JONATHAN:

Good afternoon everyone… and, of course, good morning to those of you joining us from the west coast. I’m Jonathan Marashlian and I will moderate today’s discussion about complying with the CVAA. CVAA stands for the Communications and Video Accessibility Act, which is a law passed in 2010 that extended a variety of disability access rights, duties and obligations to include manufacturers and providers of advanced communications and video equipment and services.

I’m joined today by my colleague, Rob Jackson, who heads up our firm’s CVAA compliance team. I’m also very excited to have Travis Roth with us. Travis is a principle partner at Accessibility Partners, LLC, one of the nation’s leading CVAA consulting firms. One of the things we try to do at our law firm is to find and partner with best of breed businesses that specialize in unique and often times complex regulatory areas, such as disability access to telecommunications and advanced services. By finding, vetting, working together and partnering with best of breed providers like Accessibility Partners, we are able to more efficiently and effectively develop solutions to fulfill each client’s unique needs. Later on in our presentation, Rob will describe some of the many benefits our clients can achieve by working together with counsel and third party specialists, like Accessibility Partners, through carefully crafted arrangements that seek to protect sensitive and confidential information.

So without further adieu, I’m going to turn over the microphone to Rob Jackson, who’ll be guiding you through the first set of slides before handing off to Travis.

ROB JACKSON:

Thank you, Jonathan, for that introduction and for coordinating today’s webinar on the CVAA. Any time Congress comes out with a new law… or the FCC issues new regulations… that attempt to regulate the rapidly evolving area of advanced communications, there are bound to be issues, questions, uncertainties and… of course… a great deal of non-compliance as a consequence of these uncertainties.

We’re excited about the size and diversity of our audience today and we view this as a testament to the strong desire of the communications industry to not only to follow the FCC’s rules for CVAA compliance, but also to develop services and products that are more accessible to customers with disabilities. The CVAA presents service providers and manufacturers with opportunities to expand their customer base and to make more sales. That beats a tedious compliance exercise any day.

We will walk through the CVAA and its requirements, with discussion of both technical compliance and the very important recordkeeping obligations. We will take your questions as well. Please make sure you submit them during our presentation. We’ll get to as many as we can before the end of the hour and for those we can’t address in the Q&A, we’ll follow-up with you after the webinar.

So, let’s get started.

I’ll discuss the CVAA, the policy goals behind the law and the FCC’s implementation of the Act. Travis will talk about what constitutes a “disability,” assistive technology, and business drivers for compliance. I will jump back in for a deeper discussion of the FCC’s implementation, compliance and its challenges, as well as risk and exposure, both to FCC enforcement and the ever-present civil lawsuit, which so often is a class action. I will inform you about the ways Marashlian & Donahue, along with our network of technical experts, can assist your company with cost-effective compliance and bolster your defenses against agency enforcement or lawsuits. And then Travis will talk about his company’s services. Finally, we will all answer your questions.

Slide 2

For many years, Congress and the FCC have required carriers and manufacturers to provide access to telecom services to people with disabilities. For example, long-standing rules require hearing aid compatible telephones. Thirty years ago, the FCC required discounted long distance rates for TDD users. Carriers and their customers pay fees to operate the Telecommunications Rely Services for hearing impaired and non-hearing impaired customers to communicate with each other. Meanwhile technology and the market continued to develop, and they got ahead of government rules.

As a result, in 2010, Congress passed the 21st Century Communications and Video Accessibility Act (CVAA) to update our nation’s telecommunications protections for people with disabilities. Changed technology, broadband availability & public safety needs drove Congress to amend the Communications Act of 1934.

Slide 3

The CVAA regulates both services and devices, chiefly those that are used over broadband Internet connections. The Act has two separate titles.

Title I addresses Communications Access and covers newer cell phones; specialized VoIP phones; personal computers, laptops and tablets; video conferencing equipment (covered products) as well as text messaging, e-mail, instant messaging, and interactive video communications (covered services, also known as “advanced services”). As technology and market forces continue their constant march of change, we expect the CVAA may well be interpreted to cover new, but similar, products and services, for example, the “Internet of things.” But that topic is for another day.

Title II regulates Video Programming. It covers TVs and other devices capable of displaying video programming, e.g., newer cell phones; personal computers, laptops and tablets; and programming servers and set top boxes (covered devices) and all video programming broadcast/cablecast on TV that is also shown over the Internet (covered services).

Both Titles expand access to Public Safety services, Enhanced and New Generation 911 and Emergency Alert System (EAS).

So, bottom line, if your company provides advanced services or TV programming to end user customers, it likely has CVAA obligations. Similarly, if your business manufactures devices that use broadband connections to deliver advanced services to consumers or devices that deliver TV programming over the Internet, it most likely has CVAA obligations. We will talk about what that means in a few moments.

Slide 4

What about ordinary carriers who simply transmit the ones and zeros that constitute advanced or video services. Section 2(a) of the CVAA exempts entities that only transmit covered services or provide an information location tool. The CVAA exempts ISPs & operators of broadband platforms that provide web-based access to email or instant messaging. The law excludes storage, transmission or routing functions. For example, a company that merely stores covered messaging services is not itself under the CVAA’s obligations. Likewise, a platform that only offers a directory, index, reference, pointer, menu, guide, user interface, or hypertext link that accesses covered services is not covered by the CVAA. This is similar in concept to the rule of law that excludes ISPs from liability for what their subscribers say or publish over the Internet, similar to the rules that governed common carriers for their subscribers’ speech.

The FCC’s test or rule of thumb is: a mere “passive conduit” does not carry with it CVAA obligations. On the other hand, if a carrier’s IP transport service interferes with, blocks, or otherwise negatively affects advanced services, the IP transport is not a “passive conduit.” It has compliance obligations. If that exists, your company needs to be talking to us. Now to Jonathan, who will tell us how the FCC has been implementing the CVAA.

# Slide 5: What is a disability?

To start off, the word ‘disability’ can mean different things to different people. Trying to come up with an overarching term is difficult, but the Americans with Disabilities Act of 1990, or the ADA has a working definition. Under the ADA, an individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major life activities.

There are a wide variety of disabilities and within these are a lot of overlap. There are Blindness and Low Vision, Deafness and Hearing Loss, Limited Movement, Speech Disabilities, Cognitive Limitations, or combinations of the above. People with disabilities are the only minority group that anyone can enter at any time in their life, in any fashion.

# Slide 6: Assistive Technology

Broadly, assistive technology is technology used by people with disabilities to perform functions that might otherwise be difficult or impossible.

Assistive technology is a small but established field. It can consist of any kind of technical device that helps a person with a disability. These types of items include walkers, wheelchairs, hearing aids and TTY phones. Yet, there is much more assistive technology that the average person does not immediately think about. Assistive technology includes all types of hardware, software and peripherals for the computing device.

Tools such as screen readers read text that is shown on the screen to users that have visual disabilities. Other assistive technologies that those with visual disabilities can use are screen magnifiers, and color contrast devices.

Sometimes, people with disabilities cannot use a standard keyboard or mouse. Assistive technology known as augmented input devices is used for those with mobility or dexterity disabilities. This can include on screen keyboards or sometimes Braille keyboards. Joy sticks help users put in information if they have mobility impairments. There are also other ways to input information through mouth sticks and speech recognition software. You might be aware that your phones have speech recognition, with programs like Siri for the iPhone.

Videophones are also a type of assistive technology. They help with the increasing demand of face to face communication. Videophones allow users to communicate in a variety of formats, whether through text or audio to anyone else who possesses the same software. Plus, for a person with a mobility disability, it removes the need for movement to a meeting. People can meet anywhere and anytime with a video phone.

# Slide 7: Business Drivers

Let’s look at the numbers for a second. 1 out of every 3 households in America includes a person with a disability, which shows how common living with a disability really is. Over 60 million Americans have at least one disability. This translates to about one out of every five Americans.

As the ‘Baby Boomer’ generation ages, disabilities will only become common. Most disabilities are acquired as people age and some of their faculties decrease. It is unavoidable but leads to an increased need for accessibility and technology. There are currently about 76 million baby boomers living in America at present time.

Furthermore, because of the growing amount of people with disabilities, there is a large market. People with disabilities have an estimated discretionary income of $220 billion. Thus, this makes the accessibility market a tremendous commodity.

The marketplace is changing fast; from your employees to the customers you serve, disability is commonplace. It is wise to tap this powerful group now.

Having recognition for being a company that provides acdcessible products and services to people with disabilities creates longstanding loyalty. Once the loyalty is established, people will continuously use that service. Everyone benefits from having a long time, satisfied client.

Of course, the CVAA and other accessibility regulations are the law, and you want to be compliant.

Slide 8

Rob: The FCC has adopted rules to implement the CVAA. Most of these regulations became effective in 2012. Examples are:

Video Description - Audio-narrated descriptions of a television program’s key visual elements.

Recordkeeping Compliance - Entities subject to duties under §§ 255, 716, or 718 of the Communications Act and the FCC's rules implementing those sections. Covered Entities must submit recordkeeping compliance certifications and contact information to the FCC annually by April 1.

As a matter of background, note that Section 255 of the Communications Act covers Access to Telecommunications Services & Equipment for service providers and manufacturers; Section 716 covers Access to Advanced Communications Services & Equipment; and Section 718 covers Internet Browsers Built into Telephones Used with Public Mobile Services.

Slide 9

The CVAA and FCC rules also govern The National Deaf-Blind Equipment Distribution Program (NDBEDP) - This program enables low-income individuals who are deaf or blind to access 21st Century communications services through targeted subsidies.

The new rules regulate Captioning of Internet Video Programming - FCC rules require captioning of TV programs when re-shown on the Internet; and the Display of Captioning on Equipment Used to View Video Programming - This extends closed captioning requirements to other devices used to view programming, such as certain smart phones, tablets, personal computers, and television set-top boxes.

New rules and decisions took effect in October 2013. These include regulations for § 718 (access to ACS and equipment) that are consistent with existing § 716 (Internet browsers in mobile phones) regulations The FCC did, however, decline to adopt requirements for, or safe harbors with respect to, accessibility application programming interfaces (“APIs”). And it retained § 14.31’s recording keeping requirements for manufacturers and service providers subject to § 718.

Also, covered providers of interconnected text messaging services, including wireless common carriers, must transmit “bounce back” messages to senders of 911 emergency texts (“SMS”) in locations where text-to-911 is not available.

Slide 10

The FCC adopted other CVAA rules that have taken or will take effect after March 2013, including rules related to access to emergency services:

Effective January 2014,

Set-top boxes for video programming services and related devices, including other devices used to receive or play back digital video, ranging from televisions and computers to tablets and smart phones, must provide on-screen text menus and guides with audible accessible and a button, key or icon for activating certain accessibility features, such as closed captioning.

Non-navigation devices must make their other built-in functions accessible. Finally, there are outreach requirements to inform the public about the availability of accessibility options and a procedure for making complaints to the FCC.

The recordkeeping rules need OMB approval to take effect.

Effective in May 2015, emergency information provided within video programming must be accessible to the visually impaired; certain equipment must be capable of delivering video description and emergency information to those same individuals; & manufacturers of covered video devices must make available the “secondary audio stream, which is currently used to provide video description and which will be used to provide aural emergency information.”

The FCC reaffirmed and refused to change the obligation for Internet browsers used for to provide advanced services also constitute software subject to § 716 of the Act & must be accessible by people with disabilities, unless doing so is not achievable.

Finally, the FCC is still considering other CVAA-related issues. Petition for reconsideration of User Interfaces Order and Application of the IP Closed Captioning Rules to Video Clips i.e., excerpts of full length programming

Slide 11

Now let’s look at some of the problems—or if you prefer—opportunities with CVAA compliance. As you probably know, standards are not well-established. The Act and the rules are intentionally vague and intended to be developed in a flexible manner to achieve broad access to advanced services and related devices for those of us who have disabilities—a group that increases as the average age of Americans increases. But we do know that several factors are likely to be considered in determining compliance. These include the needs of people with disabilities; limits and promises of technology; and costs for compliance. What is needed? What can be delivered at a reasonable cost?

There is no obligation to retrofit products and services that existed before the FCC’s rules took effect. But most, if not all, post 2012 products and services are not likely exempt from compliance obligations. So if you introduced a new tablet or enhanced email service in October 2013, which is not CVAA compliant, you likely have a compliance issue that we should be discussing offline.

Let’s dig a little deeper. If a service, let’s say instant messaging, cannot be used by anyone with visual impairment, your company will likely have a compliance problem. But if instant messaging can be accessed verbally on two tablets, three smart phones and five laptops, there would likely be less concern even when other products manufactured by your company are not accessible to the visually impaired. Perfection is not the enemy of good with respect to CVAA compliance.

I would not recommend, however, that for a big manufacturer, building in compliance into only its highest priced devices. There should be some level of compliance with low-end devices, unless this is simply unaffordable. The same logic applies to service providers that also sell or lease equipment. Service providers should work towards full accessibility for their offerings using a reasonable set of devices, if applicable.

Dialog with disability interest groups can be useful. Explain your situation and ask for feedback. A company that reaches out to the disabled community is less likely to be viewed as “unresponsive” even where accessibility gaps exist for some products or services. As Jonathan will explain, we and our network of consultants can assist with this outreach.

Reasonable, good faith efforts will go much farther than a narrow, legalistic reading of the rules. And document, document, document. You need to have good, contemporary records of what your company has done to comply with the CVAA.

Each product or service should have its own “story “in a CVAA compliance file. Here’s what we looked at; here’s what we found; here’s who we talked to; here’s our plan to ensure future service offerings or products are compliant; here’s who we consulted; here’s what they recommended. And that’s just for 2014. To be compliant with recordkeeping obligations, a service provider should review its services annually. The same goes for manufacturers.

Rob’s rule of thumb. Imagine the FCC opens an investigation of your company’s CVAA compliance; the state attorney general sues your company for violating a state disability law; or a process server has just delivered a class action summons to your registered agent. What do you want to be in your file? What don’t you want the other side to see? We can work with you and consultants to develop a CVAA file that protects your company.

Slide 12

What if you don’t or cannot comply? What are the risks?

The first risk of noncompliance is FCC enforcement. The FCC has statutory authority to impose cash forfeitures and to impose greater CVAA obligations, such as a duty to caption additional programming. CVAA violations can result in forfeitures of up to $100,000 per violation or for each day of a continuing violation, up to a maximum of $1 million and orders to bring products into compliance. Being the target of an FCC enforcement proceeding is not a pleasant experience. And think of the bad publicity. Your competitors would love to be able to point out that your products and services are not easily accessible by the many Americans who have a disability.

Also, note the FCC has developed a new, streamlined complaint process for consumers. It’s easy for a disgruntled consumer to file a complaint because she or he cannot send email messages orally. And once a complaint is filed, it won’t be ignored if it has merit.

A much better approach is to work on, and achieve, reasonable compliance. If that is not doable, it may be possible to obtain a waiver from the FCC. For example, this year the Commission grandfathering for one year, non-compliant e-readers designed for text-based digital works, even though they can provide access to ACS. In the case of the FCC, it is better to ask permission, rather than forgiveness.

What about complaints against wholesale providers? The FCC would expect a wholesale provider to provide evidence its service is a “passive conduit.” Without good evidence, a complaint could be challenging for defendants. Hence, document, document, document. (I don’t think the FCC would investigate a wholesale provider without a complaint being filed.)

Slide 13

And now let’s look at lawsuits, especially class action lawsuits. The CVAA does not allow for private enforcement. Only the FCC has the statutory right to enforce the law.

But courts have held private parties can bring suit under the Americans with Disabilities Act (ADA) or state disability laws (which permit private enforcement) and raise CVAA standards. In other words, judges can impose CVAA requirements in ADA or state law actions.

The leading case is *National Association of the Deaf v. Netflix* (D.Mass.) This was a suit by deaf person and related interest group, under the ADA, to force Netflix to provide closed captioning on all of its “Watch Instantly” programming. The case settled with Netflix agreeing to close caption all “Watch Instantly” programming by September 2014. As per the consent decree, Netflix also paid attorneys’ fees and $40,000 for the NAD to monitor compliance. This is probably just the tip of the iceberg. There will be more and more class action law suits involving CVAA access issues. Why do I think this way?

Do you watch cable TV? Have you seen the many commercials seeking class action plaintiffs? Have you seen the class action websites? Class actions are big business in the United States. And communications-related lawsuits are significant.

Slide 14

What do we think about CVAA litigation risks? Who has higher risks? First, let’s talk about Providers of Covered Services & Equipment. The obvious conclusion is that larger companies = more visibility = more risk. Verizon has more visibility and exposure than a small interconnected VoIP provider. But that small provider can be the target of a small law firm or sole practioner.

All covered service providers and manufacturers need to make good faith, reasonable compliance efforts in order to reduce risk. Document, document, document. Sticking one’s head in the ground is not a good idea. The defendant needs a “paper trail” showing compliance efforts. Further, covered businesses need to establish collaborative relationships with disability groups, either directly or through trade associations. As Jonathan will explain, we can help with that outreach effort.

The risk of litigation for wholesale providers should be quite small. But a wholesale provider needs evidence that it looked at its services and determined they are simply “passive conduits.” The existence of incorrect statements in the documentation could increase the risk of litigation. “We examined our IP transport service. It cannot affect CVAA covered services under any conditions.” Somewhere, somehow, an engineer will find a way that transport services can, under some unique circumstances, interfere with the delivery of adaptive services. Recall the massive SS7 failures of the 1990s that were caused by minor glitches. How does a wholesale provider square its earlier statement with that of the plaintiff’s expert engineering witness? The time for review and documentation is now.

While the risk of direct litigation on CVAA claims (ADA- or state law-based) is likely quite remote, wholesale providers need to be aware of being pulled into other companies’ lawsuits. A retail service provider faced with a massive class action may well decide to implead its wholesale carrier and claim transport services contributed to the retailer’s inability to comply with CVAA accessibility. Litigation allows defendants to try to pass on blame and seek monetary contributions. Rule 14 of the Federal Rules of Civil Procedure allows defendants to implead those who might be liable to the defendant. Most states have similar rules.

Even an innocent wholesale provider might find itself faced with increased legal fees and nuisance settlements.

And disability rights groups are more aggressive today. Their members are unwilling to accept “second class citizenship” or “exclusion from advanced services.” It is of critical importance to have some form of direct or indirect relationship with disability organizations. And with those comments, I will again turn over the webinar to Jonathan.

Slide 15

M&D has established a broad network of connections with companies, consultants, engineering firms, nonprofits, disability interest groups, colleges and universities, and the FCC’s Disabilities Rights Office, which it can leverage to provide valuable information and compliance services, including:

Evaluation of products and services for CVAA compliance;

Negotiation and consensus building for the establishment of compliance standards; and

Cross-sharing of information and identification of cost-effective solutions, i.e., avoidance of overly expensive fixes.

Slide 16

Compliance review and certification can be obtained through M&D, with the potential availability of attorney-client and work-product privileges to protect confidential information – not available through direct hiring of 3rd party entities.

Given the unsettled state of CVAA compliance, M&D clients can obtain “early mover” advantage – helping to set cost-effective compliance requirements, as opposed to being governed by other parties’ consensus.

More information about M&D’s compliance network “members” can be obtained after execution of a non-disclosure agreement (NDA) with individual or group “members

# Slide 17

Accessibility Partners is headquartered in the Washington D.C. area. We are an accessibility consulting firm focused on accessibility of information and communication technology. We have subject matter experts in accessibility including Section 508, which is part of the Rehabilitation Act and covers accessibility by the Federal government, the World Wide Web Consortium, or W3C, Web Content Accessibility Guidelines and the FCC’s 21st century Communications and Video Accessibility Act, or CVAA.
Here at Accessibility Partners, we have staff who are also expert users of assistive technology products such as screen readers. Having a diverse staff of people with disabilities gives us a unique insight into the individual experiences of a wide range of technological users.

Our clients are in the public and private sectors from technology companies to telecommunications to education.

# Slide 18

Our core service is accessibility testing and auditing of products and services. Some of the types of things we have tested are software and web applications such as web portals and security tools. Others are hardware such as laptops, cellphones and tablets. What is most challenging is some of today’s devices such as cellphones combine aspects of hardware and software into one package which brings several accessibility considerations into play at once.

Accessibility Partners monitors legislation, guidelines and standards as they pertain to accessibility both nationally and internationally. This enables us to be current on the accessibility landscape and guide our clients for the immediate and for the future. We understand that sometimes products and services have a long-term horizon for implementation or for their expected lifespan and our clients need to be prepared and keep surprises to a minimum when possible.

# Slide 19

When Accessibility Partnrs takes on a project we look to understand what our client actually needs. The testing of products, explaining what we found and helping to plan for accessibility enhancements where they’re needed helps position our clients as leaders in providing accessible products and services.

# Slide 20

An accessibility audit can lead to compliance with accessibility law such as the CVAA. The audit finds how a product or service stacks up with accessibility guidelines. It focuses not only on what is wrong and inaccessible, but also on what is accessible. The findings can surve as a guide for future enhancements, as well as to promote what the product already does well.

In addition, the documentation from an accessibility audit can support the recordkeeping requirements of the CVAA.

# Slide 21

In an accessibility audit, the focus is on the end user and how he or she interacts with the product. Users may have various disabilities such as blindness, low vision, deaf and hard of hearing, and dexterity impairments. Part of testing a product is to consider what common assistive technology a typical user with a disability would use to gain access. For example, a blidn user often uses a screen reader to read text shown on a computer or cellphone screen. Then, how well does the product work with the assistive technology currently? What can be changed to allow it to work better? These questions can be answered in the accessibility audit.

# Slide 22

Briefly the testing methodology is:

First, review requirements, specifications and product documentation.

Then develop test plan based on requirements such as CVAA, Section 508, etc.

Test the product by using a combination of automated test tools, assistive technology and manual inspection of the products.

Where possible we include people with disabilities to ensure “real world” feedback; Accessibility Partners employs testers with disabilities so this is usually the case.

A comprehensive report including gap analysis and optionally remediation suggestions is prepared.

# Slide 23

Compliance documentation is created. For example, for a CVAA-based audit the documentation will list how the product complies to the CVAA. Similarly, a Voluntary Accessibility Template (VPAT) is used for Section 508.

CVAA needs several documents including statements on Accessibility of the product, Information about the compatibility of products and services with peripheral devices, Specialized customer premise equipment commonly used by individuals with disabilities to achieve access, and efforts to Consult with Individuals with Disabilities.

# Slide 24

The final documentation package ensures compliance with FCC’s recordkeeping rules as part of the CVAA.

An affidavit or declaration is filed annually, on or before April 1 stating that the CVAA accessibility documentation does exist.

The annual filing also includes contact information for the consumers, and a US agent for service contact information.