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FEDERAL COMMUNICATIONS LAW COMPLIANCE OVERVIEW FOR 2016

January 2016

Baller Herbst Stokes & Lide, P.C. has prepared this document for providers of cable television, telecommunications, interconnected VoIP, Internet access, and other communications and information services. We have summarized below, by service, the main federal regulatory requirements that apply to such providers. At the end of the memorandum, we have provided a chart setting forth the deadlines for various filings and other time-sensitive activities.

Disclaimers

This memorandum is not intended to be exhaustive. It only addresses requirements that apply to communications or information service providers when acting as such, and not when acting in other capacities – e.g., as pole owners. It does not cover tax, environmental, corporate, employment, or other requirements of general applicability. It does not deal with state or local franchising, right-of-way, tower siting, and other requirements. It discusses the matters covered only as they existed on January 1, 2016, and only in sufficient detail to make readers aware of potential compliance issues and of the main considerations involved. Whether and how a particular requirement may apply will depend on a provider's particular circumstances.

We are providing this memorandum solely for general educational purposes. It is not intended to be legal advice and should not be treated or cited as such. For legal advice, please consult your own legal counsel or contact us.

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DISCUSSION

I. CABLE SERVICE

Providers of “cable service” over a “cable system,” as defined in the federal Communications Act and FCC rules, may be subject to the following requirements.¹

A. Cable Service – Reporting, Filing, and Other Requirements

1. Requirements for New Cable Operators and New Communities Served

- In addition to the reporting, filing, and other obligations outlined below, new providers of cable service may be required to submit a variety of information to the FCC prior to, or shortly after, commencing service. This is in addition to local or state franchise requirements, if any, and other regulatory requirements (e.g., notifying local broadcasters, etc.). FCC filing requirements for new operators include:
 - Obtaining FCC Registration Number (FRN). All entities that wish to do business with the FCC must first obtain an FRN, which can be obtained online at: <https://apps.fcc.gov/coresWeb/publicHome.do>.
 - Community Registration. Before commencing operation, a cable system operator must file Form 322 Cable Community Registration for each

¹ A “cable service” is defined in Section 602(6) of the Communications Act, 47 U.S.C. § 522(6), as: “((A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” Section 602(7) of the Act, 47 U.S.C. §522(7), defines a “cable system” as “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include [various specified exceptions].”

community to be served.² Registration is accomplished online through the FCC's Cable Operations and Licensing System ("COALS").

- If applicable, filing a form to establish a New Cable Television Relay Station ("CARS") (FCC Form 327).

2. Form 325 – Annual Cable Operator Report

- Cable systems serving 20,000 or more subscribers must file Form 325 – Annual Cable Operator Report. For cable systems serving fewer than 20,000 subscribers, the FCC selects a random sample who must file Form 325.
- Form 325 collects basic information on:
 - number of subscribers
 - number of potential subscribers
 - number of cable modem subscribers
 - equipment information (leased cable modems and set-top boxes)
 - plant information (type of system, length of coaxial/ fiber optic plant, etc.
 - frequency and signal distribution information
 - video channel capacity
 - channel lineup
 - See 47 CFR §76.403
- Deadlines:
 - If the operator has more than 20,000 subscribers, the deadline is the end of the calendar year.
 - If the operator has less than 20,000 subscribers "within 60 days after the Commission notifies the operator that the form is due." According to the FCC Media Bureau, the Commission sends out notification letters to affected cable operators near the end of the calendar year. Form 325 may only be submitted electronically, via COALS <https://apps.fcc.gov/coals/>

²

47 C.F.R § 76.1801

3. Form 396-C: MVPD EEO Program Annual Report

- Cable operators with six or more full-time employees must complete the brief [Form 396-C](#), affirming their compliance with the FCC's EEO program, 47 CFR 76.71, *et seq.* Form 396-C must be filed electronically.
- Deadline: **September 30, 2016.**

4. Performance Testing

- Under 47 CFR § 76.601, each cable system with more than 1,000 subscribers must conduct complete technical performance tests at least twice each calendar year, to determine the extent to which the system complies with technical standards set forth in § 76.605(a).
- No form submission is required, but affected cable operators must maintain proof-of-performance testing records in the public file.
- All-digital systems may not need to conduct performance testing described above. In 2009, the FCC granted RCN a complete waiver from performance testing requirements for its all-digital systems, finding that the technical standards set forth in § 76.605 are designed to test analog systems, and have little relevance for digital systems.³ While the FCC has *not* issued a blanket waiver relieving every all-digital system from compliance, in August 2012 the Commission initiated a [rulemaking](#)⁴ to modernize its technical standards as they apply to digital cable systems, but as of yet has not followed through with the adoption of any rules pertaining to performance testing for digital systems

5. Signal Leakage and Aeronautical Frequency Monitoring

- Cable systems operating in frequency bands 108-137 and 225-400 MHz must perform certain signal leakage tests, as set forth in 47 CFR § 76.1803 and § 76.614.
- Affected providers must file Form 320 – “Basic Signal Leakage Performance Report - on an annual basis, “at least once each calendar year, with no more than 12 months between successive tests thereafter”

³ *In the Matter of RCN Corporation Petition for Special Relief*, CSR-8166, Order, DA 09-2260 rel. October 9, 2009.

⁴ *In the Matter of Cable Television Technical and Operational Requirements*, MB Docket No. 12-217, Notice of Proposed Rulemaking, FCC 12-86, rel. August 3, 2012.

(§76.611). Form 320 must be filed electronically via COALS <https://apps.fcc.gov/coals/>.

- In the event a cable system signal leakage impacts certain aeronautical frequencies, cable systems must also file Form 321, Aeronautical Frequency Notification.

6. Annual FCC Regulatory User Fees

- Pursuant to 47 C.F.R. § 1.1155, cable operators operating on October 1, 2015 must pay an annual regulatory fee in 2016 on a per-subscriber basis, based on the number of basic cable subscribers served on December 31, 2015.
- Government entities⁵ and non-profit entities⁶ that are exempt from taxation under section 501(c) of the IRS Code are exempt from regulatory fees and need not submit payment. See 47 CFR § 1.1162.
- ***De minimis* exception:** The FCC increased the *de minimis* exception threshold to \$500 from \$10. Regulated entities whose total regulatory fee liability amounts to less than \$500 are exempt from payment of regulatory fees.
- The regulatory fee applicable to fiscal year 2015 (FY 2015) was set at \$0.96 per subscriber, based on the number of basic cable subscribers served on December 31, 2014. If the Commission remains consistent with past practice, it will issue a fact sheet in early 2016 addressing what providers owe for fiscal year 2015, and when the fee is due. Regulatory fees are typically due in late August or September. In 2015, the regulatory fee was due September 24, 2015.⁷

⁵ “For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.” 47 CFR § 1.1162(b).

⁶ See 47 CFR § 1.1162(c). Such non-profit entities must provide proof of status to the Commission within “60 days of its coming under the regulatory jurisdiction of the Commission or at the time its fee payment would otherwise be due, whichever is sooner.”

⁷ See *FY 2015 Cable Fact Sheet for Regulatory Fees*, FCC Document (Sept. 11, 2015) available at: <https://www.fcc.gov/document/fy-2015-cable-fact-sheet-regulatory-fees>.

- In FY 2013, the FCC concluded that Internet Protocol Television (IPTV) providers should be included in the cable television systems category, and assessed a regulatory fee at the same rate.⁸
- Direct Broadcast Satellite (DBS) providers must pay a regulatory fee as of FY 2015. DBS providers are required to pay \$0.12 per subscriber per year. For FY 2015, the number of subscribers is based on the total subscribers as of December 12, 2014.
- Licensees of CARS (Cable Television Relay Service) facilities must pay a regulatory fee.⁹ For fiscal year 2015, entities that held a CARS license on October 1, 2014 were required to pay \$660 per license.
- Entities must file any annual regulatory fee obligation using the Commission's Fee Filer system, with Form 159-E. Use of the Fee Filer system is mandatory, and payments in the form of checks, money orders, and cashier's checks are no longer accepted.
- Further information, including methods of payment, waivers, deductions, and deferments, is available at <http://www.fcc.gov/regfees>.

7. Copyright Statutory Royalty Fee

- Under federal law, cable operators are required to pay a statutory royalty fee for retransmitting television and radio broadcasts. 17 U.S.C. § 111. On a semi-annual basis, operators must file Statements of Account with the Licensing Division of the U.S. Copyright Office, reflecting accounting periods of January 1-June 30, and July 1-December 31.
- Notably, under the federal rules certain providers may qualify as "cable systems" for copyright purposes, even if there may be some question about whether the system would be a "cable system" for other purposes under federal law. See 37 CFR § 201.17(b)(2).¹⁰

⁸ See *FY 2013 Report and Order*, 28 FCC Rcd at 12363 ¶ 33.

⁹ See 47 CFR § 1.1155 Schedule of regulatory fees and filing locations for cable television services.

¹⁰ "A cable system is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. A system that meets this definition is considered a "cable system" for copyright

- Cable systems whose semiannual gross receipts are less than \$527,600 are to complete the [SA1-2 Short Form](#).¹¹
- Cable systems with semiannual gross receipts exceeding \$527,600 must use the [SA3 Long Form](#).¹²
- **Deadlines:** Cable systems are given 60 days after the close of each accounting period in which to file statements of account and royalty fees. Accordingly, for the July – December 2015 accounting period, file between January 1 and March 1, 2016. For the January – June 2016 accounting period, file between July 1 and August 29, 2016.

8. Review and Update Public File

- Under the FCC’s “public file” requirement, certain records must be maintained and made available for inspection by cable systems (47 CFR §§ 76.1700 – 1717). We recommend that cable operators periodically review their compliance with FCC public file requirements. Information required to be kept in the public file may include:
 - Political file
 - Equal employment opportunity
 - Commercial records on children’s programming
 - Proof-of-performance test data
 - Performance tests
 - Signal leakage logs and repair records
 - Leased access
 - Principal headend
 - Availability of signals
 - Operator interests in video programming
 - EAS tests and activation
 - Complaint resolution
 - FCC rules and regulations
 - Sponsorship identification
 - Compliance with technical standards

purposes, even if the FCC excludes it from being considered a “cable system” because of the number or nature of its subscribers or the nature of its secondary transmissions....” 37 CFR § 201(b).

¹¹ <http://www.copyright.gov/forms/SA1-2c-2011.pdf>

¹² <http://www.copyright.gov/forms/SA3c-2011.pdf>

- Different requirements based on the number of subscribers:
 - < 1,000: exempt from public inspection requirements pertaining to the political file, sponsorship identification, EEO records, children's programming, proof-of-performance test data, and signal leakage.
 - 1,000 – 4,999: sets of records outlined above for <1,000 must be provided upon request, but need not be maintained for public inspection.
 - >5,000: must maintain such records in a public inspection file.

9. Annual Privacy Notice

- Section 631 of the Communications Act of 1934, as amended (codified at 47 U.S.C. §551), regulates the disclosure of the personally identifiable information collected by cable operators. Under the provisions, cable companies are required to provide notice to their customers regarding what personally identifiable information is collected, if it is disclosed, how long the information is stored, etc. In addition, cable operators are prohibited from collecting or disclosing personally identifiable information without the subscriber's written or electronic consent, and must take steps to prevent unauthorized disclosure of personally identifiable information.
- Cable operators must provide the privacy notice to subscribers "at the time of entering into an agreement to provide any cable service or other service to a subscriber and at least once a year thereafter..." 47 U.S.C. § 551(a)(1).

10. Commercial Leased Access

- Section 612 of the Communications Act of 1934, as amended, and as codified at 47 U.S.C. § 532, requires a cable operator to set aside channel capacity for commercial use by unaffiliated video programmers.
- The FCC has adopted extensive rules governing commercial leased access, which are codified at 47 C.F.R. §§ 76.970 through 76.977. In 2008, the Commission issued a *Report and Order* that would have imposed far more demanding requirements on cable operators and would have lowered significantly the rates that they could charge for commercial leased access. *In the Matter of Leased Commercial Access, Report and Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd 2909 (2008). The U.S. Court of Appeals for the Sixth Circuit stayed the effect of the *Report and Order*, leaving the regulations contained in the October 2007 Edition of the Code of Federal Regulations as presently controlling.
- The Communications Act and the FCC's current regulations establish leased access set-aside requirements that are based on a cable system's total

activated channel capacity. Cable operators with 36 to 54 activated channels must set aside 10 percent of those channels not otherwise required for use, or prohibited from use, by federal law or regulation for leased access. Operators with 55 to 100 activated channels must set aside 15 percent of those channels not otherwise required for use, or prohibited from use, by federal law or regulation. Cable operators with more than 100 activated channels must designate 15 percent of such channels for commercial use.

- In accordance with the statute, cable operators may continue to employ any unused channel capacity designated for leased access until an unaffiliated programmer actually obtains use of the channel capacity pursuant to a written agreement. 47 U.S.C. § 532(b)(4). Moreover, cable operators may use up to 33 percent of the channel capacity designated for leased access for qualified minority or educational programming sources, whether or not the source is affiliated with the cable operator.¹³
- Under the FCC's current rules, cable operators are required to provide prospective leased access programmers the following information on receipt of a bona-fide request for leased access capacity:
 - A statement of how much of the operator's leased access set-aside capacity is available;
 - A complete schedule of the operator's full-time and part-time leased access rates;
 - Rates associated with technical and studio costs; and
 - If specifically requested, a sample leased access contract.¹⁴
- If a cable operator has less than 15,000 subscribers, it must provide the above information within 30 calendar days of the date which a bona fide request for leased access is made. If the cable operator has more than 15,000 subscribers, it must provide the above information within 15 days of the request for leased access.

11. Closed Captioning

- All video programming distributors (VPDs) (cable operators, broadcasters, satellite distributors, and other multi-channel video programming

¹³ 47 C.F.R. § 76.977.

¹⁴ 47 C.F.R. § 76.970(i)(1).

distributors) are required to close caption their television programs.¹⁵ On February 20, 2014, the FCC adopted a Report and Order containing new rules for TV closed captioning that became effective on March 16, 2015.¹⁶ The FCC placed the burden of compliance with the new closed captioning rules on VPDs instead of video programmers, who are largely responsible for the closed captioning. As a result, VPDs must exercise best efforts to obtain compliance certifications from its video programmers.

- Under the new closed captioning rules, VPDs must use best efforts to obtain a certification from each video programmer with whom it contracts attesting that the programmer:
 - Complies with the new captioning quality standards;
 - Adheres to the best practices for video programmers; or
 - Is exempt from the closed captioning rules under one or more pre-existing exemptions.
- The Order distinguishes between pre-recorded, live, and near-live programming recognizing the difficulties involved with captioning live or near-live programming. The Order also contains measures to promote greater access to news programming for individuals who are deaf and hard of hearing.
- The FCC has previously established different closed captioning schedules applicable to English language and Spanish language programming. All new English language programming must be captioned with some exceptions.¹⁷ As of January 1, 2010, all new Spanish language programming must be captioned, with some exceptions.¹⁸ Separate

¹⁵ 47 C.F.R. § 79.1 *et seq.*

¹⁶ See *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc.*, CG Docket 05-231, Report and Order, Notice of Declaratory Ruling, and Further Notice of Proposed Rulemaking (February 20, 2014), available at: <http://www.fcc.gov/document/closed-captioning-quality-report-and-order-declaratory-ruling-fnprm>

¹⁷ 47 C.F.R. § 79.1(b)(1)(iv).

¹⁸ 47 C.F.R. § 79.1(b)(3)(iv).

schedules describe the percentage of “pre-rule” English and Spanish language programming that must be captioned.^{19, 20}

▪ Exempt Programming

• Self-Implementing Exemptions²¹

Self-implementing exemptions operate automatically and programmers do not need to petition the FCC. Examples include public service announcements that are shorter than 10 minutes and are not paid for with federal dollars, programming shown in the early morning hours (from 2 a.m. to 6 a.m. local time), and programming that is primarily textual in nature. There is also an exemption for non-news programming with no repeat value that is locally produced by the video programming distributor (VPD). To see a complete list of self-implementing exemptions, visit the FCC’s Web site at: <http://fcc.us/fvNL26>.

• Economically Burdensome Exemptions Based²²

The FCC has established procedures for petitioning for an exemption from the closed captioning rules when compliance would be economically burdensome on a cable operator (previously referred to as “undue burden petitions”). The FCC must consider the following facts to determine whether closed captioning would be economically burdensome: 1) the nature and cost of the closed captions for the programming, 2) the impact on the operation of the provider or program owner, 3) the financial resources of the provider or program owner, and 4) the type of operations of the provider or program owner. To find out more, see the FCC’s website at: <http://fcc.us/fRkmQy>. There is no form to fill out. Electronic filing and faxes will not be accepted. A summary of the petition process is provided at the FCC Web site address above. While a petition is pending, the programming that is the subject of the petition is exempt from the closed captioning requirements.

¹⁹ 47 C.F.R. § 79.1(b)(2)(ii).

²⁰ 47 C.F.R. § 79.1(b)(4)(ii).

²¹ 47 C.F.R. § 79.1(d).

²² 47 C.F.R. § 79.1(f).

- Compliance and Complaints

Cable operators are required to provide a telephone number, fax number, and e-mail address for the receipt and handling of immediate closed captioning concerns raised by consumers while they are watching a program. Operators must also include this information on their Web sites. In situations where a cable operator is not immediately available, any calls or inquiries received, using this dedicated contact information, should be returned or otherwise addressed within 24 hours. In those situations where the captioning problem does not reside with the distributor, the staff person receiving the inquiry should refer the matter appropriately for resolution.

In addition, cable operator are required make contact information available for the receipt and handling of written closed captioning complaints. The contact information required for written complaints shall include the name of a person with primary responsibility for captioning issues and who can ensure compliance with our rules. In addition, this contact information shall include the person's title or office, telephone number, fax number, postal mailing address, and e-mail address. Cable operators are required to provide this information on their billing statements and on their website.

Further, all cable operators are required to provide the Commission their contact information for immediate and written closed captioning concerns.²³ Failure to provide such information could result in enforcement action. Section 79.1(i)(3) offers three methods by which VPDs may submit the requisite contact information. The preferred method for submission is through a web form on the Commission's closed captioning webpage: <https://esupport.fcc.gov/vpd-data/login!input.action>.

The FCC rules establish specific time limits for cable subscribers to file closed captioning complaints. The complaint must be filed within 60 days of the captioning problem. After receiving a complaint, a cable operator will have 30 days to respond to the complaint.

11. Requirements for New Cable Operators and New Communities Served

- In addition to the reporting, filing, and other obligations outlined above, new providers of cable service may be required to submit a variety of information to the FCC prior to, or shortly after, commencing service. This is in addition to local or state franchise requirements, if any, and other

²³

See Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers, CG Docket No. 05-231, ET Docket No. 99-254, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, 23 FCC Rcd 16674 (rel. Nov. 7, 2008).

regulatory requirements (e.g., notifying local broadcasters, etc.). FCC filing requirements for new operators include:

- Obtaining FCC Registration Number (FRN). All entities that wish to do business with the FCC must first obtain an FRN, which can be obtained online at: <https://apps.fcc.gov/coresWeb/publicHome.do>.
- Community Registration. Before commencing operation, a cable system operator must file Form 322 Cable Community Registration for each community to be served.²⁴ Registration is accomplished online through the FCC's Cable Operations and Licensing System ("COALS").
- If applicable, filing a form to establish a New Cable Television Relay Station ("CARS") (FCC Form 327).

B. CALM Act

The [Commercial Advertisement Loudness Mitigation \(CALM\) Act](#) went into effect on December 13, 2012, making mandatory the Advanced Television Systems Committee A/85 Recommended Practice ("ATSC A/85 RP"), which describes how the TV industry can monitor and control the audio of digital TV programming.

Under the rules as they apply to cable operators, the FCC makes cable operators responsible for the volume of both national and local ads, and TV stations will also be responsible for the national network and syndicated ads on both broadcast and on the signals they deliver to cable operators. In other words, if a cable operator delivers an embedded TV station ad that violates the act, it is the broadcaster who will be responsible. If the cable operator inserts a local commercial, the operator must install and use the equipment and software necessary to comply with ATSC A/85. If a local commercial is inserted by a third party, a cable operator can show compliance with ATSC A/85 by relying on a certification by the third party. In addition, a cable operator can comply with ATSC A/85 by using a real-time audio processor, which limits the dynamic range of all content.

C. STELAR Act

The Satellite Television Extension and Localism Reauthorization (STELAR) Act was passed in December 2014. The primary purpose of the Act was to extend the compulsory copyright licenses that permit delivery of distant broadcast network and non-network television signals to subscribers of satellite dish services. STELAR extended beyond licensing issues, however, and will have some implications for cable operators. STELAR

²⁴ 47 C.F.R § [76.1801](#)

modified some of the rules surrounding retransmission consent negotiations and eliminated the “sweeps” rule.

Most significantly, STELAR directed the FCC to establish a streamlined process by which small cable operators could file petitions arguing that “effective competition” existed in a particular community. If the FCC determined there was “effective competition” in a community where the petition was filed, the petitioning cable operator would no longer be subject to regulation of basic tier services. On June 3, 2015, the FCC adopted a rebuttable presumption that cable operators are subject to effective competition.²⁵ As a result, franchising authorities will be prohibited from regulating basic cable rates unless they can demonstrate that the cable system in question is not subject to effective competition. To do so, a franchising authority would need to file a Form 328 and attach evidence to overturn the FCC’s presumption.²⁶

II. “TELECOMMUNICATIONS” AND “TELECOMMUNICATIONS SERVICE”

This section outlines the main filing, reporting, and other requirements applicable to providers of “telecommunications”²⁷ and to providers of “telecommunications service.”²⁸ In our experience, distinguishing between “telecommunications” and “telecommunications service” is crucially important. That is so because Congress treated the term “telecommunications service” as the linchpin of the Telecommunications Act – that is, as the vehicle through which Congress allocated a wide range of regulatory obligations and incentives among persons subject to the Act.

²⁵ *In the Matter of Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of STELA Reauthorization Act*; Report and Order, 30 FCC Rcd 6574 (2015) (“Effective Competition Order”).

²⁶ *Notice of Effective Date of Revised Effective Competition Rules*, FCC Public Notice (Sept. 17, 2015) available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1049A1.pdf

²⁷ The Communications Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

²⁸ The Communications Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). A “telecommunications carrier” is defined as “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” 47 U.S.C. § 153(44).

For example, the Act requires providers of “telecommunications service” to interconnect their facilities with those other providers of telecommunications service and to refrain from engaging in activities that may harm disabled Americans (Section 251); to file annual reports and make contributions to various federal universal service support mechanisms (Section 254); to take various steps to protect consumer privacy (Section 222); to comply with the Communications Assistance to Law Enforcement Act of 1994; etc. At the same time, providers of “telecommunications service” are entitled to interconnection, collocation, pole attachment, E911, and certain wholesale benefits (Section 251); to protection from state and local barriers to entry (Section 253); and to universal service subsidies of various kinds (Section 254). Providers of pure “telecommunications” are not subject to most of these obligations or incentives.

Unfortunately, it is not always easy to distinguish between “telecommunications” and “telecommunications service” in particular circumstances. Accordingly, before discussing the compliance requirements of providers of “telecommunications” and “telecommunications service” in detail, we provide below a brief overview of some key points to consider in determining whether a service is properly characterized as “telecommunications” or “telecommunications service.”

A. Private Carriage (“Telecommunications”) vs. Common Carriage (“Telecommunications Service”)

As the FCC and the courts have often held, Congress intended that the term “telecommunications service,” as used throughout the Communications Act, would apply only to “common carriers” of “telecommunications” – i.e., to entities that hold themselves out as being willing to transmit the information of all potential customers indifferently, on the same terms and conditions.²⁹ In contrast, “private carriers” of “telecommunications” are entities that negotiate carriage agreements individually on a case-by-case basis.³⁰

A comprehensive discussion of the differences between common and private carriage is beyond the scope of this compliance overview. Indeed, it is virtually impossible to make categorical statements without reviewing particular situations in detail, as it is often necessary to evaluate complex facts that point in different directions. In general, however, the outcome will require weighing various factors, including, but not limited to, the following considerations:

- Whether contract terms are offered indiscriminately, or on a case-by-case basis;

²⁹ See, e.g. *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 ¶ 785 (1997), citing the Joint Explanatory Statement of the Conference Committee, S. Rep. No. 104-230, 104th Cong., 2d Sess. 115 (1996) and *National Association of Regulatory Utility Commissioners v. FCC*, 553 F.2d 601, 608 (D.C. Cir. 1976).

³⁰ *Id.*

- Whether the provider is using excess capacity, as distinguished from capacity developed to support the particular business in question;
- Whether, to what extent, and how the provider markets its services;
- Whether the provider serves a large number of transient customers, as distinguished from a small and stable number of customers;
- Whether the provider has a screening process that can result in rejection of potential customers for various reasons;
- Whether the service is regulated or certified by the state (i.e., CLEC certification);
- Whether the provider has sought to obtain regulatory, commercial, or other benefits that are available to common carriers.

As discussed later, this determination is especially important for purposes of compliance with the federal Universal Service Program (USP).

B. Federal Registration Requirement

There is no federal requirement to obtain prior authorization or certification to provide domestic telecommunications services, *per se*. However, all domestic *interstate telecommunications service* providers must register with the FCC within one week of providing service. Registration is accomplished by filing with the Universal Service Administrative Company a signed copy of FCC Form 499-A, with completed pages 1, 2, 3 and 8.³¹ Among other things, the form requires a carrier to provide an agent for service of process in the District of Columbia and requires the carrier to furnish a list of states where the carrier provides or intends to provide service.

C. Federal Universal Service Program

The federal Universal Service Program (USP) is highly complex and, in many ways, counterintuitive. Many of its requirements are widely misunderstood. In general, providers of “interstate” and “international” “telecommunications,” “telecommunications service,” or “Voice over Internet Protocol” service that enables calls to and from the Public Switched Telephone Network (“Interconnected VoIP”), must pay into the Universal Services Fund (USF) a certain percentage of their “end-user revenues” on sales of these services. Each calendar quarter, the FCC announces the relevant percentage for that quarter, which generally ranges from 12% - 17%. The proposed contribution factor for the fourth quarter of 2015, the proposed percentage is 16.7%.

³¹

Form 499 is discussed in greater detail below in II.C.

1. Key Principles

In this section, we highlight a few of the key features of, and important exceptions to, the federal USP, in particular as it applies to providers of “telecommunications” and “telecommunications service.”

- **“Interstate.”** The physical location of the line is not determinative. If the terminating points of the line are located in different states, if the line provides a connection to the Internet or an interexchange carrier, or if more than 10% of the traffic transmitted over the line is interstate in nature (whether or not originating with the provider), the line itself likely will be deemed “interstate.” While at first glance this would appear to be a simple determination, it has proven to be quite controversial in practice, and the FCC has before it several proceedings relating to providers’ burdens and presumptions concerning the “10 percent rule.”
- **“End-user revenues.”** Ordinarily, one thinks of an “end-user” as the last purchaser in a chain of distribution – typically a retail customer. Under the federal USP, however, “end-user” has a special meaning – it also includes purchasers of covered “telecommunications,” “telecommunications services,” or “interconnected VoIP” that do not make payments into the USF. For example, if a carrier sells telecommunications services to an Internet Service Provider (ISP) that combines them with information services and sells the combined service at retail as Internet access service, the retail Internet access service is exempt from USF obligations, so the USP treats the ISP as the carrier’s “end-user” and requires the carrier to make payments into the USF on its gross revenues from its sales to the ISP.³² In contrast, if the carrier sells telecommunications service on a wholesale basis to another telecommunications provider that itself contributes to the USF, the carrier’s wholesale revenues from such sales will not count as “end-user revenues.” The wholesaler must, however, annually obtain and retain certain information from its customers, as prescribed by the FCC.

³²

Note that the FCC treats revenues earned by common carriers on sales of the transmission component of wireline broadband Internet access service as assessable under the USP. In contrast, the FCC treats revenues earned by private carriers on sales of the same services as non-assessable. “Line 406 includes all revenue from broadband service (including the transmission component of wireline broadband Internet access service) provided on a common carrier basis. Revenues for the provision of wireline broadband Internet access transmission on a non-common-carrier basis should be reported [as non-assessable] on Line 418.” Instructions to Form 499-A (2014), at 17.

- **De minimis exception.**³³ Sellers of “telecommunications” on a private carrier basis are exempt from USP reporting and contribution obligations if their projected annual end-user revenues, multiplied by the FCC’s contribution factor, would result in a contribution obligation of less than the *de minimis* threshold of \$10,000. For example, if a provider of private carriage “telecommunications” anticipates sales of \$62,000 in the forthcoming year and the FCC’s current estimation factor was 16.1 percent, its USP contribution obligation would be \$9,982. Because that is below \$10,000, the provider would be exempt from USP reporting and contribution obligations. It would just have to retain its calculations for possible inspection by the FCC or its administrative agent, the Universal Service Administration Corporation. In contrast, a seller of even *de minimis* amounts of “telecommunications service” or “interconnected VoIP” must complete and file Form 499A and contribute relatively small amounts to three other federal funding mechanisms – *i.e.*, those supporting Telecommunications Relay Service, Local Number Portability, and the North American Numbering Plan Administration.
- **Government or public safety service exemption.** Since 1997, the FCC has recognized exemptions from USP filing and contribution requirements for “Government entities that purchase telecommunications services in bulk on behalf of themselves, such as state networks for schools and libraries;” “Public safety and local governmental entities licensed under Subpart B of Part 90 of the Commission’s rules or any entity providing interstate telecommunications on a private carrier basis exclusively to public safety or government entities who does not offer services to others;” and “Broadcasters, non-profit schools, non-profit libraries, non-profit colleges, non-profit universities, and non-profit health care providers.”³⁴ The exemption is a strict one: if a service entity provides service to *any* customer that is not a government or public safety entity, it cannot take advantage of the exemption.
- **“Self-service” exception.** “Entities that provide telecommunications only to themselves or to commonly-owned affiliates need not file” Form 499 or contribute directly to the federal USP.³⁵

³³ Instructions to Form 499 (2014), at 4.

³⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997), ¶ 800; Instructions to Form 499-A (2015), at 4-5.

³⁵ Instructions to Form 499-A (2015), at 5.

2. Universal Service Compliance: Forms 499-A, 499-Q

- USP payment obligations are imposed on providers of “interstate and international end-user telecommunications revenues, net of prior period actual contributions,” 47 C.F.R. § 54.709(a), and are calculated on the basis of a contributor’s “projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly by the Commission.” *Id.* The FCC determines the contribution factor each quarter “based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions.” 47 C.F.R. § 54.709(b). The contribution factor historically has ranged from 12% - 17%, and the proposed percentage for the fourth quarter of FY 2015 is 16.7%.
- The FCC requires providers subject to the USP to register and file Telecommunications Reporting Worksheets, utilizing FCC Form 499-A for annual reports and FCC Form 499-Q for quarterly reports. All contributors are required to file the FCC Forms 499-A and 499-Q electronically. Accommodations may be made for any filers that lack sufficient Internet access to submit the forms through Universal Service Administrative Company’s (USAC) website.
- Providers of solely private carrier “telecommunications” must make the relevant calculations and keep them for three years, but they need not file a Form 499A until the year in which they project that their contribution obligations will exceed the *de minimis* amount of \$10,000.
- As indicated above, all providers of “telecommunications service” must register and begin to file reports within thirty days of the commencement of their services, but they need not make contributions until their payment obligations are expected to exceed \$10,000 in the year ahead. Even if providers of “telecommunications service” qualify for the *de minimis* exception, they must still file Form 499A, which includes reporting and contributions toward three other federal programs: Local Number Portability, Telecommunications Relay Service, and the North American Numbering Plan.
- If a provider’s customers are themselves subject to the USP (including, for example, resellers), the provider can avoid having to make USP payments on its sales of “telecommunications” or “telecommunications service” to them if it can show that they are making appropriate payments into universal service support mechanisms themselves. To the extent that the provider’s customers are making such payments, the customers are not treated as “end users” of the provider. The FCC’s instructions to Form 499A specify the kinds of information that providers must obtain and retain for this purpose.

In particular, wholesale providers may need to obtain a “reseller certification” from reseller customers *each calendar year*, as specified in the Instructions.

- Providers that have not yet made any USP filings or contributions must initially file Form 499-A, writing “NEW” in the space seeking the filer ID number. Upon filing, the FCC will issue a filer ID to be used for all subsequent Form 499 purposes.
- The quarterly report (Form 499-Q) is due **February 1, May 1, August 1, and November 1**. The annual report (Form 499-A) is due **April 1**. To access the most current version of the forms visit the [FCC forms webpage](#) or the [USAC website](#).

D. Section 214 Certification

1. Construction, Acquisition and Extensions of Lines

- Under 47 U.S.C. § 214, a telecommunications common carrier which seeks to construct, acquire or operate a new line, or to extend a line, must obtain a certificate from the Commission. Unless such line is “within a single State unless such line constitutes part of an interstate line, [or] local, branch, or terminal lines not exceeding ten miles in length. . . .” 47 U.S.C. §214(a). The FCC has, however, adopted a blanket grant of authority for all domestic interstate telecommunications services. Specifically, 47 C.F.R. § 63.01 states,

(a) Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.

2. Prior Authorization of Transfer of Line Subject to 214

- Under the FCC’s rules any telecommunications service provider of interstate service that seeks to transfer control of lines or authorization to operate pursuant to section 214 is required to file for prior Commission authorization.³⁶ This includes carriers that have received a blanket grant of 214 authority mentioned above.

³⁶ 47 C.F.R. § 63.03.

3. Discontinuance of Service

Section 214(a) of the Communications Act requires all common carriers to obtain FCC authorization before discontinuing, reducing, or impairing telecommunications service to a community.³⁷ Under Part 63 of its rules, the FCC has adopted specific requirements that clarify this duty and ensure that customers of domestic telecommunications services receive adequate notice of a carrier's discontinuance plans and have an opportunity to inform the Commission of any resultant hardships.³⁸

- Before discontinuing service, a telecommunications carrier must notify all affected customers of its proposed discontinuances. Notice to customers must include the name and address of the carrier, the date of the planned service discontinuance, the geographic areas where service will be discontinued, and a brief description of the type of service affected.
- The notice must include a prescribed statement that informs customers of their right to object to the proposed discontinuance of the dominant or non-dominant carrier by filing comments either 30 or 15 days, respectively, after the FCC releases public notice of the proposed discontinuance.³⁹ The prescribed statement also informs customers that the Commission normally will authorize the proposed discontinuance “unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected.”⁴⁰
- After a carrier has given the prescribed notice to all of its affected customers, it must submit a discontinuance application to the FCC.⁴¹ In addition to the information provided in the notice to affected customers, each application must contain: (1) a brief description of the dates and methods of notice to all affected customers; (2) a statement as to whether the carrier is considered dominant or non-dominant with respect to the

³⁷ 47 U.S.C. § 214(a).

³⁸ See 47 C.F.R. §§ 63.60 *et seq.*

³⁹ 47 C.F.R. § 63.71(a).

⁴⁰ See *id.*

⁴¹ See 47 C.F.R. § 63.71(b).

service to be discontinued, reduced, or impaired; and (3) any other information the Commission may require.⁴²

- Carriers also must notify and submit a copy of the discontinuance application to the public utility commission and Governor of each state in which the discontinuance is proposed, and also to the Secretary of Defense.
- Unless the FCC notifies the carrier otherwise, discontinuance applications for dominant and non-dominant carriers will be automatically granted on the 60th and 31st day after public notice of the application, respectively.⁴³

E. Other Requirements

Again, a complete discussion of the regulatory burdens for providers of telecommunications and telecommunications service is beyond the scope of this document. In particular, we do not address here any reporting or other requirement relating to rates, access charges, intercarrier compensation, tariffs, and the like. The FCC website includes a more complete collection of forms and reporting requirements for firms providing telecommunications services at: <http://www.fcc.gov/wcb/filing.html>.

1. Form 477: Local Telephone Competition and Broadband Reporting Data

- Form 477 collects information about wired and wireless local exchange telephone services and broadband connections. *See* 47 CFR § 43.11. The form—which requests a large amount of information and may take substantial time to complete—must be submitted twice a year, as described below.
- Form 477 previously applied primarily to local exchange carriers, but the FCC has since expanded its scope to apply also to providers of interconnected VoIP service (as defined at 47 CFR § 9.3), as well as facilities-based broadband service connections to end-user locations, as described below.⁴⁴

⁴² *See id.*

⁴³ 47 C.F.R. § 63.71(c).

⁴⁴ *See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-89 (rel. June 12, 2008) (Form 477 Order), ¶ 25.

- In 2013, the FCC issued an Order announcing it would begin tracking broadband deployment in 2014. Previously, the National Telecommunications & Information Administration (NTIA) collected deployment data through its State Broadband Initiative and the FCC collected subscription data through Form 477 collection. These efforts were consolidated in 2014 with an updated Form 477. Information on the updated filing and the latest instructions are available on the [FCC website](#).
- Deadline: Providers must file by **March 1** for data as of December 31 of the preceding year, and must file by **September 1** for data as of June 30 of the same year. Form 477 data as of December 31, 2015 will be due March 1, 2016.

2. Annual FCC Regulatory Fees

- Interstate telecommunications service providers, including inter-connected VoIP providers, local exchange carriers and other telecommunications service providers must pay an annual FCC regulatory fee. The regulatory fee assessed is based on an interstate telecommunications service providers' total revenue. In 2015, the regulatory fee was assessed at .00329 per revenue dollar. For more information, see: <http://www.fcc.gov/fees/regfees>.
- A *de minimis* exemption applies to any provider whose total FY 2015 regulatory fee liability, including all fee categories, is under \$500.
- Government entities⁴⁵ and non-profit entities⁴⁶ exempt under section 501(c) of the IRS Code are exempt from regulatory fees and need not submit payment. See 47 CFR § 1.1162.
- Affected providers must use Fee Filer to review their regulatory fee bill. The fee itself may be paid online via Fee Filer, or via more traditional means with an accompanying Form 159-E (generated by Fee Filer).

⁴⁵ “For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.” 47 CFR § 1.1162(b).

⁴⁶ See 47 CFR § 1.1162(c). Such entities must provide proof of status to the Commission within “60 days of its coming under the regulatory jurisdiction of the Commission or at the time its fee payment would otherwise be due, whichever is sooner.”

- **Deadline:** The Annual Regulatory Fee is typically due in late August or September. Assuming it remains consistent with past practice, the FCC will issue guidance on the 2016 payment late in the first quarter of 2016.

3. Consumer Proprietary Network Information (CPNI) Compliance Certification

- FCC rules require providers of telecommunication services to take certain steps to safeguard customer information.
- Telecommunications service providers must file an annual certification acknowledging compliance with the CPNI rules along with an accompanying statement explaining CPNI procedures, a summary of customer complaints in the past year concerning the unauthorized release of CPNI, and list any proceedings instituted or petitions filed against data brokers.
- In the past, the FCC has issued enforcement advisories relating to CPNI compliance shortly after the start of each year, which include a FAQ, a CPNI Certification Template, and the text of the CPNI rules. See Enforcement Advisory No. 2015-02, Annual CPNI Certifications Due March 1, 2011, EB Docket No. 06-36, rel. Feb. 9, 2015, https://apps.fcc.gov/edocs_public/attachmatch/DA-15-178A1.pdf.
- The FCC also has published a CPNI compliance guide directed to small entities, which includes detailed information on compliance and the contents of the aforementioned certificate. See FCC Small Entity Compliance Guide, Customer Proprietary Network Information, FCC 07-22, DA 08-1321, June 6, 2008, online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-1321A1.pdf.
- **Deadline: March 1** (for data pertaining to previous calendar year).

4. Common Carrier Annual Employment Report (Form 395)

- Common carriers with sixteen or more employees must complete and file FCC Form 395, Annual Employment Report, by **May 31** of each year. Data must reflect employment figures from any one payroll period in January, February, or March. The form may be completed and filed electronically. See <http://www.fcc.gov/Forms/Form395/395instr.pdf>.

5. Communications Assistance for Law Enforcement Act (CALEA)

- Providers of telecommunications service are generally subject to the Communications Assistance for Law Enforcement Act (CALEA). Various

resources relating to CALEA are available on the Baller Herbst web site:
<http://www.baller.com/calea.html>.

6. Other Requirements

As noted in the introduction, the compliance obligations outlined within this document are not intended to be exhaustive. This advice is particularly true for providers of “telecommunications service,” as such providers may face additional federal regulatory duties depending on the specific services they provide and the circumstances surrounding their provision. For example, 47 U.S.C. § 251 imposes on all “telecommunications service” providers the general duty to “(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.” We urge providers to conduct a thorough regulatory review based on their particular circumstances.

III. INTERCONNECTED VOIP

A. Definition and Regulatory Status

The term “interconnected VoIP” is not defined in the Communications Act, and the FCC has not yet classified it for regulatory purposes. In a series of orders applying various telephone-like requirements on the service, the FCC has defined the term as follows:

[I]nterconnected VoIP services include those VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN... To be clear, a service offering is ‘interconnected VoIP’ if it offers the *capability* for users to receive calls from and terminate calls to the PSTN; the offering is covered by CALEA for all VoIP communications, even those that do not involve the PSTN. Furthermore, the offering is covered regardless of how the interconnected VoIP provider facilitates access to and from the PSTN, whether directly or by making arrangements with a third party.⁴⁷

As noted above, the FCC to date has not classified any type of voice-over-IP (VoIP) service as a fully regulated “telecommunications service.” Over the past few years, however, the Commission has made an important regulatory distinction between a VoIP service that interconnects with the public-switched telephone network (PSTN) – deemed “interconnected VoIP” -- and a VoIP service that does not. For a provider of

⁴⁷ *First Report and Order*, ¶ 39. See 47 CFR § 9.3.

interconnected VoIP service, the FCC in a piecemeal fashion has imposed various reporting and other regulatory requirements, including the following (many of which are discussed in greater detail elsewhere in this memo).

B. Requirements

1. Universal Service Reporting and Contribution (Form 499-A, 499-Q)

- In 2006, the FCC determined that interconnected VoIP providers are generally subject to contribution requirements under the federal Universal Service Program, and therefore must complete and submit Form 499-A. Unlike telecommunications service providers, however, VoIP providers need not file Form 499-Q unless they exceed the *de minimis* contribution threshold. For the purposes of the Universal Service program, the FCC treats “interconnected VoIP” in much the same way as it treats “interstate telecommunications service.” (A more detailed explanation of USP obligations is included in our discussion of “telecommunications service” providers in Section II.) One difference is that the FCC has established a presumption or “safe harbor” that providers of interconnected VoIP can use in calculating their USF contributions. Under this “safe harbor,” a certain percentage of interconnected VoIP traffic is presumed to be “interstate” in nature. The current safe harbor presumption allows providers to assume that 64.9% percent of their revenue from interconnected VoIP service is from interstate service.⁴⁸
- As a result of the Twenty First Century Communications and Video Accessibility Act of 2010,⁴⁹ interconnected VoIP providers must contribute to the Telecommunications Relay Service (TRS) Fund. In 2011, the FCC expanded this obligation to apply to *non*-interconnected VoIP services as well.⁵⁰

2. Form 477: Local Telephone Competition and Broadband Reporting

- Form 477 collects information about wired and wireless local exchange telephone services and broadband connections. *See* 47 CFR § 43.11. The form – which requests a large amount of information and may take

⁴⁸ See Instructions to Form 499-A (2015), at 27.

⁴⁹ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 103(b), 124 Stat. 2751, 2755 (2010), enacted Oct. 8, 2010.

⁵⁰ *In the Matter of Contributions to the Telecommunications Relay Services Fund*, CG Docket No. 11-47, Report and Order, FCC 11-150, rel. October 7, 2011.

substantial time to complete – must be submitted twice a year, as described below.

- Form 477 previously applied primarily to local exchange carriers, but the FCC has since expanded its scope to apply also to providers of interconnected VoIP service (as defined at 47 CFR § 9.3), as well as facilities-based broadband service connections to end-user locations, as described below.⁵¹
- The latest instructions for Form 477 instructions are available at: <http://www.fcc.gov/Forms/Form477/477inst.pdf>.

3. Customer Proprietary Network Information (CPNI)

- Interconnected VoIP providers are subject to customer proprietary network information protection, maintenance and reporting requirements, including the filing of an annual CPNI compliance certification. *See infra*, Section II.E.3.

4. E911 Service

- All interconnected VoIP service providers must meet several 911 service requirements, set forth in 47 CFR § 9.5. Such providers must acquire location information from the customer, must meet certain 911 service level requirements, must provide notification to customers if the service does not provide 911 capabilities, and must send a letter to the FCC detailing compliance with the statutory requirements.

5. Disability Access

- The FCC has long required telephone carriers to comply with the disability access requirements of Section 255 of the Communications Act. In 2007, the FCC extended these requirements to providers of interconnected VoIP. Under the FCC's rules, all covered entities must act to make their services "accessible" to, and "usable" by, individuals with disabilities where doing so is "readily achievable." The FCC has defined the term "readily achievable" as meaning that the accessibility and accessibility of a

⁵¹ See *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-89 (rel. June 12, 2008) (Form 477 Order), ¶25.

feature can be easily accomplished and carried out without substantial difficulty or expense to the provider.

- In 2010, Congress amended the Communications Act by, among other things, adding new Sections 716, 717 and 718. New Section 716 requires providers of “advanced communications services” and manufacturers of equipment used for those services to ensure that such services and equipment are accessible to and usable by individuals with disabilities, unless doing so is not achievable. “Advanced communications services” means interconnected VoIP service, non-interconnected VoIP service, electronic messaging service, and interoperable video conferencing service.⁵² Unlike Section 255, the new standard under Section 216 is that the access be made available where “achievable” which the FCC defines as available with “reasonable effort or expense.”
 - Importantly, the requirements of Section 716 do not apply to any equipment or services, including interconnected VoIP service, that were subject to the requirements of Section 255 of the Act on October 7, 2010, and such services and equipment remain subject to the requirements of Section 255.⁵³
- As of January 30, 2013, providers of telecommunications services and VoIP service have been required to maintain records of their efforts to ensure that the services and equipment they provide are accessible to individuals with disabilities. A provider is required to make changes to its services or equipment only if it can “readily” achieve the goal of accessibility.

Providers of telecommunications service, VoIP service and advanced communications services must make an annual recordkeeping certifications to the FCC on April 1. The certification must be made on-line at: <https://apps.fcc.gov/rccci-registry/login!input.action>.

6. Local Number Portability

- On November 8, 2007, the FCC released a Local Number Portability (“LNP”) Order,⁵⁴ in which it extended LNP obligations to interconnected VoIP providers to ensure that customers of such VoIP providers may port

⁵² 47 U.S.C. § 153(1).

⁵³ 47 U.S.C. § 617(f).

⁵⁴ *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243, Report and Order, released November 8, 2007.

their North American Numbering Plan (NANP) telephone numbers when changing telephone providers.⁵⁵ In its *LNP Order* the FCC found that customers of interconnected VoIP services should be entitled to receive the benefits of LNP. To effectuate this policy, the FCC addressed the obligations of interconnected VoIP providers as well as the obligations of telecommunications carriers that serve interconnected VoIP providers as their numbering partners. Specifically, the FCC affirmed that only certificated telecommunications carriers may access numbering resources directly from the North American Numbering Plan Administrator (NANPA) or the Pooling Administrator (PA). The FCC indicated that interconnected VoIP providers that have not obtained a license or certificate of public convenience and necessity from the relevant states or otherwise are not eligible to receive numbers directly from the administrators may make numbers available to their customers through commercial arrangements with carriers (*i.e.*, numbering partners).

7. Communications Assistance for Law Enforcement Act

- Providers of interconnected VoIP are subject to the Communications Assistance for Law Enforcement Act (CALEA).

8. Form 395: Common Carrier Annual Employment Report

- Common carriers with sixteen or more employees must complete and file FCC Form 395, Annual Employment Report, by May 31 of each year. Data must reflect employment figures from any one payroll period in January, February, or March. The form may be completed and filed electronically. Up to now, the FCC does not appear to have explicitly required VoIP providers to file Form 395, see <http://www.fcc.gov/Forms/Form395/395instr.pdf>. As a precaution, however, VoIP providers that offer VoIP on a common carrier basis should consider filing such forms.

9. Annual FCC Regulatory Fees

- Interstate telecommunications service providers (ITSPs), including interconnected VoIP providers, local exchange carriers and other telecommunications service providers, must pay an annual FCC regulatory fee. For FY 2015, ITSPs were required to pay \$0.00331 per dollar of

⁵⁵ 47 U.S.C. § 251(b)(2); 47 C.F.R. §§ 52.20 *et seq.* The NANP is the basic numbering scheme that permits interoperable telecommunications service within the United States, Canada, Bermuda, and most of the Caribbean. See *Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, 11 FCC Rcd 2588, 2590, ¶ 3 (1995) (*NANP Order*).

subject revenue. For more information *see*:

<http://www.fcc.gov/fees/regfees>.

- A de minimis exemption applies to any provider whose amount due is under \$500.
- Government entities⁵⁶ and IRS Code § 501(c) non-profit entities⁵⁷ are exempt from regulatory fees and need not submit payment. See 47 CFR § 1.1162.
- Affected providers must use Fee Filer to review their regulatory fee bill. The fee itself may be paid online via Fee Filer, or via more traditional means with an accompanying Form 159-E (generated by Fee Filer).
- Deadline: The Annual Regulatory Fee is typically due in late August or September. Assuming it remains consistent with past practice, the FCC will issue guidance on the 2014 payment late in the first quarter of 2015.

IV. BROADBAND INTERNET ACCESS SERVICE

A. Regulatory Treatment of Broadband Internet Access Service (BIAS)

In its March 2015 *Open Internet Order*,⁵⁸ the FCC fundamentally changed the regulatory classification of broadband Internet access service. Previously, Internet access service was determined to include both telecommunications and “information service” components which, when offered to the consumer, merged together into an undifferentiated “information service,” not subject to regulation under the federal Communications Act. In the *Open Internet Order*, the FCC concluded that BIAS providers that offer their services

⁵⁶ “For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.” 47 CFR § 1.1162(b).

⁵⁷ See 47 CFR § 1.1162(c). Such entities must provide proof of status to the Commission within “60 days of its coming under the regulatory jurisdiction of the Commission or at the time its fee payment would otherwise be due, whichever is sooner.”

⁵⁸ *In the Matter of Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, rel. March 12, 2015 (“*Open Internet Order*”). At the date of this writing, the *Open Internet Order* is on appeal in the U.S. Court of Appeals for the D.C. Circuit.

“directly to the public”⁵⁹ are subject to federal regulation as providers of “telecommunications service” under Title II of the Communications Act. While other “information services,” such as email and online storage, may be offered alongside BIAS, the core service – high speed access to the Internet – is “telecommunications.”

The FCC defined BIAS as:

A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.⁶⁰

The discussion that follows highlights the key regulations that do and do not apply to BIAS as a consequence of the *Open Internet Order*. It does not, however, provide a comprehensive analysis of the implications of Title II reclassification, which is well beyond the scope of this compliance memo.

B. Application of Title II Regulations to BIAS

If the *Open Internet Order* is upheld, BIAS will be subject to federal regulation as a Title II common carriage service. For the time being, however, the FCC has chosen to forebear from applying to BIAS many⁶¹ of the regulatory requirements that apply to “telecommunications service.”⁶² The FCC has noted that its decision to forebear from particular regulations may be reversed, but at least for now BIAS providers are exempt from several regulatory requirements.

More specifically, the FCC has held that BIAS is exempt from the following regulations, otherwise applicable to telecommunications carriers under Title II:

⁶⁰ *Open Internet Order*, ¶ 364.

⁶¹ More specifically, the FCC forbore from applying 27 different provisions of Title II, and over 700 Commission rules and regulation

⁶² Section 10 of the Communications Act allows the FCC to forebear from applying regulations to “telecommunications” or “telecommunication services” where the regulations may not be necessary for ensuring the providers of such services are acting reasonably and justly or for promoting the public interest. 47 U.S.C. § 160(a).

- Universal Service Program contribution obligations:⁶³
 - o Section 254 generally *does* apply, but the FCC forbore from sections imposing contribution requirements. BIAS provider might ultimately be subject to USP contribution requirements after further deliberation of the issue.
 - o BIAS does not create an independent obligation to file Form 499-A, yet.
- Rate regulation, tariff filing obligations, cost accounting rules:
 - o Forborne: Obligation to file contracts (Section 211), valuation of property (Section 213), FCC authority to examine certain transactions (Section 215), FCC authority to inquire into the management of the carrier's business (Section 218), authority to require annual financial and other reports (Section 219), prescription of forms of accounts to be kept by carrier, and depreciation prescription provisions (Section 220).
- Various "interconnection and market-opening provisions" in Sections 251, 252, and 256. Forbearance from:
 - o Duty to interconnect
 - o Unbundling
 - o Duty to afford access to poles, ducts, conduits and rights-of-way
 - o Resale obligations

While the FCC has forbore from applying significant parts of Title II to BIAS, other regulatory obligations specifically *do* apply. As such, they amount to new regulatory obligations imposed upon (or in some cases, powers granted to) BIAS providers:

1. Open Internet Rules

Naturally, the Open Internet rules articulated in the *Open Internet Order* apply to BIAS providers. Under the Open Internet Order, the FCC established three bright line rules for BIAS providers: no blocking, no throttling, and no paid prioritization. The FCC also adopted a catch-all provision stating that BIAS providers: "shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services,

⁶³

"[W]e do forbear in part from the first sentence of section 254(d) and our associated rules insofar as they would immediately require new universal service contributions associated with broadband Internet access service." *Open Internet Order*, at ¶ 488. For more information, see Baller Herbst Universal Service Memo (2016), available at www.baller.com.

or devices available to end users.”⁶⁴ The FCC stated it would determine what constituted unreasonable interference on a case-by-case basis.

The FCC also extended some transparency requirements to BIAS providers under the Open Internet Order. BIAS providers disclosures must include, but are not limited to: (1) the price of monthly service, any promotional rates, and other fees the consumer may incur; (2) data caps or allowances that are part of the consumer’s plan; (3) actual network performance, including packet loss, in addition to speed and latency, measured in terms of average performance and during peak usage; (4) practices related to congestion management, application-specific behavior, device attachment rules, security, and practices applied to traffic associated with a particular user or user group; and (5) direct notification to end users if their individual use will trigger a network practice.⁶⁵ The FCC created a temporary exemption for BIAS providers with less than 100,000 subscribers. That exemption has been extended but is currently under review at the FCC.

2. Infrastructure Access Rights

While not a compliance obligation per se, the infrastructure access rights granted to BIAS providers as a consequence of the Title II reclassification represent a significant change of policy. Under Section 224, telecommunications carriers (now including BIAS) have a right of access “to the poles of local exchange carriers and other utilities at just, reasonable, and nondiscriminatory rates.”

3. Consumer Protection, Enforcement and Redress

BIAS offerings are now subject to the fundamental consumer protection rules applicable to telecommunications carriers under Title II. While BIAS is not subject to specific rate regulation, rates must be “just and reasonable” (Section 201), and there can be no “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service...” (Section 202). A broad right to complain of violations now applies as well (Section 208).

4. Customer Privacy / CPNI

The *Open Internet Order* the FCC applies the core customer privacy protections of Section 222 to BIAS, but the FCC forbore from applying the telephone-centric CPNI rules, stating that specialized rule may be adopted in a future rulemaking. At least for now, BIAS providers, unlike telecommunications carriers and VoIP providers, are *not* required to submit an annual CPNI certification.

⁶⁴ *Open Internet Order*, ¶136.

⁶⁵ *Open Internet Order*, ¶¶ 163-171.

On May 20, 2015, the FCC Enforcement Bureau issued guidance as to how the Enforcement Bureau intends to enforce Section 222 in connection with BIAS until any specific FCC rules are adopted.⁶⁶

During this period, the Enforcement Bureau intends to focus on whether broadband providers are taking reasonable, good-faith steps to comply with Section 222, rather than focusing on technical details. By examining whether a broadband provider's acts or practices are reasonable and whether such a provider is acting in good faith to comply with Section 222, the Enforcement Bureau intends that broadband providers should employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protections.⁶⁷

The Enforcement Advisory went on to state that the Bureau "will provide informal as well as formal guidance" to BIAS providers.

5. Disability Access.

Sections 225, 255 and 251(a)(2) and implementing regulations apply to BIAS. (See discussion above in Section III.B, p. 30.)

C. Filing and Reporting Requirements

In addition to the obligations imposed as a consequence of the *Open Internet Order*, outlined above, BIAS providers must also comply with the following:

1. Form 477: Local Telephone Competition and Broadband Reporting

- Form 477 collects information about broadband connections and wired and wireless local telephone services. The form – which requests a large amount of information and may take substantial time to complete – must be submitted twice a year, as described below.
- Form 477 previously applied primarily to local exchange carriers, but the FCC has since significantly expanded its role to include data collection for

⁶⁶ [FCC Enforcement Advisory No. 2015-03](#), Open Internet Privacy Standard, DA 15-603, rel. May 20, 2015.

⁶⁷ *Id.*

facilities-based providers of broadband⁶⁸ service to end user locations.⁶⁹ It also previously tracked only broadband subscriptions; however, in 2014, the FCC began tracking broadband deployment. Information on the updated filing and the latest instructions are available on the [FCC website](#).

- Form 477 also applies to providers of interconnected VoIP service. It does not apply to providers of fixed wireless services (e.g., Wi-Fi) that only enable local distribution and sharing of a premises broadband facility.
- **Deadline:** Providers must file by **March 1** for data as of December 31 of the preceding year, and must file by **September 1** for data as of June 30 of the same year. Data as of December 31, 2015, must be filed by March 1, 2016.

⁶⁸ While the FCC has since raised the bar for what connection speed qualifies as “broadband,” it is important to note that Form 477 retains the original 200 kbps definition. In other words, a service could potentially be deemed “broadband” for purposes of Form 477 filing obligations, yet not be considered “broadband” for most other purposes under federal law.

⁶⁹ FCC Form 477, Instructions for March 1, 2014 filing, <http://transition.fcc.gov/Forms/Form477/477inst.pdf> (emphasis in original):

Entities that are facilities-based providers of **broadband connections** – which, for purposes of this information collection, are wired “lines” or wireless “channels” that enable the end user to receive information from and/or send information to the Internet at information transfer rates **exceeding 200 kbps in at least one direction** – must complete and file the applicable portions of this form for **each state** in which the entity provides **one or more** such connections **to end user locations**. For the purposes of Form 477, a broadband “**end user**” is a residential, business, institutional, or government entity who uses broadband services for its own purposes and who does not resell such services to other entities or incorporate such services into retail Internet-access services. For purposes of Part I of Form 477, an Internet Service Provider (ISP) is not an “end user” of a broadband connection. For the purposes of Form 477, an entity is a “**facilities-based**” **provider** of broadband connections **to end user locations** if any of the following conditions are met: (1) it **owns** the portion of the physical facility that terminates at the end user location; (2) it obtains unbundled network elements (UNEs), special access lines, or other leased facilities that terminate at the end user location and **provisions/equips** them as broadband, or (3) it **provisions/equips** a broadband wireless channel to the end user location over licensed or unlicensed spectrum.

2. Communications Assistance for Law Enforcement Act (CALEA)

- Facilities-based Internet access providers may be subject to the Communications Assistance for Law Enforcement Act (CALEA). Various resources relating to CALEA are available on the Baller Herbst website: <http://www.baller.com/calea.html>.

3. Digital Millennium Copyright Act (DMCA)

- The Digital Millennium Copyright Act of 1998 includes various “safe harbors” for online service providers, including broadband Internet access providers and providers of website hosting services, from potential liability for contributory copyright infringement based on the actions of users. Service providers must take steps to avail themselves of the limitations of liability, including:
- Adopt and reasonably implement, and inform subscribers and account holders of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers. *See* 17 U.S.C. § 512(i). We recommend that online service providers draft such a policy and post it conspicuously on the service website.
- Register a designated agent with the U.S. Copyright Office, to receive notifications of claimed infringement. *See* <http://www.loc.gov/copyright/onlinesp/>.

COMPLIANCE TIMETABLE		
FILING/REPORT	DUE DATE	AFFECTED PROVIDERS
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(1)	February 1, 2016	All telecom service and telecom or interconnected VoIP that exceed <i>de minimis</i> level
Form 477: Local Telephone Competition and Broadband Reporting Data (1)	March 1, 2016	All broadband, telecom service, interconnected VoIP
CPNI Compliance Certification	March 1, 2016	All telecom service, interconnected VoIP
Copyright Statutory Royalty Fee Report (1)	March 1, 2016, August 29, 2016	Cable
Form 499A: Annual Telecommunications Reporting Worksheet pp. 1,2,3 and 8 (initial registration)	Within one week of providing telecom service	All telecom service and interconnected VoIP?
Form 499A: Annual Telecommunications Reporting Worksheet (Universal Service)	April 1, 2016	All telecom service, interconnected VoIP, and telecom providers that exceed <i>de minimis</i> level
Annual Disability Access Record Keeping Certification	April 1, 2016	All telecom service, interconnected VoIP, and providers of advanced services.
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(2)	May 1, 2016	All telecom service and telecom or interconnected VoIP providers that exceed the <i>de minimis</i> contribution
Form 395: Common Carrier Annual Employment Report	May 31, 2016	Telecom service (and possibly interconnected VoIP) with >16 employees
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(3)	August 1, 2016	All telecom service and any telecom or interconnected VoIP providers that exceed the <i>de minimis</i> contribution
Form 477: Local Telephone Competition and Broadband Reporting Data (2)	September 1, 2016*	Broadband, telecom service, interconnected VoIP
Form 396-C: MVPD EEO Program Annual Report	September 30, 2016	Cable
Annual FCC Regulatory Fee	TBD, sometime in Q3	Cable, telecom, interconnected VoIP
Form 499Q: Quarterly Telecommunications Reporting Worksheet (Universal Service)(4)	November 1, 2016	All telecom service and any telecom or interconnected VoIP providers that exceed the <i>de minimis</i> contribution

FILING/REPORT	DUE DATE	AFFECTED PROVIDERS
Form 322: Cable Registration	Before commencing service	Cable
Form 325: Annual Cable Operator Report	If more than 20,000 subscribers end of calendar year, if notified by Commission; due “within 60 days after FCC notifies operator that form is due”	Cable
Performance Testing	Twice each year	Cable
Form 320: Signal Leakage	Once each year	Cable (aero. freq.)
For general reference purposes only. Providers are urged to obtain a determination specific to their own circumstances and offerings. Dates marked with “*” are tentative, unreleased, and/or may be subject to change, but are based on filing dates for 2015. Please refer to the FCC forms page for latest information.		