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## Telecom Monitor

by Glenn S. Richards and Christine A. Reilly

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### *The Commission's Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 Initiates a Two-Year Deadline for Providers of Advanced Communications Services and Manufacturers of Equipment Used in Advanced Communications Services to Comply with Disabilities Access Requirements.*

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The Federal Communications Commission (the "Commission") recently adopted a Report and Order ("R&O") and Further Notice of Proposed Rulemaking ("FNPRM") implementing Section 104 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the "CVAA"), codified as Sections 716, 717 and 718 of the Communications Act of 1934, as amended (the "Act"). The purpose of the CVAA is to "ensure that people with disabilities have access to the incredible and innovative communications technologies of the 21<sup>st</sup> century."

Prior to the passage of the CVAA, and pursuant to Section 255 of the Act, the Commission imposed disabilities access requirements on manufacturers of telecommunications equipment (including answering machines, pagers and telephones) and providers of telecommunications services. In 2007, the Section 255 requirements were extended to providers of interconnected VoIP services and manufacturers of VoIP equipment. The CVAA expands the Commission's regulatory authority to historically unregulated providers of advanced communications services ("ACS") and manufacturers of equipment used for ACS (collectively the "Covered Entities") and codifies the requirement as it applies to interconnected VoIP.

ACS includes interconnected VoIP, noninterconnected VoIP, electronic messaging service and interoperable video conferencing services, which are defined as:

- Interconnected VoIP: a service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment ("CPE"); and (4) permits users generally to receive calls that originate on the public switched telephone network ("PSTN") and to terminate calls to the PSTN.
- Noninterconnected VoIP: a service that (i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment" and "does not include any service that is an interconnected VoIP service.

- Electronic Messaging Service: “means a service that provides real-time or near-real-time non-voice messages in text form between individuals over communications networks. This service does not include interactions that include only one individual (human to machine or machine to human communications).
- Interoperable Video Conferencing Services: services that provide real-time video communications, including audio, between two or more users. This service does not include video mail. The Commission has sought additional comment, pursuant to the Further Notice of Proposed Rulemaking, regarding the definition and application of “interoperable”.

The Commission clarified that the regulations implemented pursuant to the CVAA “do not apply to any telecommunications and interconnected VoIP products and services offered as of October 7, 2010.” The R&O also indicates that any regulated equipment or service offered after October 7, 2010 may be governed by both Sections 255 and 716.

The CVAA established, among other things, a phased compliance timeline due to the financial and technical burdens associated with developing and implementing technological changes required by the CVAA. Covered Entities must comply with Sections 716 and 717 within one year of the effective date. Section 718 compliance must be achieved within two years of the effective date or no later than October 8, 2013. The CVAA also includes long-term reporting obligations, enforcement procedures, limitations on liability for violations and finite compliance deadlines. The Commission decided that the rules, as implemented, would not include any safe harbors or technical standards at this time. Finally, the Commission determined that when implementing the CVAA, its rules should include opportunities for waivers and self-executing exemptions.

Pursuant to the CVAA, Covered Entities will be required to design, develop and market a range of products and services that are “accessible” to people with disabilities.

In this context, the Commission retains the Section 255 definition of accessibility, which states a product or service is accessible if it “provides accessible input, control and mechanical functions, as well as accessible output, display and control functions.” If accessibility is “unachievable”, Covered Entities must make their products and services compatible with “existing peripheral devices or specialized customer premises equipment”. According to Section 716 of the Act, achievable is defined as, “with reasonable effort or expense, as determined by the Commission.”

Section 716 establishes four factors that the Commission must consider when determining what is a reasonable effort or expense. Those factors are:

- (1) The nature and cost of the steps needed to meet the requirements of this section [716(g)] with respect to the specific equipment or service in question.
- (2) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies.
- (3) The type of operations of the manufacturer or provider.
- (4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

Section 716 provides that Covered Entities may achieve accessibility by “either building accessibility features into their equipment or services or relying on third-party applications, peripheral devices, software, hardware, or customer premises equipment (“CPE”) that are available to individuals with disabilities at nominal cost.” If a Covered Entity elects to rely on third-party solutions for purposes of compliance, that entity is liable for any compliance violations. The Covered Entity is also required to provide consumers with access to ongoing updates to the third party solution or make available an alternate solution to maintain accessibility or compatibility.

The R&O addresses numerous raised by industry and the disabled community, including the regulation of products or services, identified as multi-purpose products (gaming consoles, smart phones and tablets), that may provide ACS on an “incidental basis”.

According to the R&O, the Commission determined that products and services that provide ACS on an incidental or secondary basis are **not** exempt per se and therefore are required to comply with Sections 716, 717 and 718 of the Act. The Commission decided that multipurpose devices are not exempt, absent a waiver, from complying with the CVAA. Such waivers, granted on a case-by-case basis, are subject to a two part review to determine if the equipment or service is capable of accessing ACS and whether it was designed for multiple purposes or primarily for purposes other than using ACS.

As discussed above, the Commission may, on its own action, waive or exempt certain entities/classes, products and services from compliance with the CVAA. Alternatively, Covered Entities may apply for waivers. Waiver requests will be subject to a 30-day public notice period and the Commission must take final action on the waiver request within 180 days of public notice of the waiver request.

The CVAA also carves out two specific self-executing exemptions associated with customized equipment and small businesses, applicable to Section 716 (and Section 717 by default). Customized equipment or services, developed for the unique needs of an entity, not offered to the general public, are exempt from the CVAA. The Commission clarifies that this exemption applies to public safety communications networks and equipment/devices.

In order to provide relief to smaller entities that lack “legal, financial and technological capability” to achieve compliance, and in an effort to avoid adding barriers to entry or suppressing development and market participation, the Commission also created a temporary small business exemption to the CVAA. The Commission notes that the small business exemption qualifications, which consider the number of employees or the annual receipts earned by an entity (which vary by industry), have been regularly employed in other regulatory proceedings. The temporary exemption will expire on the effective date of the rules adopted pursuant to FNPRM or by October 8, 2013.

Section 717 mandates ongoing record keeping and annual reporting obligations for Covered Entities and a biennial reporting obligation for the Commission, institutes enforcement procedures for violation of Sections 716, 717 and 718, “compels the Comptroller General to conduct a study of the Commission’s enforcement actions” and requires the “creation of a clearinghouse for information about the accessibility of products, services and accessibility solutions....” Compliance with the record keeping and annual reporting obligations will commence one year after the effective date of the Commission’s rules. The enforcement procedures will provide the public with the option to file either an informal or formal complaint. Both processes will be handled by the Consumer and Governmental Affairs Disability Rights Office.

Section 718 requires that Covered Entities “make Internet browsers built into mobile phones accessible to and usable by people who are blind or have visual impairments, unless doing so is not achievable” and establishes forfeiture penalties for violations of Sections 255, 716 and 718. Mandatory compliance with

Section 718's Internet browser accessibility requirement has been delayed until October 8, 2013 due to the "unique challenges of achieving non-visually accessible solutions in a mobile phone and the relative youth of accessible development for mobile platforms." The R&O indicates that compliance with the Section 718 Internet browser requirement does not mandate that Covered Entities "make Internet content, applications or services accessible to or usable by individuals with disabilities". The CVAA establishes penalties between \$100,000 (per violation per day) and \$1,000,000 for continuing violations of the CVAA.

The Commission has also initiated a FNPRM associated with the implementation of the CVAA. Some of the issues the Commission seeks further comment include:

- Whether to adopt a permanent small business exemption, and if so, whether to retain the current Small Business size and standards (employees/receipts) as the qualifications for such exemption.
- Whether Section 718 is an exception to the general coverage of Internet browsers as software subject to the requirements of Section 716.
- What steps should be undertaken to successfully implement Section 718 (i.e., initial development of an accessibility application programming interface ("API")), and if so, should multiple APIs be developed and who should monitor the standards associated with such development.
- Clarification on the preferred meaning of interoperability and whether interoperability, as ultimately defined, should be mandatory for all video conferencing products and services.
- Should the Commission exercise ancillary jurisdiction to require video mail providers to comply with the accessibility requirements of the CVAA.

The Commission's rules implementing the CVAA will become effective 30 days after publication in the Federal Register (which has not yet occurred). Comments on the Further Notice of Proposed Rulemaking will be due 45 days after Federal Register publication; and replies are due 30 days later.

If you have any questions about the content of this publication, please contact the authors below.

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