

## FCC Proposes to Extend Accessibility and TRS Fund Contribution Obligations to Unregulated Internet Services

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As the Internet becomes a bigger part of Americans' lives, the days when it could remain "unfettered by Federal or State regulation" appear to be drawing to a close. A recent illustration is the 21st Century Communications and Video Accessibility Act (Accessibility Act), which President Obama signed into law last October.

The Accessibility Act is intended to help bridge the growing divide between modern communications services and the ability of individuals with hearing and/or vision impairments to access those services.<sup>1</sup> In doing so, a new statutory category of service called "non-interconnected VoIP" was created. While the statute itself does not say much about what constitutes a "non-interconnected VoIP" service, the FCC's interpretation of the law, as discussed in two recent notices of proposed rulemaking proceedings (available [here](#) and [here](#)) adopted last week, signals a potential for comprehensive registration, reporting, enforcement, contribution and other compliance obligations on an extremely broad range of VoIP services that, prior to enactment of the Accessibility Act, had been subject to little, if any, FCC regulation or oversight.

Consequently, "one-way" VoIP services, as well as "multi-purpose" services like online games, Internet customer service, and private internal enterprise systems, all of which have some degree of integrated VoIP functionality, are now potentially subject to regulation of one kind or another by the FCC.

### Non-interconnected VoIP: a new statutory service category

The Accessibility Act broadly defines "non-interconnected VoIP"<sup>2</sup> to include any VoIP service not currently deemed an "interconnected VoIP" service, as that term was defined by the FCC in 2005, and has now been codified by statute.<sup>3</sup> This would appear to capture an extremely broad range of services, but primarily includes one-way VoIP services, that is, those VoIP services that enable a user to either make or receive calls from the public telephone network, but not both.<sup>4</sup>

Under the new law, providers of non-interconnected VoIP must comply with two obligations currently imposed on telecommunications carriers and interconnected VoIP providers: (1) participation and contributions to the Telecommunications Relay Services Fund (TRS Fund); and (2) ensuring that services are "accessible to" and "usable by" individuals with hearing and/or vision impairments (accessibility rules).

The Accessibility Act gives the FCC discretion to determine the scope of non-interconnected VoIP services subject to new regulations, by authorizing the FCC to waive application of the rules for non-interconnected VoIP services designed with "multiple purposes" in mind.<sup>5</sup> Indeed, both the Senate and House committees reported that this authority gives the Commission "flexibility to waive the accessibility requirements" for non-interconnected VoIP that is, "in the judgment of the Commission, designed primarily for purposes other than accessing [non-interconnected VoIP]," if it would, for example, "promote technological innovation."<sup>6</sup>

Although several parties commented that this provision demonstrated Congress' intent to exempt multi-purpose services from the accessibility rules, the FCC has proposed *not* to invoke its waiver authority and treat even multi-purpose services with a "purely incidental VoIP component" as a non-interconnected VoIP service, subject to regulation. The FCC explained that while the "core" function of an offering may be relevant (e.g., the core function of an online gaming service is to facilitate playing games online), it should not be dispositive of whether a device or service is entitled to a waiver, because the "primary feature" of a multi-purpose device or service can vary from person to person. Moreover, a product or service should not be exempted simply because its "basic feature" may be a non-VoIP offering.

Consequently, under the FCC's current interpretation, both one-way VoIP services as well as multi-purpose services and devices will be subject to the new TRS and accessibility obligations under the Accessibility Act and the FCC's implementing rules. These obligations are summarized below.

### **Accessibility obligations for non-interconnected VoIP providers**

Pursuant to the Accessibility Act, the FCC has proposed rules requiring non-interconnected VoIP service to be "accessible to" and "usable by" individuals with hearing or vision-related disabilities by either directly incorporating accessibility features into the service (universal design) or through the use of third-party applications, peripheral devices, software, hardware, or customer premises equipment that is available at a "nominal cost" and that disabled individuals can "access." In addition, the new rules would require non-interconnected VoIP services to pass-through any accessibility information (e.g., closed captioning, video descriptions) incorporated into any content that is transmitted between or among other services or devices.

The Accessibility Act also directs the FCC to establish new recordkeeping and enforcement rules on both interconnected and non-interconnected VoIP providers. For example, providers must, "for a reasonable period," maintain "records of the efforts taken" to consult with disabled individuals. Records must also provide information about the accessibility of a provider's features or services, and compatibility with other peripheral devices or specialized customer premise equipment. The provider must also submit an annual compliance certification and provide (confidentially, if necessary) such records to the FCC upon request.

Finally, non-interconnected VoIP service providers will be subject to new enforcement procedures, including informal and formal complaints and FCC inquiries and investigations. The Accessibility Act also establishes statutory liabilities specifically for non-compliance with the accessibility rules of up to \$100,000 per violation per day for a continuing violation, and a maximum of \$1 million per violation.

As noted above, while Congress gave the FCC the authority to waive these accessibility rules for services designed "primarily" for purposes other than non-interconnected VoIP, the FCC has determined not to invoke this authority, and apply its accessibility rules to all non-interconnected VoIP.

### **Obligations under the TRS fund**

The TRS Fund is a cost-recovery mechanism to compensate TRS providers for the reasonable costs of providing TRS to the disability community.<sup>7</sup> Prior to the Accessibility Act, only providers of telecommunications and interconnected VoIP services contributed to this fund on an annual basis. The Accessibility Act now requires non-interconnected VoIP providers to contribute to the TRS Fund in a manner that is "consistent with and comparable to the obligations of other contributors to such Fund." The FCC has proposed that providers must register by Sept. 30, 2011, and submit their first TRS worksheets by April 1, 2012 to report interstate end-user revenue for the period Oct. 1 through Dec. 31, 2011.

Currently, telecommunications carriers and interconnected VoIP providers contribute to the TRS Fund on the basis for their interstate end-user revenues.<sup>8</sup> For non-interconnected VoIP services that generate revenue, it appears that the FCC will likely adopt the same approach to calculate TRS contributions. However, the FCC also recognized that many non-interconnected VoIP services are offered for free. Thus, there would be no end-user revenue to report, resulting in a zero contribution calculation. The FCC has devoted a number of questions to this particular issue. For example, the FCC seeks comment on whether it would be appropriate to assess contributions on revenues from advertisers, donors, or other revenue sources, or whether revenues associated with the VoIP component of a multi-purpose service can be disaggregated from the revenue, if any, associated with the non-VoIP components of the service. Because the TRS rules currently impose a \$25 minimum contribution requirement, regardless of reported revenues, the FCC seeks comment on whether free VoIP services should also be subject to this minimum requirement or some other de minimis contribution amount.

Unlike the accessibility rules, the Accessibility Act *does not* authorize the FCC to waive the TRS

requirements for non-interconnected VoIP services. Thus, all providers of non-interconnected VoIP services—one-way as well as multi-purpose services—will be subject to the new TRS registration, reporting and contribution obligations.

Comments on any of these issues may be filed with the FCC within 30 days after the respective NPRMs are published in the Federal Register, which has not yet occurred. If you would like to participate in filing comments with the FCC, or have questions about your particular obligations under the Accessibility Act or the FCC's proposed rules, please contact us for more information.

## FOOTNOTES

**1** See *21st Century Communications and Video Accessibility Act of 2010*, Public Law 111-260 (codified at various sections of Title 47 of the United States Code) (Accessibility Act).

**2** The Accessibility Act defines “non-interconnected VoIP” 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).

**3** Interconnected VoIP is essentially a type of VoIP service that enables a person to make and receive calls, no different than a traditional landline telephone service. This generally includes voice services offered by Vonage and cable operators. See 47 C.F.R. § 9.3. The Accessibility Act codified the FCC’s definition of “interconnected VoIP” at 47 U.S.C. § 153(25).

**4** Technically, such services either allow a user to terminate calls to the Public Switched Telephone Network (PSTN) but not receive calls originating from the PSTN, or receive calls originating from the PSTN but not make calls to the PSTN.

**5** The Accessibility Act explicitly authorizes the FCC, on its own motion or by petition, to waive the accessibility requirements for any device, service, or class of devices or services, that is capable of accessing non-interconnected VoIP (or other “advanced communications service”) and is “designed for multiple purposes, but is designed primarily for purposes other than using [non-interconnected VoIP].” 47 U.S.C. § 716(h)(1).

**6** S. Rep. No. 111-386, at 8 (2010); H.R. Rep. No. 111-563, at 26 (2010).

**7** TRS is a telephone service that allows persons with hearing or speech-related disabilities to place and receive telephone calls with the use of a TTY (Text Telephone) or other text input device, though many users now use more mainstream forms of text and video communications (i.e., text messaging and video chat), as well as video relay services, IP-relay, and IP captioned telephone service.

**8** Interconnected VoIP providers can satisfy their TRS obligations by reporting actual interstate revenue (if possible), submitting a traffic study to identify the proportion of interstate minutes, relying on a safe harbor percentage of total revenue, which is currently set at 64.9%.

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