

# Access to Advanced Communications Services for Individuals with Disabilities

January 30, 2012

## Access for Individuals With Disabilities to Advanced Communications Services

The Federal Communications Commission ("FCC" or "Commission") recently released a Report and Order implementing provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") to ensure that people with disabilities have access to advanced communications services ("ACS"). Providers of ACS and manufacturers of equipment used for ACS will be required to make their products and services accessible to people with disabilities, unless it is not "achievable" to do so.

### When Is the Order Effective and Who Must Comply?

Most provisions of the order become effective today, but the requirements are phased in over two years. As of today, covered entities must take accessibility into consideration during the design or redesign process for new products and services. The record keeping and annual certification requirements apply as of January 30, 2013 and full compliance with the order is required by October 8, 2013. Consumers can begin filing complaints on that date.

"Covered entities" are providers of ACS, including resellers and aggregators, and manufacturers of end user equipment and software used to provide these services.

### What Are Advanced Communications Services?

The CVAA and the order define ACS as:

1. interconnected VoIP service (as previously defined in the FCC's rules);
2. non-interconnected VoIP service (does not require connection to the PSTN);
3. electronic messaging service (including text messaging, instant messaging, email and two-way interactive messaging through a social networking site); and
4. interoperable video conferencing service.

Covered entities must make their services or equipment accessible to people with disabilities unless doing so is not achievable. There is a narrow exception for customized equipment or services not offered directly to the public.

### How Can A Covered Entity Comply?

A covered entity may comply with the requirements either by building accessibility features into the equipment or service or by using third party applications, peripheral devices, software, hardware, or

customer premises equipment ("CPE") that is available to consumers at nominal cost and that individuals with disabilities can access.

Whenever such accessibility is not achievable, covered entities must ensure that the equipment or service is compatible with existing peripheral devices or specialized CPE commonly used by individuals with disabilities, unless that is also not achievable. The FCC will look at the following factors of compatibility: (1) external access to all information and control mechanisms; (2) existence of a connection point for external audio processing devices; (3) text telephone (known as "TTY") connectability; and (4) TTY signal compatibility.

### What is Considered a Disability?

The CVAA defines disability consistent with the Americans with Disabilities Act. Determinations of disability are made on a case-by-case basis, but they generally apply to individuals with hearing, vision, movement, manipulative, speech, and cognitive disabilities.

### What Does Achievable Mean?

Achievable means with reasonable effort or expense, as determined by the FCC. The FCC must consider the following factors equally in making its determination:

1. the nature and cost of the steps needed to meet the requirements;
2. the technical and economic impact on the operation of the covered entity;
3. the type of operations of the covered entity; and
4. the extent to which the covered entity in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

A covered entity need not demonstrate that accessibility is not achievable unless it is the subject of a complaint. In that event, the entity has the burden of proving that accessibility was not achievable and must have adequate records to meet that burden. The FCC will not pre-clear a service or product as compliant and there are no technical safe harbors.

### What Opportunities Exist for Waiver of the Requirements?

The Commission granted a temporary exemption from the requirements for small businesses that meet the size limits in the Small Business Administration's rules (the size limits vary by type of provider and may be based on number of employees or annual receipts) until the FCC can make a decision on a permanent exemption as part of the further notice of proposed rulemaking. In addition, the FCC has discretion to waive the requirements for equipment and services that are capable of accessing ACS, but are designed primarily for purposes other than using ACS. In the commenting rounds some parties have argued unsuccessfully that such waivers should apply broadly to video game consoles, operating systems and games, Internet TV sets and Internet-connectable digital video players. The FCC determined that it will undertake a case-by-case, fact-based analysis of equipment and services or classes of equipment and services, including a review of how they are marketed, based on waiver requests.

Covered entities are not required to, but should strongly consider, filing any waiver requests during the design phase of the equipment or service. The FCC's goal will be to process waiver requests within six months. Therefore, ACS equipment manufacturers and service providers should begin

making determinations regarding whether their product or service is eligible for a waiver in the design phase so that they can decide whether to seek a waiver at least six months in advance of October 8, 2013.

### What Are the Recordkeeping Requirements?

Covered entities are required to maintain records including: (1) information about their efforts to consult with individuals with disabilities, (2) descriptions of the accessibility features of their products or services, and (3) information regarding compatibility of their products and services with peripheral devices or specialized CPE commonly used by those with disabilities to achieve access. The records must be maintained while the product or service is offered or distributed to the public (including through third parties or resellers) and for two years thereafter.

If a covered entity does not make its products or services accessible because it is not achievable, the entity should maintain records sufficient to allow them to meet their burden of proof for the "not achievable" defense. The order sets forth a list of records that covered entities must be prepared to produce. In addition, entities will need to maintain records necessary for this defense beyond two years after the product or service is offered in order to defend against complaints.

Covered entities will also be required to sign and file with the FCC an annual certification that records required to be maintained are being kept in accordance with the CVAA. Filing instructions will be contained in a Public Notice to be issued prior to the first annual filing, which is likely to be due on or before April 1, 2013. The annual certification includes contact and service information that must be kept up-to-date.

### How Will the Requirements Be Enforced?

The CVAA establishes a process for informal complaints to enforce the requirements, and also permits complaints pursuant to the FCC's established formal complaint procedures.

Before filing an informal complaint, the complaining party (which can be an individual with or without a disability or a consumer group) must file a Request for Dispute Assistance with the FCC containing specified information. The FCC will forward the Request to the applicable manufacturer or service provider and begin a 30 day settlement process with the consumer. After 30 days, the consumer can file an informal complaint or the parties can agree to extend the settlement period in additional 30 day increments.

If an informal complaint is filed, the defendant must respond within 20 days and the complainant may then reply within 10 days. The FCC has 180 days from the date of the complaint to resolve the matter. If a violation is found, the FCC can direct the covered entity to undertake broad remedial measures with implications far beyond the individual complainant's particular situation. It can also impose forfeitures of up to \$100,000 per violation or each day of a continuing violation up to a maximum of \$1 million. The Commission did not establish a statute of limitations on informal complaints, but complaints against products or services no longer offered to the public are less likely to result in beneficial outcomes for complainants.

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