

ADVISORY | Communications, Technology and Media

September 29, 2010

20TH ANNIVERSARY OF THE AMERICANS WITH DISABILITIES ACT SPARKS LEGISLATIVE AND REGULATORY REFORM

Congress yesterday passed the Twenty-First Century Communications and Video Accessibility Act of 2010. This bill, which will become law some twenty years after enactment of the Americans with Disabilities Act (“ADA”), marks a substantial expansion of entities that need to comply with the ADA’s accessibility requirements and now includes online distributors of video programming, makers of smart phones, manufacturers of devices that offer electronic messaging and VoIP services, and providers of equipment that can receive or playback video programming. It also expands the requirements on broadcasters and video programming producers who have long been subject to closed captioning requirements by adding a video description obligation. The Federal Communications Commission (“FCC”) is charged with implementing and enforcing this law, and it is noteworthy that the new law brings many companies into the ambit of the FCC for the first time. Importantly, none of the requirements in the law become effective until the FCC adopts rules, which will begin over the next year and continue until the law is fully implemented in three years.

Also in conjunction with the ADA’s twentieth anniversary, the Department of Justice launched rulemakings governing how the ADA applies to the web sites of entities such as hotels, restaurants and theatres that are already governed by the ADA. Government web sites also will need to ensure their web sites are accessible by persons with disabilities.

Providers of Advanced Communications Services

Any entity that provides electronic messaging, VoIP, or video conferencing (or “advanced communications services”) are now regulated by the FCC and need to make their service accessible to visually impaired persons, if achievable. They can meet that requirement by building accessibility features into the service or by relying on peripheral devices if those devices are available to consumers at nominal cost. The determination of “achievable” will be made by the FCC, and Congress identified four factors for it to consider: nature and cost of meeting that requirement for the specific service or equipment, impact on the operations of the manufacturer or service provider, type of operations of the manufacturer or provider, and the extent to which the provider or manufacturer offers other services or devices at different price points that are accessible.

In addition, beginning one year after enactment, any entity that provides non-interconnected VoIP service (such as many online gaming sites) must contribute to the Telephone Relay Service fund, which is administered by the FCC to provide telephone services to the hearing impaired. The FCC will set the level of contribution in the next several months. For the first time, non-interconnected VoIP providers will have to contribute to support a social good.

Providers of Internet-Based Equipment

The Act also has significant implications for manufacturers of a wide variety of devices that access the Internet, including video players, video game consoles, set-top boxes, and smart phones.

- **Closed Captioning, Video Description, and Emergency Information Capabilities for Video Devices:** The FCC must adopt regulations for any device designed to receive, play back, or record video programming transmitted simultaneously with sound, regardless of screen size, regarding (1) the display of closed-captioned video programming, (2) the transmission and delivery of video description services, and (3) the conveyance of emergency information. These regulations would not be limited to television receivers, and could include, for example, mobile phones, video game consoles, set-top boxes, and personal computers.
- **Accessibility of On-Screen Menus and Other User Controls:** The FCC must issue rules improving accessibility of (1) on-screen text menus, other visual indicators, and user controls that are built into digital devices designed to receive or play back video programming, and (2) navigation devices.
- **Accessibility of Internet Access Equipment:** The FCC is directed to adopt rules requiring manufacturers of “Internet access equipment,” a term added to the law by this Act that includes hardware and software makers, to make their products and user interfaces for such equipment accessible, unless doing so would not be achievable. However, device manufacturers can meet these requirements by using third-party applications, peripheral devices, software, hardware, or customer premises equipment that is available to the consumer at nominal cost and that individuals with disabilities can access. These manufacturers also will need to comply with a number of recordkeeping requirements, such as descriptions of their accessibility features.
- **Internet Browsers Built into Smart Phones:** The FCC will issue regulations requiring that Internet browsers built into smart phones be accessible to and usable by blind or visually impaired users, unless doing so would not be achievable.
- **Expansion of Hearing Aid Compatibility Requirements:** The FCC will expand the hearing aid compatibility requirements to cover equipment that enables voice communications and is used for interconnected and non-interconnected VoIP services, electronic messaging services (e.g., instant messaging), and video conferencing services.
- **Prohibition on Requiring the Use of Proprietary Technology:** The Act prevents the FCC from requiring the use or incorporation of proprietary technology to implement the Act’s requirements. While the FCC is allowed to indicate that use of a particular technology is sufficient to meet the statutory requirements, companies must remain free to use alternative solutions as long as these alternatives also meet the statutory requirements.

Distributors of Video Programming

The Act contains a number of provisions that will affect entities that distribute video programming, which includes traditional distributors such as broadcasters, cable operators, and DBS providers, but also includes entities distributing video programming via the Internet. Specifically:

- **Video Description Rules:** Within one year, the FCC must reinstate the video description rules that the Commission adopted in 2000 but were invalidated on appeal, with a few statutory modifications. These rules generally required that (1) television stations affiliated with the Big-4 networks in the top-25 markets provide 50 hours per calendar quarter of audio description of key visual elements in programming aired during prime time or children’s programming, and (2) television stations affiliated with any television network pass through video descriptions when the network provides them. The FCC may subsequently increase the number of hours required for video description and expand the requirements to all broadcasters if certain findings are made, but that expansion is subject to a ten-year phase-in. The FCC also must initiate inquiries into video description of television programming and video programming distributed via the Internet.

- **Closed-Captioning for Internet Video:** The FCC is directed to adopt rules requiring the provision of closed-captioning for video programming delivered via the Internet. Video programming is defined as the equivalent of programming shown on television, so it would not include games and does not include consumer-generated media. Notably, these requirements will apply only to video programming that was first transmitted for display on broadcast or cable television with closed captioning after the effective date of the regulations. The regulations also may take into account whether compliance would be economically burdensome.
- **Accessibility of Emergency Information:** The FCC must adopt rules to help ensure that certain video programming providers, distributors, and program owners convey emergency information in a manner that is accessible to persons who are blind or visually-impaired.

The FCC is expected to commence soon the rulemakings needed to implement this law so they can meet the various statutory deadlines.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our communications and media practice group:

Gerard J. Waldron
Lindsey Tonsager

202.662.5360
202.662.5609

gwaldron@cov.com
ltonsager@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2010 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.