

FCC Proposes New Accessibility Rules Affecting VoIP, Video Chat and Other Advanced Communications Services

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On March 3, 2011, the Federal Communications Commission (FCC) adopted a Notice of Proposed Rulemaking to implement Sections 716 and 717 of the Communications Act, both products of the Twenty-First Century Communications and Video Accessibility Act (Accessibility Act), which the President signed into law in Oct. 2010. Section 716 requires providers of “advanced communications services” (ACS) to make services accessible to and usable by people with hearing- and vision-related disabilities.¹ The services covered by Section 716 include both interconnected and non-interconnected VoIP, electronic messaging services (e.g., text messages and email) and interoperable video conferencing services (e.g., video chat).

These obligations complement those currently imposed on telecommunications and interconnected VoIP providers under Section 255 of the Communications Act and corresponding FCC regulations (47 C.F.R. parts 6 and 7) (collectively, the Section 255 rules). However, Section 716 arguably imposes a more stringent standard of compliance compared to Section 255, but also gives the industry flexibility not available under the Section 255 rules.

In addition, Section 717 directs the FCC to establish new recordkeeping rules for all entities covered by either Section 255 or 716, as well as new enforcement procedures that apply under both sections, with new forfeiture amounts of up to \$1 million for violations.

While Section 716 attempts to overcome the shortcomings of Section 255 (both substantively and in its application), the practical impact of the new accessibility rules is not yet clear, as the NPRM attempts to address the difficulties presented by the fact that Section 716 covers a broad range of services and service providers, including hybrid services and devices that may invoke both Section 255 and 716. Although established services (including interconnected VoIP) that are subject to Section 255, are exempt from Section 716 (but not Section 717), providers of communication services that have never been subject to accessibility rules, or even FCC regulation in general, will soon find themselves subject to a multitude of compliance, recordkeeping and complaint resolution obligations mandated by federal law.

Applicability of ACS rules

Section 716 requires “a provider of advanced communications services” to make services “accessible to” and “usable by” individuals with disabilities. While the statute does not define the term, “provider” of ACS, the NPRM suggests that resellers and aggregators should be considered “providers,” consistent with the FCC’s approach taken under Section 255.

Section 716 applies directly to interconnected VoIP, which is now specifically codified into law at Section 3(25) (47 U.S.C. § 153(25)). Previously, “interconnected VoIP” was a purely regulatory term, defined at 47 C.F.R. § 9.3. The codification does not appear to constitute a change of law, as Congress chose to adopt the regulatory definition verbatim.

What is new is the definition of “non-interconnected VoIP,” which is defined as “(A) a service that (i) enables realtime 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 (B) does not include any service that is an interconnected VoIP service.” 47 U.S.C. § 153(36). The FCC proposes to adopt this definition in its rules, and seeks comment on this proposal. The NPRM also proposes to treat any offerings with a “purely incidental VoIP component” as

covered by Section 716, thus potentially regulating, for example, gaming consoles or private internal enterprise services, which some commenters argue should not be regulated as they do not utilize ACS as a “core” function or feature.

The NPRM also discusses at length the meaning of “interoperable video conferencing service,” another newly defined statutory term (47 U.S.C. § 153(27)) and requests comment on the separate meanings of “interoperable” and “video conferencing.” The NPRM proposes that “video conferencing” include not only traditional conferencing, but also newer video communication services provided by videophones (iPhone, Droid X) and software applications (Skype, Google Video Chat, AIM Chat). With regard to “interoperable,” the NPRM seems less certain, and poses a variety of questions intended to determine the meaning of the term in the context of accessibility of ACS. Like non-interconnected VoIP, “incidental uses” of video conferencing services will also be covered by Section 716.

The NPRM also proposes that “electronic messaging service” be defined to include traditional two-way text messaging, instant messaging, and e-mail, but not blog posts, online publishing, or social networking postings.

Duty not to impede or impair accessibility

The NPRM plans to adopt as a rule an ACS provider’s duty under Section 716(d) not to install network features, functions or capabilities that impair or impede accessibility or usability. This is consistent with the duty under Section 251(a)(2), which prohibits telecommunications carriers from installing network features, functions or capabilities that impede accessibility under Section 255. The NPRM seeks comment on how best to educate ACS providers of this affirmative duty, reflecting the reality that the accessibility obligations under Section 716 apply to a broad range of services and service providers.

Section 255 carve out and other exclusions, safe harbor

Because telecommunications services and interconnected VoIP are already subject to the Section 255 rules, the Accessibility Act grandfathers these services and exempts them from regulation under Section 716. Specifically, Section 716 “shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before the date of enactment of the [Accessibility Act]. Such services and equipment shall remain subject to the requirements of section 255.” The Accessibility Act was enacted Oct. 8, 2010, thus, any interconnected VoIP service subject to Section 255 as of Oct. 7, 2010 is not subject to Section 716. (Note that Section 255 services, however, will be subject to the new recordkeeping and enforcement regulations pursuant to Section 717, as discussed below.)

The NPRM, however, questions whether and to what extent this means that interconnected VoIP in particular will remain subject to Section 255, and seeks comment on alternative interpretations. In addition, the NPRM seeks comment on whether multi-purpose devices that offer both Section 255 and Section 716 services should be regulated under Section 255 only, and apply Section 716 “solely to the extent that the device provides ACS service not otherwise subject to Section 255.”

Other services excluded from regulation under Section 716 are customized services for businesses or enterprise use (e.g., the NPRM seeks comment on whether the rules apply to equipment or services that have been customized in minor ways but are otherwise available to the public) and, potentially, services and devices (or classes of services and devices) designed “primarily” for purposes other than ACS (e.g., the NPRM seeks comment on whether the FCC should establish a waiver procedure for such services and devices). Section 716 also authorizes the FCC to exempt “small entities,” and the NPRM seeks comment on how this status should be determined (e.g., by size, circumstances, operations). Although Section 716 authorizes the FCC to adopt technical standards as a safe harbor, the FCC has chosen not to provide such a safe harbor, consistent with the position of a vast majority of commenters.

“Achievable” standard

Section 716 imposes an “achievable” standard for compliance (defined as “with reasonable effort or expense”), which, according to the NPRM, represents a “higher standard of achievement” than the “readily achievable” standard under Section 255. However, a House Report on the Accessibility Act suggests (and the NPRM agrees) that accessibility under Section 716 should be interpreted the same way that accessibility under Section 255 is interpreted, “such that if the inclusion of a feature in a product or service results in a fundamental alteration of that service that it is *per se* not achievable to include that function.” (Under Section 255, a fundamental alteration occurs when a feature “alters the product substantially or materially.”) Moreover, one of the factors for determining accessibility under Section 716, discussed below, grants industry a certain level of flexibility to comply with the law that is not available under the Section 255 rules, which would seem to at least temper the higher standard of achievement under Section 716. Thus, it is not yet clear what the practical differences will be between the two standards.

In determining whether accessibility is “achievable,” Section 716 requires the FCC to consider four factors. Three of these factors are similar to those considered under the Section 255 rules, namely, the nature and cost of compliance, the technical and economic impact on operations (including research and development), and the type of operations of the provider. The fourth factor is new, and reflects Congress’s attempt to provide industry with “as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors.” This factor requires the FCC to consider the “extent to which the service provider...offers accessible services...containing varying degrees of functionality and features, and offered at differing price points.” In other words, a provider need not make a particular product accessible if the provider otherwise makes a “good faith effort to incorporate accessibility features in different products across multiple product lines.” The NPRM does, however, maintain that, like Section 255, the FCC may require “easy” accessibility features to be included on every product.

Assuming that compliance is “achievable,” Section 716 affords providers with additional flexibility that is also absent from Section 255. Whereas Section 255 contemplates compliance through universal design (accessibility and usability must be incorporated in the device itself), under Section 716, a provider can satisfy its obligations either by universal design or through the use of third-party applications, peripheral devices, software, hardware, or customer premises equipment, available to the individual “at nominal cost” and that disabled individuals can “access.” The NPRM seeks comment on what “nominal cost” means, and proposes that “access” means not more burdensome to a consumer than a built-in solution.

Compatibility with peripheral or specialized devices

If accessibility is not “achievable,” then providers must ensure that ACS is “compatible” with existing peripheral devices or specialized customer premises equipment “commonly used by individuals with disabilities to achieve access,” unless compatibility itself is “not achievable.” The NPRM proposes to generally follow the same definitions for peripheral devices and specialized CPE as used under the Section 255 rules, but questions whether ACS compatibility needs to include TTY connectability and signal compatibility, as required under the Section 255 rules. According to the NPRM, a “sizable majority” of TTY consumers have transitioned to more mainstream forms of text and video communications. In fact, the NPRM is considering whether the TTY requirements should also be phased out for purposes of Section 255 compliance as well.

Performance objectives

Section 716 requires the FCC to establish industry obligations and performance standards for ACS accessibility. The NPRM proposes to adopt obligations that are similar to those applied to providers under the Section 255 rules. Similarly, the NPRM proposes to incorporate into ACS performance objectives the same “outcome-oriented definitions” for accessible, compatibility and usable as used under the Section

255 rules. The NPRM further notes that these objectives may be revised after the Emergency Access Advisory Committee releases its recommendations on ensuring access to emergency services, which are expected by December 2011.

Pass-through of accessibility information

Section 716 contains a “pass-through obligation” that requires ACS accessibility information (e.g., closed captioning, video descriptions, etc.) to remain intact when handed-off from one medium to another. In the words of the statute, ACS providers, including networks, may not impair or impede the accessibility of information when incorporated into “content for transmission through [ACS], equipment used for [ACS], or networks used to provide [ACS].” The NPRM seeks comment on this and other pass-through obligations with respect to ACS.

Recordkeeping obligations under Sections 255 and 716

In an effort to harmonize Sections 255 and 716, Section 717 requires the FCC to adopt rules to implement new recordkeeping obligations for all providers subject to Sections 255 and 716. These recordkeeping rules, which go into effect one year after the FCC’s ACS rules become final, require providers to maintain, in the ordinary course of business, and for “a reasonable period,” all “records of the efforts taken” to implement Sections 255 and 716, including information regarding efforts to consult with disabled individuals, available accessibility features of services, and the compatibility of services with peripheral devices or specialized customer premise equipment. The provider must submit an annual compliance certification and provide (confidentially, if necessary) such records to the FCC upon request. The NPRM seeks comment on a number of recordkeeping issues, including what type of records are sufficient to demonstrate compliance, what constitutes a “reasonable period,” and whether to require additional types of records to be maintained. The NPRM proposes not to mandate a particular form in which records must be kept. There is also the question of how to deal with complaints during the one-year transition period before the recordkeeping obligations take effect.

Enforcement

Section 717 also charges the FCC with harmonizing the complaint process for violations of Sections 255 and 716. The NPRM seeks comment on a number of procedural issues, both general and specific to informal and formal complaints. In particular, the NPRM notes that new Section 718(c), also created by the Accessibility Act, adds that providers may be liable for forfeitures of up to \$100,000 per violation or each day of a continuing violation, with a maximum amount of \$1 million for a continuing violation. It should also be noted that, like Section 255, there is no private right of action for Section 716 violations, as prohibited by Section 255(f), and the FCC has exclusive jurisdiction to hear complaints.

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Comments are due 30 days, and reply comments are due 60 days, from the date the NPRM is published in the Federal Register. The Accessibility Act requires the Commission to adopt its proposed ACS rules as final no later than Oct. 8, 2011. Please let us know if you would like more information regarding the NPRM or the requirements under the Accessibility Act, and if you would like to participate in filing comments with the FCC.

FOOTNOTE

¹ Section 716 also imposes accessibility obligations on manufacturers of equipment used for advanced communications services. This advisory focuses primarily on the obligations for service providers; however, the obligations for equipment makers are essentially the same. If you would like more information about how the rules specifically apply to ACS equipment, please feel free to contact us.

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