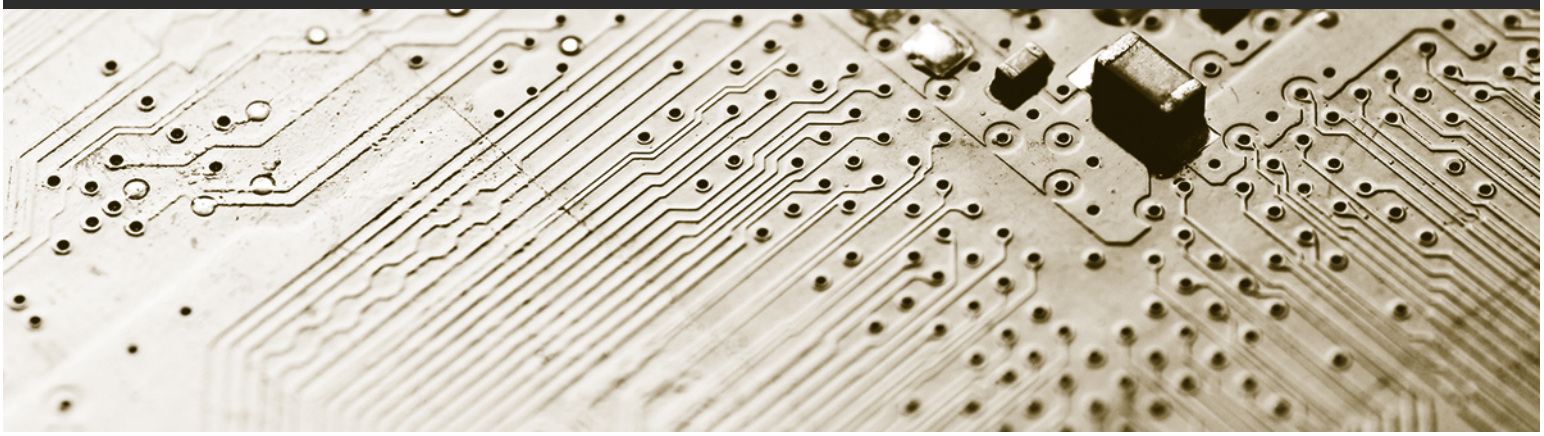
GT GreenbergTraurig

Alert | Technology, Media & Telecommunications



October 2018

California Fights Federal Government in Efforts to Regulate the Internet

On Sept. 30, the final day for acting on legislation, California Gov. Jerry Brown signed Senate Bill (SB) 822 (Wiener), enacting the California Internet Consumer Protection and Net Neutrality Act of 2018. This law's provisions are directly contrary to the Federal Communications Commission's 2017 rescission of a series of prior FCC regulations governing the Internet. This statute prohibits several business practices by Internet service providers (ISPs). ISPs are companies that provide telecommunications facilities that enable consumers to access Internet content and applications. These include wireline and wireless telephone companies, cable operators, satellite operators, and others.

Under SB 822 it would be illegal for an ISP to do any of the following when providing broadband Internet access service:

- Intentionally blocking lawful content, slowing or speeding traffic, or otherwise interfering with access to lawful content based upon source, destination, content, application, or service, or use of a non-harmful device.
- Engaging in third-party paid prioritization (that is, delivering some Internet content to consumers at higher speeds than other content based on compensation paid to ISPs by content providers).
- Selectively allowing consumers to access certain Internet content or websites without that access counting against broadband data limits (a practice commonly referred to as "zero-rating").

- Engaging in practices that have the purpose of evading net neutrality requirements. This prohibition may not be construed as prohibiting ISP traffic exchange agreements that comply with net neutrality requirements.
- Failing to publicly disclose accurate information about the network management practices, performance, and commercial terms of its broadband Internet access services to enable consumers to make informed choices about those services. (The FCC's current rules also contain such a disclosure or transparency requirement).
- Requiring consideration from "edge" providers, monetary or otherwise, for access to an ISP's end users. (Edge providers are entities which provide Internet content or applications).

According to the bill's author, Democratic Sen. Scott Wiener of San Francisco, this law "puts California at the national forefront of ensuring an open Internet. It establishes comprehensive and enforceable net neutrality standards to ensure that all California residents have the right to choose whether, when, and for what purpose they use the internet." Several other states either have enacted or are considering similar intrastate net neutrality laws.

This law is not California's first effort to challenge the federal scheme established by the FCC for lightly regulating Internet access. In January 2018, California joined 20 other states and the District of Columbia (as well as several private parties) in appealing the FCC 2017 Restoring Internet Freedom decision - the FCC decision that rescinded the prior FCC's 2015 net neutrality rules (See GT Alert – "FCC Votes to Undo 'Net Neutrality' Rules – Now What?", December 2017). Those appeals of the FCC's 2017 Restoring Internet Freedom decision remain pending and will be argued on Feb. 1, 2019, before the U.S. Court of Appeals for the District of Columbia Circuit.

Shortly after SB 822 was signed, the United States Department of Justice filed suit in the U.S. District Court for the Eastern District of California seeking to enjoin enforcement of the new law and to obtain a judicial declaration that the California law is preempted by federal law. Attorney General Jeff Sessions said that the lawsuit was necessary because "[o]nce again the California legislature has enacted an extreme and illegal state law attempting to frustrate federal policy." California Attorney General Xavier Becerra promised to defend SB 822, saying that California "will not allow a handful of power brokers to dictate sources for information or the speed at which websites load." In addition, on Oct. 3, 2018, several national industry associations representing ISPs filed a separate lawsuit in the Eastern District of California seeking injunctive relief against SB 822.

Whether the provisions of SB 822 will survive the federal challenge is questionable. In its 2017 decision rescinding the prior federal net neutrality rules, the FCC concluded that broadband Internet access service is an interstate information service under the federal Communications Act of 1934, and explicitly stated that states are preempted from imposing state regulations on that interstate service. With traditional telecommunications service (such as wireline and wireless telephone service), intrastate calls (e.g., calls between San Francisco and Los Angeles) and interstate calls (e.g., calls between California and New York) are easily identified and differentiated. By definition, Internet access enables consumers to access Internet content posted anywhere in the world. The FCC maintains there is no such thing as intrastate Internet access. In 2015, the prior administration's FCC adopted net neutrality rules based on a premise that broadband Internet access service is a telecommunications service and therefore should be regulated as a public utility. The current FCC rejected that conclusion and reclassified it as an interstate information service. The district court in California will have to determine whether Internet access can be subject to state regulation and made subject to regulations that would more typically be imposed on public utilities, such as the requirements set forth in SB 822.

Authors

This GT Alert was prepared by **Mitchell F. Brecher** and **Bill Gausewitz**. Questions about this information can be directed to:

- Mitchell F. Brecher | +1 202.331.3152 | brecherm@gtlaw.com
- Bill Gausewitz | +1 916.868.0662 | gausewitzb@gtlaw.com
- Or your Greenberg Traurig attorney