



ACCESSIBILITY ON DEMAND

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GROUP

Section 717 - Recordkeeping

Presented by:
Maria Browne
Tim Springer





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Webinar Features

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FCC Accessible Communications

- DWT and SSB are providing a three part webinar series covering the FCC Accessible Communications requirements
- The series will cover the communications aspects of the 21st Century Communications and Video Accessibility Act (CVAA), Section 255 of the Telecommunications Act and the rules set forth at 47 CFR 6, 7 and 14.
- The series will have three sessions:
 - **Legal Requirements** – Overview of the FCC Rules Pertaining to Recordkeeping and Certification (recording available)
 - **Recordkeeping Obligations** – Review of the recordkeeping obligations for firms
 - **Product Lifecycle Implementation** – Implementation of recordkeeping requirements and extensions to the product development lifecycle (August 1st)



Agenda

- About DWT and SSB
- Overview
- Recordkeeping Requirements
 - FCC Rules
 - Annual Certification to FCC
 - Governance Model
 - Non-Achievability Documentation
- Product and Service Recordkeeping Requirements
 - Functionality Questionnaire
 - Design Checklist
 - Functional Testing
 - Accessibility Features
 - Recordkeeping Repository





About SSB BART Group

- Unmatched Experience
- Accessibility Focus
- Implementation-Oriented Solutions
- Solutions That Reduce Legal Risk
- Organizational Stability and Continuity
- Knowledge That Is Up-to-Date, All the Time
- Published and Peer Review Auditing Methodology
- Fourteen hundred organizations (1452)
- Fifteen hundred individual accessibility best practices (1512)
- Twenty-three core technology platforms (23)
- Twenty-two thousand audits (22,408)
- Fifteen million accessibility violations (15,331,444)
- One hundred twenty-one thousand human validated accessibility violations (121,290)

(Statistics provided as of January 2013)



ACCESSIBILITY ON DEMAND



About Davis Wright Tremaine

Davis Wright Tremaine LLP (DWT) is a full-service firm with approximately 500 lawyers in nine offices on the east and west coasts of the United States and in Shanghai. We are recognized for excellence in a broad number of areas, with:

- 89 of our attorneys across 32 practice areas cited as leaders in their fields in the most recent Chambers USA guide; and
- Over 140 of our attorneys across 46 practice areas included in the 2013 edition of “The Best Lawyers in America.”

Lawyers in our Communications Practice Group have decades of federal and state regulatory experience advising clients in every area of the communications industry. Our communications practice:

- Counsels clients on the business and regulatory approvals for communications transactions;
- Lobbies government officials and agencies to help shape laws that affect our clients’ businesses; and
- Handles compliance, litigation and dispute resolution in the manner that best meets our clients’ strategic and financial objectives.



Overview

- The [21st Century Communications and Video Accessibility Act of 2010](#) (CVAA) focuses on ensuring that new forms of communication and video are accessible to users with disabilities
- Primarily targeted at communications software and equipment manufacturers and service providers, video programming distributors and producers of video content
- Requires that most communications and video programming that is delivered via the Internet be provided in an accessible manner to individuals with disabilities



Recordkeeping Requirements

- Entities covered by Section 255, 716 and 718 of the Communications Act (“Covered Entities”) must create and maintain records of efforts taken to implement conformance with relevant sections of the Act.
- Records must be maintained for at least two years after a product or service ceases to be manufactured or offered by the covered entity (directly or through a third party or reseller).
- Regulations governing the record keeping, [47 CFR 14.31](#), provide a significant amount of latitude in terms of the exact format of the records.
- Records do not need to be made public until filed in response to a complaint and then are subject to certain confidentiality protections.
- FCC has said it will not create a database of the more than 3,000 filers but that contact information submitted with certifications will be available in October when complaint processes are effective.



Recordkeeping Requirements

The FCC regulations specifically identify three types of records that must be kept as part of the overall record keeping activity:

- “Information about the manufacturer's or service provider's efforts to consult with individuals with disabilities
- Descriptions of the accessibility features of its products and services
- Information about the compatibility of its products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.”

*The items above define specific records that must be kept as part of the activity but do not define **all** the records that must be kept. The records, overall, must show “records of the efforts taken by such manufacturer or provider to implement sections 255, 716, and 718 with regard to this product or service.” For example, if claiming that accessibility compliance is not achievable, must keep records that will help sustain burden of proof.*



Certification

- As of April 1st, 2013 an officer of all covered entities must certify under penalty of perjury to the FCC that they are keeping the required records.
- Certification mandates that a recordkeeping process is in place and the FCC requirements are being met.
- Certification is supported by “an affidavit or declaration under penalty of perjury, signed and dated by the authorized officer of the company with personal knowledge of the representations provided in the company's certification.”
- Certifying entity must identify the name and contact details of the person or persons within company that are authorized to resolve complaints and the name and contact details of person within company designated for receiving complaints (or registered agent).



Governance Model

FCC Accessibility

This is not Section 508

- The CVAA implies a strong, central governance model for conformance
 - Generally a materially different governance model than that currently used for accessibility
 - Most organizations have a governance model that requires each service product line to maintain its own records for accessibility
 - A central accessibility office may play a coordinating and supporting role across the organization, but typically has no authority to compel product groups to produce documentation
- Current approach was developed under and aligns well with accessibility procurement laws such as Section 508
- Section 508, however, has no enforcement mechanism, as it relates to service providers and manufacturers and is a procurement law
 - Reality – it's a pretty low risk law with spotty enforcement
 - Worst case scenario – organizations don't buy your product



Governance Model

FCC Accessibility

This is the CVAA

- CVAA regulations are enforced by the FCC and can result in damages up to \$100,000 a day and \$1,000,000 dollars in total for each complaint; common carriers also subject to damages
- Certification is “supported with an affidavit or declaration under penalty of perjury”
- Certification means that records are being actively kept; FCC requires that entity has established and sustains “effective internal procedures for creating and maintaining records.”
- A decentralized governance model runs the material risk that a product will not develop or maintain the relevant records
- In that event, should a complaint occur, the organization would find itself in the uncomfortable position of having certified to the FCC that records are being kept when, in fact, no such records exist. We would expect the FCC to react negatively to such a situation.
- A basic governance model requiring that these records be filed centrally with a group under the authority of the certifying party would seem to meet the requirements of the FCC and ensure conformance to the process



Non-Achievability Documentation

- The Act only requires that products be made accessible if doing so is “achievable.”
- When covered entities do not make their products or services accessible, and claim as a defense that it is not achievable for them to do so, they bear the burden of proof on this defense.
- While entities are not technically required to keep records to this end they should note that they bear the burden of proof for justifying such claims.



Non-Achievability Documentation

If a complaint was to arise, and a claim of “not achievable” was to be made, the FCC would require that an organization provide records demonstrating:

- The nature and cost of the steps needed to make equipment and services accessible in the design, development, testing, and deployment process to make a piece of equipment or software in the case of a manufacturer, or service in the case of a service provider, usable by individuals with disabilities;
- The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;
- The type of operations of the manufacturer or service provider; and,
- The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points. (FCC 11-151 ¶221)



Confidentiality

- Section 717(a)(5)(c) requires FCC to keep confidential records that are (1) produced in response to complaint; (2) created or maintained pursuant to the rules; (3) directly relevant to equipment or service at issue in complaint
- Not protected: other materials not required by the recordkeeping rules i.e., defense of achievability
- Any materials filed in response to FCC complaint should be filed with a confidentiality request pursuant to Section 0.459 of the FCC Rules
- Assert the statutory exemption for disclosure pursuant to Section 0.457 of the FCC Rules



Complaints

Two Complaint Paths, Informal or Formal, Both Requiring Advance Efforts to Resolve

- Informal complaints must be preceded by a Request for Assistance to the FCC Consumer Governmental Affairs Bureau
 - Informal complaint must include certification that Request for Assistance was filed within 30 days
 - FCC will help parties try to reach resolution in 30 days after which, if not resolved, complainant can file informal or formal complaint
- Formal complaints
 - Must include certification that complainant has engaged in (or attempted to engage in) good faith efforts to settle dispute including a certified letter outlining the allegations that form basis of complaint



Complaint Requirements

Informal Complaint

An informal complaint must be addressed to the FCC's Enforcement Bureau, which will then forward the complaint to the defendant agent

- The company has 20 days to file an answer, supported by a declaration of an officer of the company, demonstrating its due diligence in exploring accessibility and achievability throughout the design, development, testing and deployment stages of a product or service
- Must include all documents that support its position but such documents may be requested to be confidential
- FCC has 180 days to resolve the informal complaint



Complaint Requirements

Formal Complaint

A formal complaint must be filed with the full FCC and served on the defendant's designated agent

- In the event a Certified Letter indicating that a Formal Complaint will be filed, the company has a “reasonable period of time” to respond
- The company's attempts to discuss the possibility of settlement must be documented
- When a Formal Complaint is served on the company's Agent, the Company has 20 days from service to file an Answer, which must conform to the FCC's formal complaint proceeding rules
- The Formal Complaint may be accompanied by a request for up to ten (10) written interrogatories to which the defendant has 10 days to respond
- Supplemental complaint for damages against a common carrier may be filed within 30 days of a liability order



Product/Service Recordkeeping Requirements

Functionality Questionnaire

- Develop a basic functionality questionnaire that covers all the potential product/service features that are covered under Sections 255, 716 and 718 of the Communications Act
- If the product or service has functionality that answers “yes” to any of questions
 - Complete a more extensive compliance and record keeping process for the covered functionality.
- If the product or service answers “no” to all questions
 - Then the completed questionnaire can be submitted to the organization's record-keeping repository and the product can exit the process.



Product/Service Recordkeeping Requirements

Functionality Questionnaire – Examples

- Is the product a fixed-line telephone or telephone-like device?
 - E.g. Polycom VOIP Phone, Touch Tone Phones
- Is the product a mobile telephone?
 - E.g. iPhone, Samsung Galaxy
- Does the product or service provide for text messaging, instant messaging, e-mail or other text based communication?
 - G-mail, Yahoo mail, Outlook web client, AOL Instant Messenger, iMessage, branded web-based email provided through a service providers site
- Does the product provide for voice based communication?
 - Inter connected VoIP (such as offered by cable MSOs), Skype, Google Talk, Facebook Chat
- Does the product provide for video based communication?
 - (Also) Skype, Google Talk, Facebook Chat



Product / Service Recordkeeping Requirements

Design Checklist

- Provide a list of best practices that a system must implement to be usable by people with disabilities and meet the implementation requirements of the relevant regulations.
- The core criteria used for this are the relevant portions of the CFR that relate to the CVAA, including 47 CFR 6, 7, 14
 - Can add 47 CFR 79 but this is generally not currently covered by recordkeeping requirements and derives from Title II of the CVAA.
- Checklists will cover *all* of the best practices related to the technology platform used in the product.
- Checklists should cover all the core development platforms
 - Web, iOS, Android, Embedded Software, Windows Software, Hardware, ACS Services, etc.
- Don't try to build this yourself – recommend licensing this from SSB or another qualified vendor
 - Subject matter is complicated and changes rapidly



Product / Service Recordkeeping Requirements

Design Checklist

Define a method of implementation for each requirement on the checklist:

- Native Implementation – Best practice will be addressed directly in the product, i.e., built-in
- Accessibility API – The best practice will be implemented by supporting the relevant OS or platform level accessibility API
- Third-party – The best practice will be addressed through the use of third-party accessibility solutions, available to consumer through covered entity at nominal cost
 - Triggers a need to support the third party solution
- Non-Achievable – Conformance with the best practice is “not achievable” as defined by the CVAA.
 - Triggers a need to provide secondary documentation surrounding the determination of non-achievability
- Not Applicable – Best practice is not applicable in context of the product



Product/Service Recordkeeping Requirements

Design Checklist - Timing

- As part of the FCC accessibility requirements, products and services must ensure that accessibility is considered and evaluated as early as possible in the product development life cycle.
- Covered entities are directed to complete an accessibility evaluation as part of the design phase of the product (47 CFR § 6.7, 7.7 and 14.20(b)), and to ensure that the accessibility requirements defined for the product/service are addressed as early as possible in the development process
- As noted earlier this is often in contrast to the procurement driven accessibility governance models where accessibility is considered after the fact



Product/Service Recordkeeping Requirements

Functional Evaluations – Requirement

- User testing of the product/service by individuals with disabilities
- Ensures (i) user input into the development process and (ii) to provides validation of the use of the system in supported assistive technologies
- Strongly implied requirement under 47 CFR 14.21 (a) – Accessible
- Hard requirement of 47 CFR 14.31 (a) (1) and (3)
- Broad industry consensus that testing with users with disabilities is a requirement for ensuring accessibility
- Materially the same concept define in 36 CFR 1194.31 requirements of Section 508 with broader scope



Product/Service Recordkeeping Requirements

Functional Evaluations - Approach

- Execute a set of core use cases by individuals with disabilities to determine if users can complete core tasks in the system
- Use cases are constructed as simple acceptance tests performed by users of assistive technologies
- Functional assessment should be completed in conformance to the use case testing methodology provided as part of SSB's Unified Audit Methodology
- Testing performed in assistive technologies that meet the definition of nominal cost



Product/Service Recordkeeping Requirements

Accessibility Features

- Based on assessment results and product development activities organizations develop a list of “features” that support accessibility
- SSB recommends the features document state the compliance issues that were found in the assessment and subsequently fixed in the product
- Features document should be cumulative across releases
 - As the product/service implements more accessibility requirements this should be reflected in the document



Product/Service Recordkeeping Requirements

Accessibility Features

- A publicly available features document is required under usability requirements of performance objectives (47 CFR 14.21 (c))
- Can be the same document used to satisfy the recordkeeping requirements or a shorter document for public consumption
- For ease of maintenance SSB recommends a single document be used for both requirements
- Similar in construction to requirement under 47 CFR 1194.41 (b)



Recordkeeping Repository

- SSB recommends that organizations maintain a central repository of the product records that are maintained for each product or service that is covered under the CVAA.
- This central repository should be maintained by a single group – generally compliance - that has the authority to require and compel products to submit the relevant paperwork
- We see such a centralized approach as the clear implication of certification requirement for an officer with “personal knowledge of the representations provided in the company's certification”
- The legislative and regulatory intent aligns with this – the goal of the recordkeeping is accountability



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Tim Springer

tim.springer@ssbbartgroup.com

Maria Browne

mariabrowne@dwt.com

Kim Phillips

kim.phillips@ssbbartgroup.com

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