

President Signs into Law New Disability Access Requirements for VoIP Service, Video Programming, and Other Communications Services and Applications

President Barack Obama signed into law the Twenty-First Century Communications and Video Accessibility Act of 2010 (the Act) October 8, 2010. The Act received overwhelming support in both houses of Congress, passing the Senate by unanimous consent and the House on a voice vote. The Act is intended to ensure that individuals with disabilities have access to Internet Protocol-based communication and video programming technologies that are increasingly becoming mainstream. The Act heralds significant new regulatory obligations for both United States service providers and equipment manufacturers that provide equipment within the United States, and the Federal Communications Commission (FCC) is directed to issue a number of new regulations that implement these obligations. The Act essentially has two components: (1) provisions designed to improve access to IP-based communications services for individuals with disabilities; and (2) provisions designed to improve access to video programming across delivery platforms.

Communications Access

Access to IP-Based Services and Equipment

The Act's purpose is to increase accessibility to IP-based services by people with disabilities. Specifically, the Act directs the FCC to require that all equipment that is: (a) used with "advanced communications services" and (b) designed to provide two-way voice communications via a speaker intended to be held to the ear, similar to a telephone, must provide internal means for effective use with hearing aids. "Advanced communications services" is defined to include defined to include interconnected Voice over Internet Protocol service (VoIP), non-interconnected VoIP, electronic messaging service and video conferencing. The Act does not modify the FCC's current hearing aid compatibility regulations for commercial wireless handsets.

The Act further directs manufacturers of equipment used for advanced communications services (generally, but not limited to, IP-based services such as VoIP) to ensure that equipment is accessible to and usable by individuals with disabilities (this requirement is not limited to accessibility by individuals with hearing impairments). This new requirement will apply to equipment manufactured after the effective date of regulations to be established pursuant to the Act. Similarly, providers of advanced communications services will have an independent obligation to ensure that their services are accessible to and usable by individuals with disabilities following the effective date of new regulations. The Act directs the FCC to promulgate regulations necessary to implement both requirements within one year. Those regulations must include performance objectives, must provide that services, networks and equipment do not impede accessibility that has been incorporated into content, and must determine the respective obligations of manufacturers, service providers and application providers.

Both sets of requirements include an exception if compliance is not “achievable” – which means achievable with reasonable effort or expense. Specific factors included in the evaluation of whether particular accessibility requirements are achievable include: (1) the nature and cost of the steps needed to meet the requirements; (2) the impact on the operations of the manufacturer or provider and on the operation of the equipment or service in question; (3) the financial resources of the manufacturer or provider; (4) the type of operations of the manufacturer or provider; and (5) the extent to which the manufacturer or provider offers accessible equipment or services with varying degrees of functionality and features at different price points. Where the requirements are not achievable, the manufacturer or service provider still must ensure that the equipment or service is compatible with peripheral devices or specialized equipment commonly used by individuals with disabilities to achieve access – unless this too is not achievable. Under the Act, providers of advanced communications services will be prohibited from installing network features, functions or capabilities that impede basic accessibility or usability of those services.

Significantly, the Act includes an exception to the above requirements for any equipment or services, including interconnected VoIP service that was already subject to Section 255 disabilities access provisions of the Communications Act. Existing services and equipment presently subject to these accessibility requirements will remain subject to Section 255 and related FCC regulations. The Act does, however, include measures to strengthen accountability and enforcement of Section 255. These include a requirement that the FCC, within one year, establish new public complaint and investigation procedures, new recordkeeping requirements for manufacturers and service providers, reporting obligations for the FCC, and the establishment of a clearinghouse for information on the availability of accessible communications products and services.

The Act specifically requires manufacturers of telephones used with “public mobile services” to ensure that the functions of any included Internet browser are accessible to and usable by individuals with visual impairments. Section 710(b)(4) of the Communications Act and Section 22.99 of the FCC’s rules define “public mobile services” as including radio services used to provide mobile and related fixed radio telecommunications services to the public. This expansion of accessibility requirements to smartphones or other devices with Internet capability is subject to the same standard of “achievability,” meaning achievable with reasonable effort and expense, and will take effect three years after the

Act becomes effective. Violators may be subject to substantial fines (up to \$100,000 per violation or each day of a continuing violation, up to a total of \$1 million for a single act).

Relay Services

The Act requires, within one year after enactment, that both interconnected and non-interconnected VoIP providers contribute to the already existing Telecommunications Relay Services (TRS) Fund, pursuant to regulations to be adopted by the FCC. Further, the Act redefines TRS to make plain that relay services are intended to assist individuals with hearing or speech disabilities in communication with *all* other individuals – not only those without hearing or speech disabilities. The Act requires the FCC, within six months, to establish rules making eligible for support from the Fund programs that are approved by the FCC for the distribution of specialized equipment designed to make telecommunications service, Internet access service and advanced communications accessible by low-income individuals who are deaf-blind. The Act also provides that the total amount of support the FCC may provide from the TRS Fund in any fiscal year will be capped at \$10 million.

Access to Emergency Services

The Act requires the FCC to establish an advisory committee to help ensure that individuals with disabilities have access to emergency services and, in particular, that people with disabilities are able to access emergency services as part of a migration to a national IP-enabled emergency network. The Act contemplates the committee's submission to the FCC of recommendations for regulations implementing technologies and procedures to facilitate access, including technical protocols, capabilities and requirements for public safety answering points, communication devices and network providers, within one year.

Video Programming

Video Programming and Emergency Access Advisory Committee

Within 60 days of enactment, the FCC Chairman must establish an advisory committee to develop reports on how to realize greater access to: (1) closed captioning; and (2) video description, emergency information, user interfaces and video programming guides and menus, in each case focusing on IP-based video programming. The first advisory committee meeting is to convene within 180 days of enactment. The Closed Captioning report is to be completed within six months of the first advisory committee meeting and the Video Description report is to be completed within 18 months of enactment.

Video Description and Closed Captioning

Video Description: Video description is the description of key visual elements in programming, inserted into natural pauses in programming, designed to make video programming accessible to individuals with disabilities. The FCC originally adopted video description regulations in 2000, however, the D.C. Circuit vacated the rules in 2002 after the court found that the FCC lacked statutory authority to implement them. The Act provides the FCC with plain statutory authority and requires the FCC, following a rule-making and within one year of enactment, to reinstate most of its previous video description regulations. Specific modifications the Act directs include: (1) that video description

regulations apply to video programming displayed on television in a digital format; (2) an update to the list of the top 25 Designated Market Areas (DMAs), as well the list of the top five national nonbroadcast networks that have at least 50 hours of prime-time programming; (3) an exemption from the regulations in case of demonstrated economic burden; (4) that the regulations will not apply to live or near-live programming; (5) that the regulations provide a schedule for compliance; and (6) that the FCC consider extending exemptions and limitations in the reinstated regulations to all providers and owners of programming if compliance is not technically possible. The phase-in deadline for video description regulations for the top 60 DMAs will be within six years of enactment, except where a waiver is granted.

One year after the completion of the phase-in of the video description regulations (or seven years following enactment), the FCC must conduct inquiries concerning video description in television programming and in video programming distributed on the Internet and report its findings to Congress. Two years after completing these reports, the FCC may issue additional video description regulations for programming displayed on television, including specifying increased total hours required for video description, if it is determined that the need for and benefits of providing video descriptions for video programming, as the programming is transmitted for display on television, are greater than the technical and economic costs. The FCC may not increase the total hour requirement by more than 75 percent, however. The Act also directs the FCC to submit to Congress a report accessing described video programming, nine years after the enactment of the Act. Ten years after the Act's enactment, the FCC shall have the authority to phase-in the video description regulations for up to an additional 10 DMAs each year.

Furthermore, within a year of completion of the advisory committee's Video Description report, the FCC is to identify methods to convey emergency information in a manner accessible to individuals who are blind or have a visual impairment and adopt regulations that require designated programming providers, video programming distributors and program owners to convey emergency information in an accessible manner.

Closed Captioning: In addition to the requirements already placed on broadcasters and multichannel video programming distributors to caption certain programming, the Act also requires the FCC to adopt regulations to require the provision of closed captioning on video programming delivered using Internet protocol no later than six months after the advisory committee's Closed Captioning report is submitted. The new regulations will only apply to programming that is published or exhibited on television with closed captioning after the effective date of the regulations, and must: (1) define "programming that is edited for Internet distribution" and "programming that is near-live;" (2) clarify that the terms "video programming distribution" and "video programming providers" include entities that make available directly to the end user video programming through a distribution method that uses Internet protocol; (3) describe the responsibilities of video programming providers or distributors and video programming owners; (4) establish a mechanism to make available to providers and distributors information on video programming subject to the Act on an ongoing basis; and (5) deem a provider or distributor in compliance if the entity allows for the "pass through" of closed captioning and video description signals. The FCC may delay or waive the regulation if the application of the regulations to live video programming over the Internet is found to be economically burdensome. In addition, the regulations must provide that a *de minimis* failure to comply with the regulations will not be treated as a violation of the regulations.

A provider of video programming or program owner may petition the FCC for exemption from the video description and closed captioning requirements in limited circumstances. During the pendency of the petition, the provider or owner will be exempt from the regulations; the FCC must act on any petition in part or whole within six months of receipt.

Closed Captioning Decoder and Video Description Capability

The Act requires that any apparatus designed to receive or play back video programming transmitted simultaneously with sound, if the apparatus uses a picture screen of any size and is manufactured in or imported to the United States: (1) be equipped with a built-in closed captioning decoder circuitry or capability designed to display closed-captioning video programming; (2) have the capability to make available the transmission and delivery of video description devices as required under the regulations; and (3) have the capability to decode and make available emergency information in a manner that is accessible to individuals who are blind or have a visual impairment. An apparatus that has a picture screen less than 13 inches is subject to these requirements only if they are achievable. Apparatus that are display-only video monitors with no playback capability are exempt from the requirements, and the FCC has the authority to waive the requirements for a particular apparatus or a class of apparatus.

The Act also requires that, if achievable, an apparatus designed to record video programming transmitted simultaneously with sound should enable the rendering or the pass through of closed captioning, video description signals and emergency information so that viewers are able to activate and de-activate the closed captions and video descriptions as the video programming is being played back on a screen of any size. Furthermore, the Act directs the FCC to require that mechanisms and standards for digital video source devices be available to carry from the source device to other equipment the information necessary to display closed captions and to make the encoded video description and emergency information audible. The Act directs the FCC to prescribe the regulations for closed captioning decoders within six months after the delivery of the advisory committee's Closed Captioning report to the FCC, and the regulations for video description capabilities within 18 months after the delivery of the advisory committee's Video Description report to the FCC.

User Interfaces on Digital Apparatus

The Act also requires, if achievable, that digital apparatus designed to receive or play back video programming, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, be designed, developed and fabricated so that control of all built-in apparatus are accessible to and usable by individuals with disabilities. In addition, if achievable, if there is an on-screen text menu or if there are other visual indicators on the apparatus, the functions should be accompanied by an audio output, so that menus and indicators are useable to individuals that are blind or have vision impairment. The Act also calls for built-in user controls on such apparatus to be capable of accessing closed captioning, including buttons on a remote control or the option for closed captioning in on-screen menus. For this section, the Act specifically excludes navigation devices. The FCC is to prescribe regulations for user interfaces on digital apparatus within 18 months after the submission of the advisory committee's Video Description report to the FCC.

Access to Video Programming Guides and Menus Provided on Navigation Devices

The Act requires, if achievable, that on-screen text menus and guides provided by navigation devices for the display or selection of multichannel video programming be designed to be audibly accessible in real time upon request by individuals who are blind or have a vision impairment. The FCC may not specify the technical standards, protocols, procedures, and other technical specifications for this requirement, however. The Act also requires, if achievable, that navigation devices with built-in closed captioning capability access such capability through a button, key, icon or other mechanism to provide a substantially equivalent level of accessibility. Entities will only be responsible for complying with these requirements with respect to navigation devices that are provided to a requesting individual who is blind or has a visual impairment, and the Act provides an exemption from these regulations for cable systems serving 50,000 or fewer subscribers. The FCC is to prescribe these regulations within 18 months of the submission of the advisory committee's Video Description report to the FCC.

The Act directs the regulations to permit, but not require, the use of separate equipment or software to comply with the regulations for navigation devices, and provides flexibility for entities subject to the Act to select their manner of compliance. Such separate equipment or software must, however, be provided at no additional charge and within a reasonable time to a requesting individual. The Act directs the FCC to provide affected entities with not less than two years for the phase-in of the closed captioning requirements for navigation menus and not less than three years to prepare to comply with the new audible accessibility requirement.

Next Steps

Congress provided the FCC with jurisdiction and explicit direction on a number of fronts, creating new obligations that will have design effects for all segments of the IP-based communications sector. Compliance with some of these requirements may be costly and, in many cases, the requirements come with strict timeframes and limited exceptions. As a result, there will be a number of FCC rulemaking proceedings and notices of inquiries forthcoming to implement the Act. Together with participation in relevant advisory committees, these provide some opportunity for service providers and manufacturers that will be affected by new requirements to shape those requirements. A general timeline of required actions is attached.

Twenty-First Century Communications and Video Accessibility Implementation Timeline

Communications Access

Access to IP-Based Services and Equipment

- > By October 8, 2011, FCC promulgates regulations requiring that: (1) manufacturers of equipment used for advanced telecommunications services ensure that equipment is accessible; and (2) providers of enhanced communications services ensure services are accessible.
- > By October 8, 2011, FCC establishes: (1) new public complaint and investigation procedures; (2) new recordkeeping requirements for manufacturers and service providers; (3) reporting obligations; (4) a clearinghouse for information on accessible products and services.
- > By October 8, 2013, manufacturers of telephones used with “public mobile services” ensure accessibility of any included Internet browser.

Relay Services

- > By April 8, 2011, FCC establishes regulations making eligible for support from the TRS Fund programs for the distribution of specialized equipment designed to make telecommunications service, Internet access service and advanced communications accessible by low-income individuals who are deaf-blind.
- > By October 8, 2011, interconnected and non-interconnected VoIP services contribute to the TRS fund.

Access to Emergency Services

- > By December 7, 2010, FCC establishes advisory committee for emergency service access for people with disabilities.
- > No later than December 7, 2011, the advisory committee submits recommendations for regulations to facilitate access, including technical protocols, capabilities and requirements for public safety answering points, communication devices and network providers.

Video Programming

Advisory Committee

- > FCC Chairman establishes Advisory Board by December 7, 2010.
- > Advisory Board first meets no later than April 6, 2011.
- > Advisory Board delivers to FCC a Closed Captioning report no later than October 6, 2011.
- > Advisory Committee delivers to FCC Video Description report by April 8, 2012.

Video Description Regulations

- > Video description regulations reinstated after a rulemaking by October 8, 2011.
- > Phase-in of video description regulations for top 60 markets by October 8, 2016.
- > FCC conducts inquiries describing video description in television programming and in video programming distributed on the Internet and reports to Congress no later than October 8, 2017.
- > FCC authorized to issue additional video description regulations for programming on television by or before October 8, 2019.
- > FCC delivers report assessing described video programming to Congress by October 8, 2019.
- > FCC authorized to increase the availability of video description programming and to phase-in video description regulations in up to 10 additional markets each year by or after October 8, 2020.
- > FCC completes a proceeding and adopts regulations for accessible emergency information no later than April 8, 2013.

Closed Captioning Regulations

- > FCC to adopt regulations to require closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions no later than April 6, 2012.

Closed Captioning Decoder & Video Description Capability

- > Regulations for closed captioning decoders no later than April 6, 2012.
- > Regulations for video description capabilities no later than October 8, 2013.

User Interfaces on Digital Apparatus

- > Regulations for interfaces on digital apparatus no later than October 8, 2013.

Access to Video Programming Guides & Menus Provided on Navigation Devices

- > Regulations to be proscribed no later than October 8, 2013.
- > Phase in for regulations: no later than April 8, 2015, for closed captioning regulations and April 8, 2016, years for audible accessibility requirement.

Please contact any of the Drinker Biddle professionals listed below if you would like to discuss matters discussed in this alert in more detail.

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