

New Accessibility Requirements in Effect for Video Game Software

As of January 1, 2019, video game developers and publishers are now subject to certain accessibility requirements under the Twenty-First Century Communications and Video Accessibility Act (CVAA) that apply to manufacturers and providers of advanced communications services (ACS). Among other things, video game developers and publishers are required to keep records of their efforts to comply with the ACS accessibility requirements, and they must submit annual recordkeeping compliance certifications to the Federal Communications Commission (FCC), the first of which is due for video game developers and publishers on April 1, 2020. This update provides a summary of ACS accessibility requirements and enforcement mechanisms, and offers video game developers and publishers best practice tips on how to facilitate ACS compliance.

Background

Enacted in 2010, the CVAA updated existing accessibility regulations to cover modern communications technologies. In relevant part, it requires manufacturers and providers of ACS to make their ACS offerings accessible to people with disabilities, subject to certain exceptions. The CVAA specifically defines ACS as (1) interconnected voice over internet protocol (VoIP) service; (2) non-interconnected VoIP service; (3) electronic messaging service; and (4) interoperable video conferencing service. Text messaging, email, instant messaging and video communications services are examples of ACS that fall within one or more of the foregoing categories. Accordingly, video games that enable or include any of these features (such as in-game chat or texting) are subject to the CVAA's ACS accessibility requirements.

The FCC, which is the federal agency responsible for enforcing the CVAA, granted the video game industry a waiver in 2012 that exempted video game software from the ACS rules. Following a series of extensions, the FCC allowed the waiver to expire at the end of 2018, which means that as of January 1, 2019, video game developers and publishers are now subject to ACS compliance obligations.

Which games are covered under the ACS rules?

Games made available to the public prior to December 31, 2018, are still covered under the prior waiver, even if they continue to be sold to the public after January 1, 2019. However, all games released on or after January 1, 2019, and all games released prior to that date that undergo future "substantial upgrades," must comply with the ACS accessibility requirements. A "substantial upgrade" means any upgrade to a video game that presents developers/publishers with a "natural opportunity" to assess and remediate the accessibility of any advanced communications functions. Natural opportunities may include, for example, "the redesign of a product model or service, new versions of software, upgrades to existing features or functionalities, significant rebundling or unbundling of product and service packages, or any other significant modification that may require redesign."

How does one make ACS accessible?

The CVAA allows some flexibility in how manufacturers and service providers can demonstrate the accessibility of ACS, providing that there must be at least one setting that renders the offering accessible to users with

disabilities (e.g., blind/low vision, deaf/hearing impaired, deaf-blind, cognitive impairment). Accessibility is determined by whether the "input, control, and mechanical functions" are "locatable, identifiable, and operable." Manufacturers and service providers can also satisfy their ACS accessibility obligations by relying on compatible third-party products and services that are available to the consumer at a nominal cost.

Are there any safe harbors that apply to ACS?

While there is no safe harbor standard for CVAA compliance, the [Web Content Accessibility Guidelines](#) set forth specific criteria used to evaluate the degree to which online content is accessible to persons with disabilities and have become the prevailing industry standard for compliance.

What recordkeeping and certification requirements apply to ACS?

In addition to complying with the ACS rules' technical requirements, video game developers and publishers must also fulfill recordkeeping and annual certification obligations. These obligations require covered manufacturers and service providers to submit to the FCC a certification of records concerning (1) efforts undertaken to consult with individuals with disabilities about product or service accessibility barriers and solutions; (2) descriptions of the accessibility features of products and services; (3) peripheral device compatibility; and (4) if a product or service is not accessible, why compliance was not "achievable" (which involves a factual and legal analysis of whether compliance is possible with reasonable effort or expense).

Video game developers and publishers offering ACS must submit the annual recordkeeping certification to the FCC by April 1 each year. Because the certification must cover records pertaining to the previous calendar year and the ACS rules did not go into effect for video game software until January 1, 2019, the first certification for video game developers and publishers—which will cover recordkeeping requirements for the 2019 calendar year—will not be due until April 1, 2020. The certification must be in the form of an affidavit or declaration signed by an officer of the company that has actual knowledge of the company's recordkeeping process and related activities. The certification must also ensure that the FCC has current contact information for a manufacturer or service provider in the event of a complaint.

How are ACS violations enforced?

Enforcement in the ACS context is largely a consumer-driven process. Consumers can file informal or formal complaints with the FCC alleging CVAA noncompliance. More often, however, consumers make requests for dispute assistance (RDAs) seeking the FCC's help in overseeing a process wherein the responsible manufacturer or service provider is given an opportunity to address the complained-of accessibility issues. To the extent that the parties fail to reach resolution through the RDA process or the noncompliance persists, the FCC is authorized to impose on the manufacturer or service provider fines of up to \$115,624 for each violation of the ACS rules. This amount can be increased by up to \$115,624 for each day of a continuing violation, up to a maximum of \$1,156,242 for any single act or failure to act. (Note that these maximum fines are adjusted for inflation by the FCC on an annual basis.)

Best Practice Tips

In order to support ACS accessibility compliance, video game developers and publishers would be wise to do the following:

- Encourage "accessibility by design" at the beginning of the game development cycle, including by consulting with members of the disability community (as required under the CVAA);
- Review game production calendars and make note of any planned "substantial upgrades" to pre-2019 video games (e.g., expansion packs, software patches and updates);
- Inventory the ACS features in all games to be released in 2019 or later (whether complete or still in development);
- Post on the video game developer's or publisher's website contact information to which consumers may direct accessibility-related inquiries; and
- Create and maintain detailed records consistent with the annual ACS recordkeeping and certification requirements referenced above.

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