

compensable in accordance with paragraph (c)(5)(iii)(L)(4) of this section.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket Nos. 13-24 and 03-123; FCC 13-13]

Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities

AGENCY: Federal Communications Commission.

ACTION: Interim rule.

SUMMARY: In this document, the Commission adopts interim rules prohibiting all referrals for rewards programs (as described in the synopsis below) and any other form of direct or indirect inducements, financial or otherwise, to subscribe to or use, or encourage subscription to or use of, Internet Protocol Captioned Telephone Service (IP CTS); requiring each IP CTS provider, as a precondition to providing service to new IP CTS users, to register each new IP CTS user, to obtain from the user, as part of the registration process, self-certification that the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, and where the consumer accepts IP CTS equipment at a price below \$75 from any source other than a governmental program, to also obtain from the user a certification from an independent, third party professional attesting to the same; and requiring IP CTS providers to ensure that equipment and software used in conjunction with their service have a default setting of captions off at the beginning of each call, so that the consumer must take an affirmative step to turn on the captions each time the consumer wishes to use IP CTS. The Commission's action is intended to address certain practices related to the provision and marketing of IP CTS that appear to be contributing to a recent and dramatic spike in reimbursement requests to the Interstate Telecommunications Relay Service Fund (TRS Fund or Fund), of sufficient magnitude to constitute a serious threat to the Fund if not promptly and decisively addressed.

DATES: Effective February 5, 2013, except the amendments to § 64.604(c)(10) of the Commission's rules which is effective March 7, 2013, and 64.604(c)(9) of the Commission's rules which contain new information collection requirements that have not been approved by the Office of Management and Budget (OMB). This amendment will become effective upon publication in the **Federal Register** of a notice announcing the approval of such requirements by the Office of Management and Budget under the Paperwork Reduction Act of 1995. The Commission will publish a separate document in the **Federal Register** announcing the effective date.

FOR FURTHER INFORMATION CONTACT: Eliot Greenwald, Consumer and Governmental Affairs Bureau, Disability Rights Office, at (202) 418-2235 or email Eliot.Greenwald@fcc.gov. For additional information concerning the PRA information collection requirements contained in document FCC 13-13, contact Cathy Williams at (202) 418-2918, or email: Cathy.Williams@fcc.gov and PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, document FCC 13-13, adopted on January 24, 2013 and released on January 25, 2013, in CG Docket Nos. 13-24 and 03-123. In document FCC 13-13, the Commission also adopted a Final Rule and a Notice of Proposed Rulemaking, each of which is summarized in a separate **Federal Register** publication. The full text of document FCC 13-13 will be available for public inspection and copying via ECFS, and during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY-A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW., Room CY-B402, Washington, DC 20554, telephone: (800) 378-3160, fax: (202) 488-5563, or Internet: www.bcpweb.com. Document FCC 13-13 can also be downloaded in Word or Portable Document Format (PDF) at <http://www.fcc.gov/cgb/dro/trs.html#orders>. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

Final Paperwork Reduction Act of 1995 Analysis

Document FCC 13-13 contains new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public to comment on the information collection requirements contained in document FCC 13-13 as required by the PRA of 1995, Public Law 104-13 in a separate notice that will be published in the **Federal Register**. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. In this present document, the Commission has assessed the effects of imposing various requirements on IP CTS providers and on consumers of IP CTS. The Commission recognizes that these requirements are necessary to detect and prevent abuse and waste in the IP CTS program. The Commission takes these actions to ensure the sustainability of the program upon which individuals with hearing disabilities have come to rely for their daily communication needs. In doing so, the Commission has balanced preserving the sustainability of the IP CTS program and minimizing the information collection burden for consumers and small business concerns, including those small businesses with fewer than 25 employees. For example, in adopting requirements for IP CTS providers, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, to register the users and obtain from the users certification of hearing loss necessitating use of IP CTS, the rule affords considerable flexibility by allowing those consumers who have purchased their IP CTS equipment for \$75 or more, or obtained equipment from a governmental program, to self-certify as to their hearing loss. Nevertheless, such procedures are necessary to limit use of IP CTS to those who actually have a hearing loss that necessitates use of the service.

Synopsis

1. In document FCC 13-13, the Commission takes immediate, interim steps to address certain practices related to the provision and marketing of IP CTS that appear to be contributing to a recent and dramatic spike in reimbursement requests to the TRS Fund, of sufficient magnitude to constitute a serious threat to the Fund

if not promptly and decisively addressed. IP CTS permits people who can speak, but who have difficulty hearing over the telephone, to speak directly to another party on a telephone call and to use an IP-enabled device to simultaneously listen to the other party and read captions of what that party is saying. In document FCC 13–13, the Commission finds good cause to adopt on an emergency basis interim rules (1) prohibiting all referrals for rewards programs (as described below) and any other form of direct or indirect inducements, financial or otherwise, to subscribe to or use, or encourage subscription to or use of, IP CTS; (2) requiring each IP CTS provider, in order to be eligible for compensation from the Fund for providing service to new IP CTS users, (i) to register each new IP CTS user, (ii) as part of the registration process, to obtain from the user a self-certification that the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, and (iii) where the consumer accepts IP CTS equipment at a price below \$75 from any source other than a governmental program, to also obtain from the user a certification from an independent, third party professional attesting to the same; (3) requiring IP CTS providers to ensure that equipment and software used in conjunction with their service have a default setting of captions off at the beginning of each call, so that the consumer must take an affirmative step to turn on the captions each time the consumer wishes to use IP CTS. The interim rules will take effect in three stages. First, the interim rules prohibiting referrals for rewards will become effective upon publication in the **Federal Register**. Second, the interim rules requiring a default setting of captions off at the beginning of each call will become effective thirty days after publication in the **Federal Register**. Third, the interim rules on registration and certification will become effective upon publication in the **Federal Register** of a notice announcing the approval of such requirements by the Office of Management and Budget under the Paperwork Reduction Act of 1995. These interim rules will sunset on a common date, which will be either (1) 180 days after the effective date for the interim rules on registration and certification or (2) the effective date of final rules on these issues, whichever date is sooner. The Commission will publish a separate document in the

Federal Register announcing the sunset date.

2. Telecommunications relay services (TRS) enable an individual with a hearing or speech disability to communicate with other individuals “in a manner that is functionally equivalent” to a hearing individual’s ability to communicate using voice communications services. 47 U.S.C. 225. This is currently accomplished through TRS facilities staffed by communications assistants (CAs) who relay conversations between persons using various types of assistive communication devices and persons using end user telephone equipment, such as a standard telephone, smartphone, or computer. Captioned telephone service (CTS) works by having the hard of hearing user dial the number she or he wishes to call. The user’s phone is automatically connected to a captioned telephone CA at the same time she or he reaches the called party. Once connected, the CA re-voices everything the called party says and uses voice recognition technology to automatically transcribe those words into captions. The captions then are transmitted directly to the user and are displayed, shortly after the called party speaks, on the display of a captioned telephone device, a computer, or a smartphone. The public switched telecommunications network (PSTN) version of CTS was approved in 2003. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, CC Docket No. 98–67, published at 68 FR 55898, September 29, 2003 (*CTS Declaratory Ruling*). The Internet-based version of CTS (IP CTS) was approved in 2007. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03–123, Declaratory Ruling, published at 72 FR 6960, February 14, 2007 (*IP CTS Order*). When this service was first established, the Commission set only the minimum standards that apply to all TRS, but did not establish any eligibility criteria specifically for use of this service.

3. Section 225 of the Communications Act of 1934, as amended (Act), 47 U.S.C. 225, and its implementing regulations provide that the costs for providing TRS, including IP CTS, are not charged to the consumers using these services; rather, the costs are passed on to all consumers of telecommunications and voice over Internet Protocol providers. 47 U.S.C. 225(d)(3); *see also* § 64.604(c)(5) of the Commission’s rules. Interstate relay calls and all calls made via Internet-based forms of TRS are

funded through mandatory contributions made to the Fund by these providers. 47 U.S.C. 225(d)(3); *see also* § CFR 64.604(c)(5) of the Commission’s rules. Eligible providers of compensable TRS are then entitled to recover their “reasonable” costs of providing service from this Fund in compliance with the Commission’s service rules. *See* § 64.604(c)(5)(iii)(E) of the Commission’s rules. IP CTS and interstate CTS providers are paid using a methodology known as the Multi-state Average Rate Structure Plan (MARS Plan), which calculates the compensation rate for IP CTS using a weighted average of the state rates for intrastate CTS. Given this funding methodology, the Commission presently does not require providers of these services to file annual cost and demand data submissions with the Fund administrator. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03–123, Report and Order, and Declaratory Ruling, published at 73 FR 3197, 3200, January 17, 2008. In the absence of such data, the Fund administrator estimates CTS and IP CTS demand projections based on actual historical demand. *See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 03–123 & 10–51, Order, 27 FCC Rcd 7150, 7155 at paragraph 13, footnote 56 (CGB 2012) (*2012 TRS Rate Order*).

4. In recent months, IP CTS has been experiencing unprecedented and unusually rapid growth. For example, the total number of minutes for which compensation was requested by providers increased by an average of 11% per month from June to October 2012. In October 2012 alone, requested minutes exceeded the minutes budgeted for this service by the Fund Administrator by 38% and as a consequence, the total requested payout also exceeded the budgeted amount by 38%, almost \$4 million. As discussed below, the Commission has reason to believe that this growth is being caused by the offering of incentives for referrals to use this service, as well as usage of this service by people without a hearing loss that necessitates the use of IP CTS to communicate in a functionally equivalent manner, and that, if unchecked, this growth threatens in the very near term to overwhelm the Fund. Because all forms of TRS are supported through one Fund, this puts all forms of

TRS in jeopardy and threatens to deprive people who are deaf or hard of hearing of the benefits of the program.

5. The growth in IP CTS witnessed in recent months represents a sudden and sharp departure from the trend of declining rates of growth in usage of this service over three prior years. It is only within recent months that the Commission learned about the extraordinary escalation in this service's usage, as well as the existence of the referrals for rewards programs and the lack of specific eligibility criteria for new users. Although there was a temporary leveling off of usage in September 2012, it was followed by a steep incline in usage in October 2012, confirming the Commission's expectation that the program's sudden acceleration of growth will continue in the immediate months ahead—growth that, if left unchecked, could exacerbate the potential for harm to both the Fund and legitimate users of TRS. In particular, data indicate that, absent Commission action, there could be insufficient funds available in this Fund year to meet the needs of the Fund, potentially triggering a violation of the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A), and otherwise threatening the availability of the service for consumers of this and other relay services supported by the Fund.

6. The Commission concludes that protecting such interests at this time outweighs the public interest in providing prior notice of the interim rules the Commission now adopts. Moreover, although the Commission did not formally provide notice and an opportunity to comment, the Commission nevertheless received extensive input from interested parties on these issues, including input from all of the active providers of IP CTS and a number of consumer groups. In order to allow for notice and comment as soon as feasible, however, the Commission is putting these rules in place for only a short interim period. Because the harm to the Fund appears to result from certain practices addressed in document FCC 13–13, the Commission believes the most appropriate immediate action is to adopt the few interim rules discussed below, rather than simply to allow the Fund to grow unchecked while the Commission solicits public comment. Such action will enable the Commission to better control the level of TRS disbursements and protect the programmatic, legal, and financial integrity of the TRS program. Conversely, failing to take immediate action to stem such practices could well threaten the availability of this and other relay services that are supported

by the Fund for the benefit of legitimate users. Moreover, because the Commission believes that a substantial portion of this growth is arising from practices that may be inconsistent with the policies underlying section 225 of the Act and the Commission's implementing regulations, the Commission is concerned that if interim rules are not adopted immediately, the use of questionable practices would continue and even accelerate, adding further to the strain on the Fund. In addition, if the Commission were to follow ordinary notice and comment procedures, IP CTS providers would be able to continue—indeed, to accelerate—the use of potentially inappropriate incentives to recruit and sign up new IP CTS users without first establishing their eligibility for an extended period of time while the rulemaking process is pending.

7. To prevent these imminent public harms from occurring and to bring Fund expenditures for this service under control, the Commission finds that three immediate measures are necessary. First, because, as discussed below, the Commission finds that referrals for rewards programs are likely to unduly and inappropriately incent consumers to obtain equipment and use service that they might not otherwise use, the Commission prohibits all referrals for rewards programs and any other form of direct or indirect inducements, financial or otherwise, to subscribe or use or encourage subscription to or use of IP CTS. Second, to prevent the unnecessary subscription to and use of the service by consumers who do not need IP CTS to communicate in a functionally equivalent manner, the Commission adopts interim rules to require each IP CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, to register each new user for service with the IP CTS provider and, as part of the registration process, to obtain from each user a self-certification that (1) the user has a hearing loss that necessitates the use of IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, (2) the user understands that the captioning service is provided by a live CA; and (3) the user understands that the cost of the IP CTS calls is funded by the TRS Fund. In addition, where the consumer accepts IP CTS equipment for less than \$75 from any source other than a governmental program that distributes the equipment, the provider must obtain from the user a certification from an independent,

third party professional attesting to the necessity for IP CTS. Third, to prevent improper billing of the TRS Fund for the use of IP CTS by individuals who do not need IP CTS to communicate in a functionally equivalent manner and who are either living in the household or visiting the house or office of an eligible user, the Commission adopts interim rules requiring IP CTS providers to ensure that equipment and software used in conjunction with IP CTS have a default setting of captions off at the beginning of each call, so that the consumer must take an affirmative step to turn on the captions each time the consumer wishes to use IP CTS. At the same time that the Commission adopts these rules on an interim basis to address these immediate concerns, the Commission seeks comment in the accompanying Notice of Proposed Rulemaking (NPRM) on these and other possible actions to address the sustainability of this service in the long term.

8. As noted above, TRS enables an individual with a hearing or speech disability to communicate with other individuals “in a manner that is functionally equivalent” to a hearing individual's ability to communicate using voice communications services. Section 225(b) of the Act directs the Commission to ensure that TRS services are available to persons with hearing and speech disabilities “to the extent possible and in the most efficient manner.” 47 U.S.C. 225(b)(1). Further, section 225(d) of the Act instructs the Commission to adopt regulations implementing section 225 of the Act, including regulations “establish[ing] functional requirements, guidelines, and operations procedures for [TRS],” 47 U.S.C. 225(d)(1)(A), as well as mandatory “minimum standards” governing the provision of TRS. 47 U.S.C. 225(d)(1)(A). These provisions authorize the rules adopted herein, and as discussed below, the Commission concludes that it has authority to adopt these interim rules immediately, without prior notice and opportunity for comment.

9. Section 553 of the Administrative Procedure Act (APA) requires that agencies provide notice of and an opportunity for public comment on their proposed rules except, *inter alia*, “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(3)(B). The decision not to follow notice and comment procedures has been allowed

in emergency situations or where delay could result in serious harm. *Chamber of Commerce*, 443 F.3d at 908. See also *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105–06 (DC Cir. 2009). In this case, the Commission finds good cause to adopt immediate interim rules to address the recent, unprecedented and unusually rapid increase in IP CTS minutes of use in order to maintain the integrity of the Fund, to sustain this service and other forms of TRS for legitimate users during the coming months, and to help avoid increasing mid-year the amount that telecommunications and VoIP providers must pay into the Fund in order to account for the rapid growth caused by these potentially improper practices. In particular, the Commission finds that because IP CTS growth is occurring so rapidly, it would be impracticable and contrary to the public interest to delay remedial action by waiting until after completion of the notice and comment process, which can take several months, to adopt any rules. See, e.g., *Amendment of the Commission's Rules to Permit FM Channel And Class Modifications by Application*, Notice of Proposed Rulemaking, 7 FCC Rcd 4943, 4944, paragraph 6, footnote 12 (1992). The actions the Commission takes in this order thus are aimed at preserving the fiscal integrity of the TRS Fund and ensuring compliance with applicable Federal law.

10. *Referrals for Rewards*. The recent expansion in usage of IP CTS appears to have been precipitated largely by new referral programs that offer monetary rewards for the referral of customers who sign up for installation of the provider's IP CTS end user equipment. These rewards are being given to third parties, including the providers' existing customers, members of the general public, and hearing and health care professionals such as audiologists. In a variation of these referral programs, providers are also making donations to charities, again contingent on a consumer's receiving the providers' IP CTS phone and service. The Commission is concerned about these financial incentive programs, which may well be resulting in the registration for and usage of IP CTS by new IP CTS users who do not need these services to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. By offering rewards to individuals, professionals, and organizations for enlisting customers for IP CTS, the referral programs may indirectly encourage consumers to sign up for this relay service, whether or not

they actually need the service to communicate in a functionally equivalent manner, in order to earn money for their friends or for programs and charitable services that they support. As noted above, such practices appear to be having a profound detrimental impact on the Fund. Specifically, payment of such rewards to third parties may well encourage consumers to order IP CTS service just to gain the incentive benefit. For example, such incentive rewards programs appear to prompt charitable organizations to advertise a provider's IP CTS to their members and to encourage those members to produce the promised donations by ordering the provider's IP CTS. When a charitable organization promotes registration with an IP CTS provider in order for the organization to receive the \$50 donations that result, such promotions may encourage the organization's members to order the IP CTS provider's service in order to support the organization, whether or not they actually need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. The more customers that sign up to use the provider's IP CTS, the greater the financial rewards to participants in the incentive programs, and the more compensation the provider is able to collect from the Fund, at no cost to the consumer. In short, offering such rewards may have the effect of enlisting customers who might not otherwise have a reason to use the service. Such practices thus not only threaten the Fund, but also may be inconsistent with the very purpose of the TRS program—to provide communication services for people with hearing or speech disabilities who are otherwise unable to use conventional telephone services. See 47 U.S.C. 225(a)(3) (defining TRS to “* * * provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio. * * *”). For these various reasons, the Commission finds good cause to adopt an interim rule expressly prohibiting, for a short term, all referrals for rewards programs and any other form of direct or indirect inducements, financial or otherwise, to subscribe to or use, or encourage subscription to or use of IP CTS, including inducements that provide incentives for potential users to subscribe to IP CTS or that incent third parties, such as audiologists and other hearing and health professionals, to encourage such subscriptions.

11. The Commission disagrees with the argument that it should treat differently the payment of referral fees to hearing specialists and payments to non-experts such as friends and charities. To the extent that such professionals are offered rewards that incent them to encourage consumers to order and use IP CTS—whether or not such consumers would actually benefit from IP CTS—such rewards may be promoting the use of IP CTS by individuals who do not need this service, or who could benefit more from other assistive devices or hearing technologies.

12. In the TRS context, the Commission has had a history of addressing fraud, abuse and misuse through restrictions on financial incentives such as those adopted here. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03–123, Report and Order, and Declaratory Ruling; published at 73 FR 3197, January 17, 2008 (prohibiting payments made to third parties and incentives that result in the registration of consumers with a TRS provider, as well as incentives that increase a subscriber's usage of TRS).

13. The Commission believes that providers can effectively promote IP CTS without offering financial rewards for referrals through, for example, the distribution of literature to assistive technology specialists, audiologists, and other professionals; the insertion of advertisements in mainstream and disability publications, and participation in disability conferences and other activities to inform professionals and the public about the benefits of this service. The Commission also believes that any expectation by professionals that they will receive compensation for making such referrals appears to be generally inconsistent with established federal policy. For example, the Commission's interim prohibition of referral awards to audiologists and other professionals is consistent with the health care anti-kickback statute, which prohibits the offering or payment of any remuneration in return for (A) referring an individual for the furnishing or arranging for the furnishing of any item or service for which payment may be made under a Federal health care program or (B) in return for purchasing, leasing or ordering any good, facility, service, or item for which payment may be made under a Federal health care program. 42 U.S.C. 1320a–7b(b)(2). Subject to receiving further comment on this and other issues, the Commission finds that

the underlying public policy reasons for the healthcare anti-kickback statute appear to apply equally to awards for referrals provided to audiologists and other professionals.

14. The temporary prohibition adopted by the Commission includes any programs initiated, sponsored or operated by IP CTS providers that offer financial or other incentives or rewards to third parties for the referral of customers who sign up to use the provider's IP CTS offering, as well as provider programs or practices offering or providing any payment or other thing of value, directly or indirectly to a potential or existing IP CTS user. In addition to the prohibition against rewards for referrals, the temporary prohibition against any other form of direct or indirect inducements, financial or otherwise, to subscribe or use or encourage subscription to or use of IP CTS would prohibit, for example, a provider from reimbursing a consumer for the cost of his or her examination by a hearing or health professional that would be needed to establish the consumer's hearing loss or for the cost of obtaining other eligibility documentation. The Commission is reserving judgment at this point pending the further development of a record in response to the accompanying NPRM as to whether there should be a permanent prohibition on these practices.

15. *Registration and Certification.* The recent and unexpected escalation in IP CTS minutes raises serious concerns about whether IP CTS is now being made available to and used by some consumers who may not need the service to communicate in a manner that is functionally equivalent to telephone communication by conventional voice telephone users. This sudden swell in IP CTS minutes not only threatens the long term viability of this service for those who truly need it, but also, on a more immediate basis, it threatens to exhaust monies currently available in the Fund for this and other approved TRS within the next few months. For the reasons discussed below, the Commission finds it necessary to adopt interim rules addressing registration and eligibility certification to use this service.

16. IP CTS is distinguishable from most other forms of TRS by its unusual ease and convenience of use. In contrast to other forms of TRS, which often require special skills (e.g., knowledge of American Sign Language by persons who use video relay services) or are designed for very discrete portions of the population with specific communication needs (e.g., people with

speech disabilities who need to use specially trained speech-to-speech CAs), consumers who use IP CTS may be less likely to "self-screen" in choosing whether to subscribe to IP CTS.

Furthermore, IP CTS is "provided in a way that is automated and invisible to both parties to the call," *IP CTS Order*, 72 FR 6960, February 14, 2007, likely making it a more attractive TRS option than other services in which the CA has a known presence. Indeed, one of the central benefits to IP CTS is that, unlike most other forms of TRS, IP CTS is capable of being used without any interruption in the normal flow of a voice telephone conversation. Further, unlike the PSTN-based forms of CTS and many other types of TRS, incoming IP CTS calls are not encumbered by having to first dial an 800 number to reach a CA; rather, the call can be directly dialed to the IP CTS user. Finally, IP CTS offers certain features that may attract its use by individuals who may not necessarily need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, but rather simply desire such features. For example, a consumer with no hearing loss might subscribe to and use IP CTS merely because it provides a transcription of what the other party to a call is saying. Other individuals may use the captions to engage in multiple tasks at the same time, and may not be aware that this is a publicly funded program that supports the costs of captions each time they are produced. And some individuals who do not need captions might sign up for service in order to obtain a free or subsidized highly-amplified phone from the provider. The Commission therefore finds that there is a greater risk, compared with other forms of TRS, that IP CTS is being used (with consequent billing of the Fund for the minutes used) by individuals who do not need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users.

17. To address the anticipated near-term impact on the TRS Fund and to ensure that only those individuals for whom TRS truly was intended are using this service—and thereby prevent waste of Fund resources—the Commission finds it necessary and appropriate at this time to adopt, on an interim basis, a registration and certification requirement to restrict the use of IP CTS to those who have a hearing disability that the Commission believes the Act and the Commission's rules are intended to address. The Commission

believes that the exigent circumstances that now exist require the Commission to take such action to protect the Fund during the 2012–13 Fund year, and to fulfill Congress's mandate for this service to be available to eligible persons who genuinely need it to communicate by telephone in a manner that is functionally equivalent to telephone use by hearing individuals. The Commission further believes that the action it takes today is in accordance with section 225 of the Act's mandate to provide TRS "to the extent possible and in the most efficient manner" to its intended population. 47 U.S.C. 225(b)(1).

18. In order to ease the burden of compliance, the Commission will accept a self-certification in those instances in which the user has either made a significant financial investment in IP CTS equipment or received that equipment through a governmental program. While there is no way at this time to pinpoint the precise cost that will most effectively deter ineligible usage of IP CTS, the Commission believes that setting a floor of at least \$75 in order to qualify for the self-certification-only option represents a reasonable balancing of interests. The amount is high enough to affect most consumers' purchasing decisions, but not so high as to make the purchase of equipment infeasible. Indeed, a floor of \$75 is well below the listed retail prices for the captioned telephones used with current IP CTS offerings. The Commission also finds self-certification alone to be sufficient if the individual obtains free or low-cost equipment from a governmental program because such programs themselves screen users to determine their need for IP CTS.

19. The Commission believes that limiting the number of potential users who need to seek third-party certification in this manner for a short period while it determines what permanent certification requirements will best serve the Fund is in the public interest, and will not place an undue burden on legitimate IP CTS users. As to the effect of this rule on low-income individuals who may not be able to afford \$75 for IP CTS equipment, those individuals may be able to obtain IP CTS equipment from state equipment distribution programs, and in any event may accept free or very low-priced equipment so long as they obtain a third-party certification. Thus, the Commission believes that this interim rule is unlikely to prevent those who truly need access to IP CTS from receiving the service.

20. The Commission therefore adopts an interim rule that requires each IP

CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, to register each new IP CTS user for service and as part of the registration process, to obtain from each user a self-certification that (1) the user has a hearing loss that necessitates the use of IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, (2) the user understands that the captioning service is provided by a live CA, and (3) the user understands that the cost of the IP CTS calls is funded by the TRS Fund. This self-certification must be made on a form separate from any other user agreement (such as on a separate page), and requires a separate signature specific to the self-certification. For the purposes of this requirement, an electronic signature has the same legal effect as a written signature.

21. Where the consumer accepts IP CTS equipment for less than \$75 from any source other than a governmental program, the interim rule also requires the provider to obtain a certification from an independent, third-party professional attesting that the user has a hearing loss that necessitates the use of IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. Such third-party professionals must be qualified to evaluate an individual's hearing loss in accordance with applicable professional standards, and may include community-based service providers, hearing related professionals, vocational rehabilitation counselors, occupational therapists, social workers, educators, audiologists, speech pathologists, hearing instrument specialists, and doctors, nurses, and other medical or health professionals. Any such professionals must certify in writing that the applicant needs IP CTS to communicate in a manner that is functionally equivalent to conventional voice telephone service experienced by individuals without hearing disabilities. In cases where new users have obtained IP CTS equipment for free or at low cost through a governmental program, the Commission finds it reasonable for purposes of the interim rules to permit the provider to rely on documentation demonstrating that the equipment was obtained through one of these programs, in lieu of providing an independent, third-party certification. These steps will protect against registration by individuals who do not need captioning, but who are registering merely to receive free or very inexpensive phones. The Commission

also requires each IP CTS provider to maintain the confidentiality of all registration and certification information obtained by the provider, and to not disclose such registration and certification information, as well as the content of such information, except as required by law.

22. *Default Captions Off.* In addition to adopting measures to ensure that IP CTS equipment and service is provided to subscribers who need the service to communicate in a functionally equivalent manner, the Commission seeks to prevent billing of the TRS Fund for casual or inadvertent use of IP CTS by other individuals who do not need IP CTS to communicate by phone, in particular those who may be living in a subscriber's household or visiting a subscriber's house or office. It is the Commission's understanding that much of the IP CTS equipment that is being distributed at this time provides for captions to be automatically displayed without the need to affirmatively turn the captions on. As a consequence, the TRS Fund is billed unless the person using the IP CTS equipment takes affirmative action to turn the captions off. Further, some equipment is configured such that the user must go through a two-step process to turn captions off, rather than having a clear on/off button visible at all times.

23. To avoid misuse of IP CTS, and to ensure that the Fund is used for functionally equivalent telephone service for people with disabilities, the Commission is requiring on an interim basis that all providers ensure that equipment and software used in conjunction with their IP CTS have captions turned off as the default setting. This is consistent with actions already taken by a number of states to prevent similar misuse of PSTN-based CTS. The Commission anticipates that consumers who are provided with a clear on/off option and an explanation of how to use it can reasonably be expected to learn to turn captioning on at the beginning of each call.

24. Further, while taking one or more steps, such as pushing a button, to receive captions may add a small burden to the process of using IP CTS, the Commission preliminarily finds that any burden is outweighed by the substantial public interest in preventing the misuse of this service. As explained earlier, IP CTS is "provided in a way that is automated and invisible to both parties to the call," *IP CTS Order*, 72 FR 6960, is capable of being used without any interruption in the normal flow of a voice telephone conversation, and offers certain features that may attract its use by individuals who may not

necessarily need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. Because of these IP CTS attributes, with a captions-on setting, the likelihood increases that individuals who do not need IP CTS may be casually or inadvertently using IP CTS, causing illegitimate minutes of use to be billed to the Fund.

25. For these same reasons, the Commission also requires, on an interim basis, that IP CTS equipment not provide consumers the option of changing the default setting from captions-off to captions-on. At this time, the Commission likewise does not adopt a proposed exception to allow a consumer-initiated "default on" setting for users that provide an elevated certification to the effect that: (a) They understand that the captioning service they enjoy free of charge is provided by a live CA dedicated to each of their captioned calls, and reimbursed by the TRS Fund, (b) their device is not accessed by or easily accessible to ineligible users, and (c) they will not permit the use of captions on their device by any ineligible persons. Even well-intentioned users may find it difficult to ensure that there is no unnecessary use of captioning once it is turned on; by contrast, the burden on the consumer to simply press a "captions on" button or similar method appears to be minimal. The accompanying NPRM seeks comment on this proposed exception, as well as a suggestion that the Commission set standards for connection time after the consumer activates the captions.

26. In order to afford IP CTS providers an opportunity to make any software and other changes necessary to implement a captions-off default setting, the requirements adopted herein will become effective 30 days after their publication in the **Federal Register**. To the extent that it is technically infeasible for a particular IP CTS provider to comply within this 30-day time period for equipment that is already deployed, the provider may request additional time by seeking a limited waiver of the effective date, supported by an appropriate good cause showing.

Effective Date

27. The APA provides that a substantive rule cannot become effective earlier than 30 days after the required publication or service of the rule, except "as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d). See also § 1.427(a) of the Commission's rules. As

discussed above, the Commission finds good cause to adopt immediately interim rules without the opportunity for public comment because the Commission believes that the imminent harms to the Fund and legitimate TRS users outweigh the public interest in obtaining comment before such rules go into effect. The same good cause reasons for adopting immediately interim rules without the opportunity for public comment apply to making the rules effective as soon as possible. As noted above, any delay in making the rules effective would encourage IP CTS providers, during the period prior to the effective date, to continue and possibly even accelerate the use of inappropriate incentives to recruit and sign up new users without first establishing their eligibility, adding additional uncontrolled growth that could result in TRS payment obligations exceeding the amount available in the Fund. Further, the Commission has no reason to believe that IP CTS providers cannot comply with the rules adopted herein within the prescribed time periods. There are only four providers currently offering IP CTS, and the payment of incentives and registration of new users are matters well within each provider's immediate ability to control.

28. The interim rules adopted in document FCC 13–13 shall cease to be effective on a common date that is either (1) 180 days after the effective date for the interim rules on registration and certification, § 64.604(c)(9) of the Commission's rules, or (2) the effective date of final rules on these issues, whichever date is sooner. The Commission will publish a separate document in the **Federal Register** announcing the sunset date.

Final Regulatory Flexibility Analysis

29. The Regulatory Flexibility Act (RFA), 5 U.S.C. 603, requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” 5 U.S.C. 601(6). In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 5 U.S.C. 601(3). A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any

additional criteria established by the Small Business Administration (SBA). 15 U.S.C. 632.

30. In document FCC 13–13, in response to an urgent public interest need to curtail misuse of IP CTS, the Commission adopts interim rules prohibiting all referrals for rewards programs and any other form of direct and indirect inducements, financial or otherwise to subscribe or use or encourage subscription to or use of IP CTS. The Commission also adopts interim rules requiring each IP CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, (1) to register each new IP CTS user for service, (2) as part of the registration process, to obtain from each user a self-certification that the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, and (3) where the consumer accepts IP CTS equipment at a price below \$75 from any source other than a governmental program, to obtain from the user a certification from an independent, third party professional attesting to the same. The Commission also requires IP CTS equipment to have a default setting of captions off at the beginning of each call, so that the consumer must affirmatively turn on the captions each time the consumer wishes to use IP CTS.

31. In recent months, IP CTS has been experiencing unusually rapid growth. The Commission is concerned that usage of this service by people who may not need the assistance of IP CTS, along with improper incentives for referrals to use this service are contributing substantially to this sudden, rapid increase in IP CTS minutes of use.

32. With regard to the criterion of the economic impact of document FCC 13–13, the Commission concludes that IP CTS providers fit within the business classification of Wired Telecommunications Carriers. *See* NAICS Code 517110 (2007). The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers, for which the small business size standard is all such firms having 1,500 or fewer employees. 13 CFR 121.201, NAICS Code 517110 (2007). Collectively, there are four IP CTS providers that are authorized by the Commission to offer these services. Only one of these entities is a small business under the SBA size standard. Therefore, the interim rules would not have a significant economic impact on a substantial number of small entities.

33. The Commission therefore certifies, pursuant to the RFA, that the interim rules adopted in document FCC 13–13 will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of document FCC 13–13, including a copy of the RFA certification, to the Chief Counsel for Advocacy of the SBA.

Congressional Review Act

34. The Commission will send a copy of document FCC 13–13 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

35. Pursuant to sections 1, 2, 4(i) and (j) and 225 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i) and (j) and 225, document FCC 13–13 is hereby *adopted*.

List of Subjects in 47 CFR Part 64

Individuals with disabilities, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission

Marlene H. Dortch,
Secretary.

Interim Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation to part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96, unless otherwise noted.

■ 2. Amend § 64.604 by adding paragraphs (c)(8), (9), and (10) to read as follows:

§ 64.604 Mandatory minimum standards.

* * * * *

(c) * * *

(8) *Inducements for use of IP CTS.* (i) An IP CTS provider shall not offer or provide to any person or entity any form of direct or indirect inducements, financial or otherwise, to subscribe to or use or encourage subscription to or use of IP CTS. IP CTS providers offering or providing such inducements shall be ineligible for any compensation for IP CTS from the TRS Fund.

(ii) [Reserved].

(9) *IP CTS registration and certification requirements.* (i) IP CTS providers, in order to be eligible to receive compensation from the TRS Fund for providing IP CTS to a new consumer, must first register the new consumer applying for service by obtaining the following registration information: The consumer's name, address and telephone number.

(ii) IP CTS providers, in order to be eligible to receive compensation from the TRS Fund for providing IP CTS to a new consumer, also must first obtain a written certification attesting that the consumer needs IP CTS to communicate in a manner that is functionally equivalent to the ability of a hearing individual to communicate using voice communications services.

(iii) The certification required by paragraph (c)(9)(ii) of this section must include the consumer's certification that:

(A) The consumer has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users;

(B) The consumer understands that the captioning service is provided by a live communications assistant; and

(C) The consumer understands that the cost of the IP CTS calls is funded by the TRS Fund.

(iv) The certification required by paragraph (c)(9)(ii) of this section must be made on a form separate from any other agreement or form, and must include a separate consumer signature specific to the certification. For purposes of this rule, an electronic

signature, defined by the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*, as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record, has the same legal effect as a written signature.

(v) In instances where IP CTS equipment is obtained by a new consumer for less than \$75, the IP CTS provider must also, in order to be eligible to receive compensation from the TRS Fund, obtain written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(v)(D) of this section .

(A) In instances where certification from an independent third-party professional is required, such professionals must be qualified to evaluate an individual's hearing loss in accordance with applicable professional standards, and may include, but are not limited to, community-based social service providers, hearing related professionals, vocational rehabilitation counselors, occupational therapists, social workers, educators, audiologists, speech pathologists, hearing instrument specialists, and doctors, nurses, and other medical or health professionals.

(B) In instances where certification from an independent third-party professional is required, such third-party professionals must certify in writing that the IP CTS consumer is an individual with hearing loss who needs IP CTS to communicate in a manner that

is functionally equivalent to telephone service experienced by individuals without hearing disabilities.

(C) In instances where certification from an independent third-party professional is required, such third-party professional must provide his or her name, title, and contact information, including address, telephone number, and email address.

(D) In instances where the new consumer has obtained equipment from a governmental program, the new consumer may present documentation to the IP CTS provider demonstrating that the equipment was obtained through one of these programs, in lieu of providing an independent, third-party certification.

(vi) Each IP CTS provider shall maintain the confidentiality of any registration and certification information obtained by the provider, and may not disclose such registration and certification information or the content of such registration and certification information except as required by law or regulation.

(vii) [Reserved].

(10) *IP CTS default settings.* (i) IP CTS providers must ensure that equipment and software used in conjunction with their service have a default setting of captions off, so that new and existing IP CTS users must affirmatively turn on captioning for each telephone call initiated or received before captioning is provided.

(ii) [Reserved].

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