

**Alert | Video Games & Esports/
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Federal Communications Commission Rules Require Communications in Video Games to Be Accessible and Usable

Advanced Communications Services (ACS) that are available in video games, such as instant messaging, enable players to interact with other players and offer an enhanced gaming experience. The Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) updated accessibility laws to ensure that persons with disabilities have access to modern technologies used in communications. In 2012, the Federal Communications Commission (FCC) adopted rules implementing CVAA that required ACS services and equipment used for ACS to be accessible to persons with disabilities.

Until earlier this year, the FCC had waived the ACS accessibility requirements for video game software (defined by the FCC to include “playable games on any hardware or online platform, including game applications that are built into operating system software”).¹ The FCC expected that manufacturers of video games that incorporate ACS functions and ACS service providers would use the waiver period “to consider accessible design early during the development stages of the next generation of their products and services to better enable them to eliminate accessibility barriers when the class waiver expires ... ”² The FCC also noted that the waiver period would enable software manufacturers to work on solutions to

¹ See, e.g., *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order, 30 FCC Rcd 10016, ¶ 16 (2015) (2015 Waiver Order).

² *Id.*, ¶ 25.

ACS accessibility barriers and allow game publishers the time needed to evaluate adoption of available accessibility solutions.³ Now that the FCC’s waiver has expired, all ACS available in video games (and in substantial upgrades to games) that are introduced into the market on or after Jan. 1, 2019, must comply with the FCC’s accessibility rules.⁴ This GT Alert describes the accessibility objectives that must be met by video games.

Video Game Entities Subject to the FCC’s Accessibility Rules

The video game industry includes game developers who create games, and game publishers who release or resell those games. The types of relationships between game developers and publishers vary across the industry. Developers and publishers may be closely related, such as when a publisher releases and markets the games it develops. Alternatively, a publisher may act simply as a reseller or storefront for games developed by a third party. The CVAA and FCC rules do not use the terms video game “developers” and “publishers,” nor do any FCC orders discuss how the relationship between a developer and publisher could impact accessibility obligations. Instead, “manufacturers” and “service providers” are subject to the CVAA and FCC rules. FCC rules define “manufacturer” to include an entity that produces equipment used for ACS, including software, and define “service provider” to include a provider of applications that can be used for ACS. The FCC interprets the term “service provider” broadly to include a provider of software that gives the consumer the ability to engage in advanced communications “whether the software is downloaded to the consumer’s equipment or accessed in the cloud.”⁵ Moreover, the FCC considers software developers and publishers to have CVAA compliance obligations related to ACS.⁶ Therefore, video game developers and publishers should be aware of the obligations described in this Alert.

General Obligations Related to Advanced Communications Services

ACS includes the following types of services: (1) interconnected Voice over Internet Protocol (VoIP);⁷ (2) non-interconnected VoIP;⁸ (3) electronic messaging;⁹ and (4) video conferencing.¹⁰ Video games are required to be “accessible to and usable by individuals with disabilities, unless the requirements ... are not achievable.”

If accessibility is not achievable (by building accessibility into software or using a third-party solution that individuals with disabilities can access at nominal cost), then ACS providers must ensure that their products are compatible with existing peripheral devices or specialized equipment that can support ACS, unless not achievable. Although video game developers are in the best position to evaluate and include accessibility solutions in games that meet the performance objectives set forth in the FCC’s rules, game

³ *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order, 32 FCC Rcd 10448, ¶ 13 & n.60 (2017).

⁴ When reviewing the accessibility of video games under development, but not yet introduced to the market as of Jan. 1, 2019, the FCC will take into consideration the developmental stage of the game and the effort and expense required to meet accessibility requirements at that stage.

⁵ *See Implementation of Sections 716 and 717 of the Communications Act of 1934*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, ¶ 86 (2011) (*2011 CVAA Order*).

⁶ *2015 Waiver Order*, ¶ 21 (agreeing with the Entertainment Software Association that “the increased availability of accessible console and platform-level ACS features is likely to help game developers and publishers address their ACS compliance obligations ...”) (emphasis added).

⁷ Interconnected VoIP service (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible customer premises equipment; and (4) permits users to receive calls from and send calls to the public switched telephone network. *See* 47 C.F.R. § 9.3.

⁸ Non-interconnected VoIP service (1) enables real-time voice communications that originate from or terminate to the user’s location using Internet protocol; (2) requires Internet-protocol compatible customer premises equipment; and (3) does not include interconnected VoIP service. *See* 47 C.F.R. § 14.10(q).

⁹ Electronic messaging service provides real-time or near real-time text messages between individuals (instant messaging or chat functions). *See* 47 C.F.R. § 14.10(i).

¹⁰ Video conferencing service provides real-time video and audio communications. *See* 47 C.F.R. § 14.10(m).

publishers should take steps to ensure that the games they release comply with ACS accessibility rules given that the FCC has noted that game publishers also have ACS compliance obligations.

- **Accessible:** Accessibility is determined by reviewing a series of performance objectives set forth in the FCC's rules (see below).
- **Usable:** Usability is met if individuals with disabilities have access to the full functionality of the product, including instructions, accessible feature information, documentation, and technical support.
- **Achievable:** Accessibility is "achievable" if it can be accomplished with reasonable effort or expense as determined by the FCC. The FCC considers several factors, including costs needed to make the service accessible, the technical and economic impact on the operation of the entity, and the extent to which the entity in question offers accessible services.

Accessibility Performance Objectives

FCC rules contain numerous accessibility performance objectives for ACS. First, to be accessible, the input, control, and mechanical functions for ACS must be locatable, identifiable, and operable in accordance with 10 separate standards, each assessed independently. Those standards include operable without vision, operable without hearing, and operable without manual dexterity. FCC rules provide details regarding how each standard is assessed. For example, to be operable with limited manual dexterity means that there must be at least one mode that does not require fine motor skills or simultaneous action.

Second, all information needed to operate and use ACS, such as text, static or dynamic images, labels, and sounds, must comply with a set of requirements, each assessed independently. Those requirements include, but are not limited to, offering visual information in auditory form, offering auditory information in visual form, and allowing users to choose static text instead of moving text.

Early in the design stage of a video game, developers are required to consider the FCC's accessibility performance objectives for ACS, as well as whether the ACS functions are usable (or compatible with peripheral devices if accessibility and usability are not achievable). Such developers also must identify barriers to accessibility and usability as they evaluate whether they can meet the performance objectives set forth in the FCC's rules.

As noted above, video game publishers, as providers of software that gives the consumer the ability to use ACS, are also subject to the requirements of CVAA. However, in practice, game publishers who are not the developers of the games being released have little or no control over the accessibility features in a game. Nevertheless, in the event of a consumer complaint regarding accessibility of a game, the FCC may look to publishers as an initial step to resolving the consumer's concerns. Therefore, it is important for game publishers, as well as game developers, to comply with FCC rules regarding accessibility. Although game publishers may not solely rely on contract provisions to meet their regulatory obligations, game publishers with limited or no control over the accessibility functions of a game can include compliance requirements and indemnification provisions in their agreements with developers as part of a plan to ensure that video games meet the FCC's requirements.

Recordkeeping and Annual Reporting

Video game developers and publishers must create records of compliance, including information about efforts to consult with individuals with disabilities; descriptions of accessibility features; and information about compatibility with peripheral devices or specialized consumer premises equipment commonly used

by individuals with disabilities to achieve access. These records must be maintained for a period of two years from the date the video games cease to be offered. By April 1 of each year, an officer of the video game developer or publisher must sign and file a compliance certificate with the FCC's Recordkeeping Compliance Certification and Contact Information Registry (Registry) declaring that the company has established operating procedures that are adequate to ensure compliance with the recordkeeping requirements and that records are being kept in accordance with those procedures, and providing certain contact information.

Enforcement

Entities that develop or publish video games that include ACS services that do not comply with the FCC rules governing accessibility may be subject to FCC enforcement actions initiated by the FCC's Enforcement Bureau or in response to a consumer complaint. FCC rules provide consumers the option of transmitting a Request for Dispute Assistance to the Consumer and Governmental Affairs Bureau, which will assist in resolution of the dispute. If a consumer is not satisfied with the resolution, or as an alternative to filing a Request for Dispute Assistance, a consumer may file an informal or formal complaint with the Enforcement Bureau. Although a game publisher may not ultimately be found responsible for an accessibility issue with a game, the FCC will contact the publisher if it is the subject of a consumer complaint. Therefore, it is essential that publishers maintain accurate contact information in the FCC's Registry.

FCC enforcement actions may include the issuance of a Notice of Apparent Liability proposing a monetary forfeiture, with the alleged violator having an opportunity to respond. The FCC may then issue a forfeiture order directing the responsible party to pay a fine. For violators of CVAA, the amount of any forfeiture penalty shall not exceed \$115,624 for each violation or each day of a continuing violation, up to a maximum of \$1,156,242 for any single continuing violation.¹¹ The FCC commonly enters into consent decrees with violators that include the payment of civil penalties and admissions of liability.

If you have questions about accessibility requirements applicable to ACS available in video games, or about the regulatory compliance obligations of game developers or publishers, please contact us at your convenience.

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¹¹ See 47 U.S.C. § 503(b)(2)(F) and 47 C.F.R. §§ 1.80(b)(3), as adjusted for inflation.

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