

Stay Current.

April 2005

GAO Describes E-Rate Problems to Congress

by Tara Giunta and Steven Rich

Summary

Increasing scrutiny and criticism by Congress has accelerated the already-intense effort at the Universal Services Administrative Company (“USAC”) and the Federal Communications Commission (“FCC”) to expand oversight of the Universal Service Fund Schools and Libraries Program, popularly known as “E-rate.” Such heightened Congressional and administrative oversight means greater uncertainty and anxiety for both schools and libraries that benefit from E-rate funding and, to an even greater extent, the service providers that serve them. In light of the potential for referral to the U.S. Department of Justice (“DOJ”) for criminal prosecution for “waste, fraud and abuse” allegations, service providers are properly devoting significant resources to addressing this area.

Given the high profile and high cost of E-rate, along with the disfavor with which many in Congress view this program, it appears likely that Congress will substantially change the way the E-rate program is administered. Service providers are well-advised to understand the changes underway in Congress and at USAC/FCC, and to provide input wherever possible so that they do not become subject to egregious procedures and unreasonable standards. Regardless of future changes to the E-rate program, absent the timely establishment of thorough and aggressive compliance and due diligence procedures and thorough internal investigations when audits are received, service providers will find themselves in the most unwanted of situations: repaying significant funds, even for the most spurious findings of program non-compliance, and potentially negotiating a settlement of criminal charges with the DOJ.

Discussion

On March 16, 2005, the Subcommittee on Oversight and Investigations of the U.S. House of Representatives Committee on Energy and Commerce (“Subcommittee”) held the latest in a series of hearings, commenced last year, on

management by USAC of the E-rate program and the FCC’s oversight thereof. At that hearing, the Subcommittee reviewed a report by the United States Government Accountability Office (“GAO”) on the E-rate program. The witnesses included Mark L. Goldstein, GAO’s Director of Physical Infrastructure Issues; Thomas D. Bennett, Assistant Inspector General for Universal Service Fund (“USF”) Oversight, Federal Communications Commission (“FCC”); and Jeffrey Carlisle, Chief of the FCC’s Wireline Competition Bureau.

The GAO’s report found that the unconventional structure established by the FCC for disbursing E-rate funds, (i.e., by creating a private, not-for-profit corporation, the USAC), had created tremendous uncertainty regarding the extent to which federal fiscal and accountability requirements applied to the E-rate program. The GAO also determined that the FCC had failed to develop any meaningful standards for evaluating the performance of the E-rate program. Finally, the GAO concluded that the FCC’s oversight mechanisms, notably its often vague rulemaking proceedings that sometimes resulted in USAC developing administrative procedures that have been found legally unenforceable, had limited the FCC’s ability to properly manage the E-rate program.

The FCC’s Office of Inspector General (“OIG”) largely concurred with the GAO’s findings. In particular, the OIG expressed concern about the lack of clarity regarding E-rate program rules and the failure of the FCC and USAC to resolve audits in a timely and effective manner. The OIG also noted that it is in the process of hiring two additional full-time staff for USF oversight, and retaining one or more public accounting firms to provide support for its USF oversight, including E-rate audits. In addition, the OIG has been working with USAC and a public accounting firm under contract to USAC to audit 100 E-rate beneficiaries, which is expected to be completed this summer.

The FCC’s Wireline Competition Bureau, not surprisingly, disagreed with several of the GAO’s

findings. For example, the FCC noted that it had previously sought guidance from the Office of Management and Budget (“OMB”) concerning the applicability to E-rate of various federal fiscal and accountability laws, and that the OMB had found these laws inapplicable. The FCC also stated that, while it had established some performance measures, it recognized the need to improve these measures and noted that it is in the process of developing new performance measures for E-rate. Finally, the FCC told the Subcommittee that it is evaluating USAC’s existing operations and administrative procedures to determine whether and to what extent these should be codified in the FCC’s rules in an effort to provide greater certainty to applicants.

The Subcommittee is currently preparing a staff report on its investigation into the E-rate program which, it is anticipated, will be used by the Telecommunications Subcommittee in its attempt to overhaul the E-rate program. It appears likely that such an overhaul will be extensive, as many in Congress have expressed serious concerns about the way that the E-rate program is operated. Such overhaul will significantly affect the service providers that receive E-rate funding and are at risk for

recovery of funds by USAC where an audit results in findings of non-compliance for even the most modest of cases.

We are experienced in advising service providers in E-rate compliance, including establishing internal compliance and due diligence programs, conducting thorough internal investigations when audits are received and developing multi-disciplinary strategies for resolving problems when they are identified. We are active before Congress, USAC and the FCC and can advise on the broad array of issues and concerns confronting service providers that receive E-rate funds.

If you have been involved in the E-rate program and either would like to know how the latest developments in Congress or before USAC/FCC will affect your business, or if you would like to discuss any E-rate concerns confronting your company, please contact:

Tara Giunta 202 551 1791
taragiunta@paulhastings.com

Steven Rich 202 551 1798
stevenrich@paulhastings.com