

FCC Waives Rules to Facilitate Telehealth and Remote Learning During Coronavirus Pandemic

On March 18, 2020, the Federal Communications Commission (“Commission” or “FCC”) released an order waiving gift and contribution rules applicable to two Universal Service Fund (“USF”) initiatives: the Rural Health Care program (“RHC”), and the schools and libraries universal support program (“E-rate”). The Commission predicated its decision on the evolving coronavirus, or COVID-19, pandemic, as schools close and transition to remote learning, and medical practitioners utilize telehealth to diagnose and treat patients.¹ According to Chairman Pai, these waivers will allow “service providers the chance to step up and give health care providers more tools to fight the ongoing pandemic and serve patients more effectively” and will assist schools and libraries in “bridg[ing] the digital divide during the coronavirus pandemic.”²

I. The Rules

RHC has two components: (1) the Telecommunications Program, which enables rural health care providers to pay lower urban telecommunication service rates rather than higher rural rates, and (2) the Healthcare Connect Fund (“HCF”), which offers rural health care providers “support for eligible services, equipment, and infrastructure” related to high-capacity broadband connectivity.³ Under the Telecommunications Program, carriers must provide service at the “urban rate,”⁴ defined as “the median of all available rates . . . for functionally similar services in all urbanized areas of the state where the health care provider is located,”⁵ and then are reimbursed for the difference between the rural and urban rates.⁶ Health care providers who obtain support under the HCF receive a 65 percent discount on the cost of eligible expenses; they are required to contribute 35 percent of the total cost of all eligible expenses using funds from “eligible sources,” such as government appropriations, loans, or grants.⁷

Under the E-rate program, schools and libraries may solicit funding for “[t]elecommunications services, telecommunications, and Internet access,” as well as “[i]nternal connections, basic maintenance and managed internal broadband services.”⁸

¹ WC Docket No. 02-60, *Rural Health Care Universal Service Support Mechanism*; CC Docket No. 02-6, *Schools and Libraries Universal Service Support Mechanism*, Order, ¶ 1 (Mar. 18, 2020) (“*Gift Rules Order*”).

² “FCC Waives Rural Health Care and E-Rate Program Gift Rules to Promote Connectivity for Hospitals and Students During Coronavirus Pandemic” (Mar. 18, 2020), <https://docs.fcc.gov/public/attachments/DOC-363137A1.pdf>.

³ 47 C.F.R. § 54.602(a), (b); see Federal Communications Commission, *Healthcare Connect Fund – Frequently Asked Questions* (Mar. 2013), <https://www.fcc.gov/general/healthcare-connect-fund-frequently-asked-questions#Q1>.

⁴ 47 CFR § 54.603(b).

⁵ 47 CFR § 54.604(a).

⁶ See 47 CFR §§ 54.602(a), 54.606(a)-(b).

⁷ 47 CFR § 54.611(a)-(b); see 47 CFR § 54.611(b)(2) (ineligible sources are “in-kind or implied contributions from health care providers; direct payments from service providers, including contractors and consultants to such entities; and for-profit entities”).

⁸ 47 CFR § 54.502(a); see Federal Communications Commission, *E-Rate - Schools & Libraries USF Program* (Mar. 19, 2020), <https://www.fcc.gov/general/e-rate-schools-libraries-usf-program>.

Applicants under all of these programs must engage in a competitive bidding process for services and/or equipment that must be fair and equitable.⁹ Pursuant to these competitive bidding processes, an applicant “may not directly or indirectly solicit or accept any gift, gratuity, favor, entertainment, loan, or any other thing of value from a service provider,” nor may a “service provider offer or provide any such gift, gratuity, favor, entertainment, loan, or any other thing of value.”¹⁰ This prohibition, adapted from the limitation applicable to federal agencies, was first imposed on the E-Rate program¹¹ and subsequently extended to the RHC program.¹² The gift rule is absolute, save for “[m]odest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, and items worth \$20 or less, including meals,” provided that “the value of these items received by any individual does not exceed \$50 from any one service provider per funding year.”¹³

II. The Waivers

Acknowledging that the coronavirus has already disrupted the operations of schools and libraries—and mindful of the limitations of rural health care providers to cope with it, given extant deficiencies in “equipment and medical supplies that they have readily available and by the scope of services that they are able to offer”—the Commission has waived the gift rules for both the RHC and E-rate programs.¹⁴ Now, educational and medical entities can accept a variety of free products and services, including “upgrades to connections, connected devices, equipment, and other services for RHC program participants who provide care via telemedicine and free broadband connections, devices, or other services that support remote learning for students and teachers who will be taking classes at and providing instruction from home.”¹⁵ In addition, the Commission has waived the “eligible sources” and urban rate rules for the HCF and the Telecommunications Program, respectively.¹⁶ This will allow service providers more flexibility to offer rates to rural health care providers that are even lower than the urban rates and provide even greater discounts on services provided under the HCF.

The Commission believes the waivers will ease “financial strain as a result of the influx of patients and other demands on the health care system” and afford “maximum flexibility for service providers and health care providers in developing responses to the pandemic.”¹⁷ The Commission enacted these waivers for good cause shown,¹⁸ on the grounds that strict compliance with the rules is inconsistent with the public interest in this time of national crisis.¹⁹

⁹ *Gift Rules Order* ¶¶ 2-3.

¹⁰ 47 CFR §§ 54.503(d)(1), 54.622(h)(1).

¹¹ *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, 25 FCC Rcd 18762, ¶¶ 87-88 (2010).

¹² *Promoting Telehealth in Rural America*, 34 FCC Rcd 7335, ¶¶ 166-167 (2019).

¹³ 47 CFR §§ 54.503(d)(1), 54.622(h)(1).

¹⁴ *Gift Rules Order* ¶¶ 5-7. The Commission “also waive[d] any other requirement, to the extent that is necessary, in these special circumstances to effectuate the relief granted, including restrictions on certification requirements.” *Gift Rules Order* ¶ 10, n.35 (citing 47 CFR §§ 54.623(a)(1)(vi), 54.627(a)(3)(ii)(H), and 54.627(d)(1)(ii)(F)).

¹⁵ *Gift Rules Order* ¶ 7.

¹⁶ *Gift Rules Order* ¶ 11.

¹⁷ *Gift Rules Order* ¶ 11.

¹⁸ *Gift Rules Order* ¶ 7; see 47 CFR § 1.3.

¹⁹ *Gift Rules Order* ¶ 7 (citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)). “In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of

CAHILL

The waivers, as applied to the RHC program, will remain in effect through September 30, 2020; the Commission has pledged to “monitor the situation and assess the need for continued relief after this date.”²⁰ They are “limited to health care providers involved in the screening and treatment of patients for COVID-19 and for providing services to other patients in an effort to both help mitigate the spread of COVID-19 and devote limited on-site medical resources towards treatment of COVID-19.”²¹ For the E-rate program, the waiver is also effective through September 30, 2020, but is “limited to offerings made by service providers and solicited or accepted by E-Rate eligible entities on behalf of students, teachers, or patrons while schools and libraries prepare for closures or remain closed as a direct result of COVID-19, regardless of funding year.”²² The Commission has cautioned participants that despite the waivers, “program participants and service providers remain otherwise subject to audits and investigations to determine compliance with USF program rules and requirements.”²³

III. The Impact

Universal service – the goal of providing communication services to all people of the United States on a fair and equal basis -- stands at the very foundation of the Commission’s enabling legislation, the Communications Act of 1934, as amended.²⁴ The Commission’s waivers ensure this vital statutory principle is realized during a national emergency, affording educators and medical professionals the resources and flexibility they need to combat and cope with the coronavirus. As Commissioner Rosenworcel stated on March 12, 2020, “The coronavirus is already exposing hard truths about the digital divide, but the Federal Communications Commission has the power to help.”²⁵

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Chérie R. Kiser at 202.862.8950 or ckiser@cahill.com; or Matthew L. Conaty at 202.862.8945 or mconaty@cahill.com; or email publications@cahill.com.

overall policy on an overall basis.” *Id.*

²⁰ *Gift Rules Order* ¶ 12.

²¹ *Gift Rules Order* ¶ 10.

²² *Gift Rules Order* ¶ 14.

²³ *Gift Rules Order* ¶ 16.

²⁴ See 47 U.S.C. § 254(b) (delineating principles of universal service, including the provision of access to advanced telecommunications services to schools, libraries, and health care providers nationwide).

²⁵ “Commissioner Rosenworcel Calls on FCC to Take Aggressive Action to Assist with Coronavirus Response” (Mar. 12, 2020), <https://docs.fcc.gov/public/attachments/DOC-363002A1.pdf>.

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.