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Federal Communications Commission: Agency Regulatory Authority and Selected Rules

The Federal Communications Commission (FCC) is an independent federal administrative agency established by the Communications Act of 1934 (1934 Act; 47 U.S.C. §151 et seq.) to regulate interstate and international communications by radio, television, wire, satellite, and cable. The agency is headed by five commissioners serving five-year terms who are appointed by the President and subject to confirmation by the Senate. The President designates one of the commissioners as chairperson. No more than three commissioners may be members of the same political party.

The FCC operates under a "public interest mandate." How this mandate is applied depends on how the Commission interprets "the public interest." Some commissioners might believe a particular regulation is needed to protect and benefit the public at large, while other commissioners might believe the public interest is better served by the promotion of market efficiency. Congress granted the FCC wide latitude and flexibility in interpreting the public interest standard to reflect changing circumstances. These circumstances, paired with changes in FCC leadership, have led to significant alterations over time in how the FCC regulates the broadcast and telecommunications industries. The context in which the FCC does so is shaped by various factors, including how the courts approach review of the FCC's interpretations in regulations. Some observers have criticized the agency for not attempting to define the public interest standard in concrete terms.

This CRS product provides a primer on the FCC's principal rulemaking authority, describes how selected FCC rules might be affected by recent judicial developments, and briefly offers considerations for Congress.

Primer on FCC Authority

The FCC's regulatory activities are governed by the Administrative Procedure Act (APA; 5 U.S.C. §551 et seq.). The APA prescribes the way administrative agencies propose and establish regulations—called the *rulemaking process*—and it grants federal courts authority to review certain agency actions.

The FCC sometimes references statutory provisions within the Telecommunications Act of 1996 (1996 Act; P.L. 104-104) as justification for its rulemakings. Some have described the 1996 Act as being vague. For example, in *AT&T Corp. v. Iowa Utilities Bd.*, which addressed whether the FCC had authority to implement certain pricing provisions of the 1996 Act, the U.S. Supreme Court wrote, "it would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction."

Loper Bright and Major Questions

Recent judicial developments may result in greater constraints on the FCC's regulatory authority. On June 28, 2024, in *Loper Bright Enterprises v. Raimondo* (*Loper Bright*), the Supreme Court overruled the framework for reviewing agency actions it had established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*). *Chevron* had generally required federal courts to defer to federal agencies' reasonable interpretations of ambiguous statutory provisions that they administered. *Loper Bright* instead directs the reviewing court to exercise its independent judgment about the meaning of ambiguous statutes. *Loper Bright* may alter how future courts review rulemakings, but it was not intended to "call into question prior cases" that relied on *Chevron*.

The courts may also approach FCC actions of national significance in light of the *major questions doctrine*—in which an agency's action must be supported by clear congressional authorization when the agency's claim of authority concerns an issue of vast economic and political significance. This context has heightened stakeholder and congressional interest in the FCC's authorities and its rules. On July 18, 2024, the chairs of the House Committee on Energy and Commerce and House Committee on Oversight and Accountability wrote to the FCC requesting information on certain agency rulemakings since January 20, 2021. The FCC responded on July 31, 2024.

Selected FCC Rules

Three recent FCC orders illustrate the types of rules that might be challenged as exceeding FCC authority under *Loper Bright* or the major questions doctrine.

Digital Discrimination Order

Section 60506 of the Infrastructure Investment and Jobs Act (P.L. 117-58) requires the FCC to, among other things, adopt rules to facilitate equal access to broadband service by (1) preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin and (2) identifying steps to eliminate digital discrimination.

In November 2023, the FCC adopted rules to implement these provisions. In defining "digital discrimination of access," the FCC barred business conduct motivated by discrimination on any of the six listed bases in the statute (referred to by the FCC as "disparate treatment") and barred business conduct having discriminatory effects (referred to by the FCC as "disparate impact"). The FCC concluded that it has enforcement authority against any entity that can affect consumer access to broadband service.

Entities have filed petitions challenging these rules in court, and the challenges could implicate both *Loper Bright* and the major questions doctrine. For example, the petitioners argue that Section 60506 does not authorize disparate impact rules. Under the former *Chevron* framework, the court would have deferred to the FCC's broader interpretation of Section 60506 if it determined that statute is ambiguous and the FCC's interpretation is reasonable. Under *Loper Bright*, the court will independently determine whether the FCC rule is based on the best reading of the statute. The petitioners also contend that imposing disparate impact liability would subject the multi-billion-dollar broadband industry to new and unpredictable liability, thereby presenting a major question. If the court agrees that the rule addresses a major question, it will likely uphold the FCC's disparate impact rules only if the court determines that Section 60506 provides "clear congressional authorization" for the FCC to create such rules.

Net Neutrality Order

"Net neutrality" is the principle that owners of the networks that compose and provide access to the internet should not control how consumers lawfully use that network, and they should not discriminate against content provider access to that network. The FCC has promulgated three net neutrality orders since 2015:

- On February 26, 2015, the FCC voted along party lines to adopt open internet rules. A controversial aspect of the rules was the decision to reclassify broadband internet access service (BIAS) as a telecommunications service under Title II of the 1934 Act, subjecting BIAS providers to a more stringent regulatory framework.
- On December 14, 2017, under different leadership, the FCC largely reversed the 2015 order, reclassifying BIAS as an information service under the 1934 Act.
- On April 25, 2024, again under different leadership, the FCC adopted an order largely restoring the 2015 open internet rules, including by classifying BIAS as a telecommunications service. The FCC based its decision on supporting the goals of broadband reliability, security, and consumer protection.

On August 1, 2024, a federal appellate court issued a stay that prevents the FCC's 2024 order from taking effect while the court reviews it. The court primarily relied on the major questions doctrine to justify the stay. In the court's view, "net neutrality is likely a major question," and there is no "clear [statutory] mandate to treat broadband as a" telecommunications service.

E-Rate Wi-Fi Hotspot Order

The 1996 Act created four Universal Service Fund (USF) programs:

- the Lifeline Program supports affordable telephone and internet services for low-income subscribers;
- the High Cost Fund helps expand telephone and internet service coverage in underserved areas;
- the Rural Health Care Fund provides discounted telephone and internet services to rural health care providers; and
- the Schools and Libraries Program—generally referred to as "E-Rate"—provides discounted internet service to schools and libraries.

Universal service policies have helped make telephone service and broadband access widely available throughout the United States. Under the 1996 Act, USF programs are funded by money collected from telecommunications companies. The FCC, through the Universal Service Administrative Company, provides subsidies directly to eligible telecommunications and BIAS providers.

Originally, E-Rate provided discounted prices to schools and libraries for high-speed internet services to and within their buildings. Over time, the FCC expanded the program to cover new technologies. In July 2024, the FCC adopted a rule to expand the program to include "the distribution of Wi-Fi hotspots and services to students, school staff, and library patrons for off-premises use."

The FCC predicated this expansion on the success of the Emergency Connectivity Fund (ECF), created during the COVID-19 pandemic to fund the purchase of connected devices, Wi-Fi hotspot devices, broadband connections, and other eligible equipment and services for students, library patrons, and staff to use at locations other than schools and libraries. The ECF ran out of funding in 2024, and the new rule is intended to mitigate the impact from the loss of the funding source. Opponents argue that the FCC may only fund services for classrooms and libraries, and that mobile hotspots fall outside its authorization. One commissioner issued a dissenting statement to the 2024 rule arguing that the FCC's interpretation of its authority is unlikely to prevail under *Loper Bright*.

Considerations for Congress

The rulemakings discussed above are a subset of the broader suite of rules initiated by the FCC that may be of interest to Congress. Even before *Loper Bright*, numerous FCC rules were being contested by affected parties, including the 5G Fund for Rural America and the transition to Next Generation 911, in both of which the FCC cites its public interest mandate. Further, in August 2022, as part of a "broad effort to update its rules for the new space age," the FCC opened a proceeding on policy questions related to in-space servicing, assembly, and manufacturing (ISAM) capabilities. This rulemaking, too, has come under scrutiny from interested parties.

Uncertainty about the scope of the FCC's authority and ability to adopt regulations in the public interest, coupled with ambiguities in the FCC's authorizing statutes, has raised questions from Congress, industry, and consumer groups. Given *Loper Bright*, Congress may legislate to clarify the agency's statutory authority or maintain the status quo and let ambiguities regarding the FCC's rulemaking authority be resolved by the courts. There are also questions on whether the FCC may alter its rulemaking efforts in response to *Loper Bright*, as well as how such alterations might affect interest in legislation.

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