the outset. Congress has already made a [\\$42.5 billion investment](#) in broadband deployment, which will largely target the disparities in access that currently exist, especially in rural areas. While the funds won't make all broadband access equal, they will work to

connect those that lack access entirely, alleviating some of the concerns regarding digital discrimination.

The best way to facilitate equal access is to encourage further investment in broadband networks. Broadband providers invested \$86 billion in 2021 alone, the largest total investment since 2001, and \$2 trillion since 1996 when Congress passed the Telecommunications Act. As investment increases, so do competition and speeds, while prices decrease.

Role for Congress

As the FCC considers the final order, Congress can play a significant role in facilitating equal access to broadband.

First, the FCC will likely keep the disparate impact standard when it votes on the order in November, but Congress has an opportunity to improve the outcome. For example, Congress could exercise direct oversight of the agency through a hearing, requiring the commissioners to fully explain and justify the decision to impose a disparate impact standard. Lawmakers could also notify the FCC in writing that Congress' intent behind the statute was to target cases of intentional discrimination, and not disparate impact resulting from technical or economic feasibility.

Second, assuming the FCC doesn't change course, Congress could update the law or invalidate the FCC's rule. Congress could amend the statute to make clear that "digital discrimination" refers to policies or practices that intentionally discriminate rather than those that have a disparate impact. This would still ban digital discrimination while facilitating equal access to broadband by incentivizing providers to continue investment in U.S. networks. Next, Congress could simply overturn the FCC's final rules using the CRA – though, of course, the agency would still need to craft new rules, and would require additional guidance from Congress to do so.

Finally, Congress should continue to implement reforms and oversight on other, deployment-related policies such as [permitting reform](#) and extending the [affordable connectivity program](#) (ACP). Permitting reforms lower costs for access to public rights-of-way such as poles and trenches, a necessary component of the deployment process. ACP provides low-income consumers with a voucher to purchase the broadband service that best suits their needs, meaning providers can see a return on investment in areas that would otherwise not be profitable due to a lack of potential customers.

Conclusion

The FCC's upcoming vote to impose a disparate impact standard for its prohibition on digital discrimination is likely to widen, not shrink, the digital divide. To prevent this, Congress should make clear that the prohibition on digital discrimination applies to situations where the broadband provider intentionally discriminates against a protected class. If it doesn't, the FCC is likely to make broadband access much less equal.