Life in the Fast Lane...
New Rules of the Road for Internet Regulation

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Panelists

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Overview

▪ Definition and Current Context of Net Neutrality
▪ Legal and Regulatory Implications
▪ Valuation Implications
Life in the Fast Lane...

- On June 11, 2018 the FCC repealed the previously existing “net neutrality” rules for regulation of the provision of broadband/internet data services.

- The previous rules, promulgated by the FCC under Title II (“common carrier” section) of the Communications Act, in summary provided that the Commission could prevent internet service providers from blocking or slowing data or websites, or prioritizing their content over others that of others.
Life in the Fast Lane...What is net neutrality again?

Net Neutrality is an idea or concept, perhaps even a principle...holding that internet providers should not be able to interfere with the public’s ability to reach websites, apps and services of choice.
Life in the Fast Lane...What is net neutrality again?

- Some believe the concept extends to consideration of broadband/internet companies potentially offering online companies “fast lanes” for their content. Particularly if this is through “paid prioritization.”
Life in the Fast Lane...What is net neutrality again?

- Rationale is that an uneven playing field could be created where big, dominant companies could afford preferred access leaving startups and small businesses behind.
Life in the Fast Lane…So where’s the rub?

▪ As a concept net neutrality appears generally accepted, as application in policy of course another story…

▪ Some think federal regulation through FCC authority is necessary to keep the game clean and internet truly “free” and open.

▪ Some think such regulation can be cumbersome, unduly burdensome and could ultimately serve to stifle the continued development of the “free” internet that it is ostensibly designed to foster.

▪ Some also think that adequate market incentives and other avenues for addressing issues of fairness exist and would better serve the public interest than direct federal regulation.
Life in the Fast Lane...How’s that relate here, in the land of the “not so fast” lane?

▪ Beyond the conceptual, net neutrality is really a public policy issue …therefore a legal and regulatory issue.

▪ Appraisal 101 that the legal and regulatory framework of a business sector is a direct factor of influence on the value of the businesses(and thus their property) operating within that sector.

▪ We’ll be discussing some of the more relevant (and hopefully relatively interesting) legal, regulatory and valuation aspects of net neutrality and how they may apply to you...whatever your professional interest.
Legal and Regulatory Implications
Relevant History- How Did We Get Here?
2015 Open Internet Order

- Reclassifies broadband as a “telecommunications” service subject to common carrier regulation under Title II of the Communications Act (1934)
  - Broad latitude to oversee “general conduct”
  - Previous classification: “information” service provider under Title I
- Codifies net neutrality principles (e.g., no discriminatory blocking, speed or signal degradation)
- Strips FTC of its authority
FCC’s Current Position on Net Neutrality: 2017 Restoring the Internet Freedom

- Reinstates classification as an “information” service provider
  - “Market Based” approach; “lighter-touch regulation”
- Heightened transparency through required public disclosure statements
- Reinstates FTC’s authority
- Went into effect June 11, 2018
- FCC warns against state regulation
The Case for Deregulation:
FCC Chairman Pai’s Defense of the 2017 Order

- 2015 net neutrality rules—
  - Interjected uncertainty into the marketplace
  - Restricted innovation
  - Chilled investment

- Goal of lighter touch regulation:
  - “[T]he federal government will stop micromanaging the Internet.” – FCC Chairman Pai
  - Better, faster, cheaper internet through more competition
  - “Digital opportunity” for all, especially in rural areas

- FTC empowered to regulate bad actors
The Case for Regulation of the Internet: The Fear of What Could Be

- Supporters of net neutrality regulation generally include consumers, edge companies (e.g., Netflix, YouTube, Amazon) and content creators
  - Commonality: lack of control over internet access or digital distribution channels

- Fear content or services will be throttled or blocked all together to—
  - Favor ISPs own competing content or services
  - Charge edge companies access or prioritization fees

- Concern edge companies will pass through higher costs
Public Reaction to the FCC’s New Order: Why Change?

- “We want the internet to work the way it always has.”
  - [https://www.youtube.com/watch?v=5o5B5jc5vqg](https://www.youtube.com/watch?v=5o5B5jc5vqg)
- Reportedly over 20 million comments when rule change proposed
  - Approximately 7.5m fraudulent
Lawsuits Filed against the FCC: Seek to Prevent Change in Net Neutrality Rules

- Various lawsuits filed by tech companies and coalitions
  - Vimeo and Mozilla filed in February 2018
  - “Coalition for Internet Openness” (Foursquare, Kickstarter, Automattic, Etsy, Expand Shutterstock) filed in March 2018
  - Others: Etsy, Free Press, National Hispanic Media Coalition
  - The Internet Association (40 tech companies, including Amazon, Facebook, Google, and Uber) announce plan to intervene

- Coalition of Attorney Generals from 23 states and D.C. file suit in February 2018
Congressional Response to FCC’s New Order
Congressional Review Act of 1966 (CRA)

- CRA: Allows Congress to override regulatory rules issued by federal agencies by passing a joint resolution of disapproval
- Intent: Thwart changes to the FCC’s net neutrality rules
  - Debates about what a successful CRA would accomplish
- Status:
  - Senate: Voted 52-47
  - House: Speaker Paul Ryan (R) unlikely to call a vote by the required January deadline
    - Focused on designing their own legislation to “permanently address the issue”— House Majority Leader Kevin McCarthy (R)
- Likelihood of Success: Minimal since subject to presidential approval
- Impact: Expected to impact Congressional mid-term elections and perhaps the 2020 campaign cycle
States’ Response to FCC’s New Order: Legislation and Executive Orders

- Legislation
  - Generally two types:
    - 1. Limit state’s authority to contract with ISPs that violate net neutrality principles
    - 2. Codify net neutrality rules
  - Current Count:
    - 3 states have passed: Oregon, Vermont and Washington
    - 10 pending, including California
    - 16 failed

- Executive Orders
  - Limit state’s authority to contract with ISPs that violate net neutrality principles
  - Hawaii, New Jersey, New York, Montana, Rhode Island and Vermont
Federal Preemption:
But, Can the States Really Do That?

- The Argument: FCC’s new rules prevent states from passing their own net neutrality rules

- The Workaround:
  - Most states’ legislation avoid directly regulating ISPs and instead, limit the state’s ability to contract with ISPs that violate net neutrality principles
  - California’s proposed legislation goes further and is seen as a direct challenge to the FCC’s attempt to federally preempt state action

- The Concern: A potential “maze of competing rules” could make broadband prices go up, confuse, customers and “diminish investment in the expansion of high-speed broadband infrastructure — which would disproportionally hurt rural and other traditionally underserved communities across the county.” (Broadband for America Spokesman Rob Tappan, USA Today, April 4, 2018)

- The Result: Litigation

- Potential Answer: Bipartisan legislation; independent tribunal
California Seeks to Lead the Pack: Senate Bill 822

- Issued under state’s police powers
- Goes beyond FCC’s 2015 net neutrality rules by —
  - Banning zero-rating data
  - Allows state to oversee commercial interconnection deals
- Must pass the CA Assembly by August 31, 2018; passed the Senate 23-12
Alaska Governor: Refuses to Issue Executive Order

- State legislation failed
- Legislators urged the Governor to act
- Governor refused to issue an executive order due to the following concerns—
  - Many areas are only covered by one ISP
  - Lack of infrastructure, especially for rural areas
  - Loss of investment (e.g., Microsoft’s Airband Initiative, Education SuperHighway)
  - Loss of federal funding
Supreme Court Nominee, Brett Kavanaugh: Where Does He Sit on Net Neutrality?

- Nominee to replace retiring Justice Kennedy (often the swing vote)
- Conservative; known for his free-market oriented approach
- Other key policy considerations—
  - Supports limiting the Chevron Doctrine
  - Supports removal of the Auer Deference
  - Favors strong Presidential powers over federal regulatory powers; disfavors the “administrative state”
  - Firm on separation of powers
- Dissent in U.S. Telecom Assoc. v. FCC (2017)
  - Is this really a First Amendment issue?
Valuation Implications
Valuation Issues

EFFECT OF REGULATION ON INTERNET

- Federal or state regulation could lead to central assessment of ISPs
- Among other states, CA and WA have pending legislation to restore net neutrality rules
- If ISPs fall under California PUC regulation, Board of Equalization has assessment jurisdiction
- Cable companies would likely be subject to central assessment
Valuation Issues

EFFECT OF REGULATION

▪ Strengthens incumbency

▪ Limits free market activity

▪ Constricts innovation

▪ Imposes social costs (e.g., increased cost to consumers)
Valuation Issues

BAN ON PAID PRIORITIZATION

▪ Goes to very heart of economic value, return on invested capital
▪ Content Providers favor because ISPs must absorb cost to build out infrastructure

WITH PAID PRIORITIZATION

▪ ISPs incented to build infrastructure for “high speed lanes”
▪ Higher margins drive higher economic value
Valuation Issues

- ARE COMPANIES MORE VALUABLE NOW?
  - Removing barriers is positive for ISPs
  - Increases economic value of enterprise
  - Does not necessarily increase value of plant & equipment
  - Capital infusion can lead to increased prices for equipment
  - Innovation keeps price pressure in check
Valuation Issues

MEETING MARKETPLACE NEEDS FOR CONTENT CONSUMPTION

- Content Delivery Networks

Before CDN

After CDN

Content Cache minimizes bandwidth to origin server
Valuation Issues

- CLOUD COMPUTING GIANTS PRIVATE NETWORKS
  - Massive investments in broadband infrastructure, fiber and wireless spectrum
  - Led by Google in 2005
  - Google, Amazon and Microsoft all have extensive networks
  - Fewer hops on public internet = faster performance
  - Sidesteps net neutrality concerns
Amazon Network

AWS Worldwide Network Backbone

- 11 AWS regions world-wide
- Compute & storage to customers & Users or required jurisdictional boundaries
- Private AWS fiber links interconnect all major regions
  - Increased availability, higher performance, lower jitter, & reduced costs
Google Network

GCP Infrastructure
6 regions, 18 zones, over 100 points of presence, and a well-provisioned global network comprised of hundreds of thousands of miles of fiber optic cable.
Microsoft Network

The Microsoft Global Network

Last mile
- Wired and wireless connections to enterprises and consumers

Edge
- Carrier neutral locations to connect to Internet Service Providers and ExpressRoute partners

Backbone
- Fiber linking all datacenters
- Submarine cables to cross oceans

Within region
- Network within datacenter
- Regional Network Gateways connecting datacenters

Within datacenter
- Network within datacenter
- Regional Network Gateways connecting datacenters
Microsoft Network

Data Center Backbone

[Image of a world map showing Microsoft data center locations]
QUESTIONS?