The Online Competition and Consumer Choice Act

What is “paid prioritization”?
The concept of paid prioritization describes an Internet Service Provider’s (ISP) practice of giving preferential treatment or priority to the traffic of an edge (or content) provider over the traffic of other edge providers for a fee. Such prioritization or preferential treatment on the last-mile (ISP to consumer) Internet connection could include faster downloads, prioritized delivery of content, throttling of non-paying edge providers’ traffic, exemption from data caps, or other discriminatory behavior.

Currently, the “best efforts” public Internet treats all data equally. The paid prioritization concept would fundamentally change that norm. It would create a two-tiered Internet leading to fast lanes for some, and slow lanes for others.

Paid prioritization harms innovation and competition online, as entities that do not have the necessary resources to enter into any special agreement with broadband providers are disadvantaged by the prioritized treatment of their more well-off competitors. It also limits consumer choice by not providing the same consumer experience to the online content or destination of a consumer’s choosing.

FCC Status
On May 15, 2014, the Federal Communications Commission (FCC) adopted a Notice of Proposed Rulemaking Proposal (NPRM) seeking comments on best approaches to restore the Open Internet rules that were struck down by the D.C. Circuit earlier this year (*Verizon v. FCC*). One of the questions that the FCC poses in its NPRM is whether certain practices, such as paid prioritization, should be prohibited, and if so, how to establish the source of FCC authority to adopt such prohibition.

The Online Competition and Consumer Choice Act
The Online Competition and Consumer Choice Act would require the FCC to adopt regulations that prohibit paid prioritization agreements between an ISP and an edge provider on the last mile Internet connection to the end user. The bill also prohibits a broadband provider from prioritizing or giving preferential treatment to the traffic of content, applications, services, or devices provided or operated by the broadband provider itself, or are otherwise affiliated with the broadband provider.

- The bill defines “end user” as residential customers, small businesses, schools, libraries, community colleges, and universities, among other entities that purchase broadband Internet access service as a mass market retail service.

Public Safety: The bill does not interfere with any obligations that a broadband provider may have to address the needs of emergency communications and public safety, consistent with current regulation under the FCC’s 2010 Open Internet Order.

FCC Authority: The bill clarifies that it does not interfere with the FCC’s ability to use existing authority to ban paid prioritization agreements concerning the last-mile Internet traffic.

Oversight: The bill includes an enforcement mechanism in accordance with the Communications Act of 1934 to deter any paid prioritization agreements that gives preferential or priority treatment of content over the last-mile connection of Internet traffic to the end user.