

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010)	CG Docket No. 10-213
)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996)	WT Docket No. 96-168
)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision)	CG Docket No. 10-145
)	

To: The Commission

COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION

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SUMMARY

The Twenty-First Century Communications and Video Accessibility Act (“CVAA”) represents a careful approach by Congress that is designed to promote the twin goals of increasing accessibility and preserving innovation. Thus, in implementing the statute – in this case, principally Sections 716 and 717, regarding “advanced communications services” – to ensure access by individuals with disabilities to new technologies and services, the Commission also should ensure manufacturers’ and service providers’ continued ability to innovate for the benefit of all consumers. This is the only approach consistent with the CVAA’s legislative history, which demonstrates Congress’s conscious effort to narrow the scope of the legislation in order to reflect important marketplace realities, such as time-to-market and proprietary technology issues, industry flexibility, and a preference for performance objectives over one-size-fits-all technical standards. Some of the proposals in the *NPRM*, however, are inconsistent with Congress’s balanced scheme: they purport to promote accessibility, but would do so at the impermissible cost of innovation. Although the Commission is charged with implementing the CVAA and necessarily has some discretion in this regard, it may not act in a manner that exceeds the scope of the statute or is contrary to Congress’s intent. Accordingly, CEA’s comments, as summarized below, include substantial discussion of the statutory text, the legislative history, and the ways in which the *NPRM* deviates from these clear roadmaps. CEA urges the Commission to implement this landmark law in the careful, balanced manner Congress intended, so that the benefits of the CVAA can be realized as soon as possible.

Definitions/Scope. The Commission should ensure that the scope of the services, equipment, and providers covered by Section 716 is consistent with the plain language of the CVAA and Congress’s intent. Fundamentally, the Commission cannot interpret the scope of Section 716 in a way that would render meaningless the liability limitation under Section 2(a). For instance, the Commission must ensure that its definition of advanced communications service (“ACS”) is consistent with Congress’s intended scope; it should not include equipment or services with a purely incidental feature that, standing alone, would be considered ACS (*e.g.*, an incidental VoIP or non-voice messaging component). Similarly, the Commission must give meaning to Congress’s inclusion of the term “interoperable” by ensuring that only the subset of video conferencing services that are genuinely interoperable are covered under Section 716. Moreover, because the statute gives the Commission authority over devices in order to ensure access to ACS, the rules should state explicitly that the accessibility requirements apply to a device only “to the extent that” the device offers ACS; such requirements should not apply to the non-ACS capabilities of a device. In addition, the Commission should make clear that developers of “third-party applications” are responsible for the accessibility of the software they develop. Finally, consistent with market realities and Commission precedent, the definition of “manufacturer” should be that already adopted under Section 255.

Exemptions/Waivers. Rather than attempting to limit the exemption and waiver provisions of the CVAA, the Commission should recognize the important role Congress intended that these provisions would serve in helping maintain the balance between accessibility and promoting innovation. For instance, the “Customized Equipment or Services” exemption should apply broadly, and the Commission should not categorically exclude particular classes of services or products from the exemption. The Commission should also use its waiver authority,

as Congress intended, to facilitate innovation and to avoid acting as a gatekeeper for new technologies. In addition, ensuring accessibility should not unduly burden small entities.

Achievability/Flexibility. As a general matter, the Commission should apply the statutory requirements in a manner that provides industry with maximum flexibility to meet the objectives of the CVAA. A determination regarding “achievability” should involve only the factors specified in the statute and should weigh each factor equally. The final rules adopted should be consistent with the CVAA’s requirement that the Commission is precluded from preferring built-in over third-party accessibility solutions. In addition, the Commission should define “accessible” and “usable” consistent with its current Part 6 rules. The definition of “compatible” should similarly provide covered entities with increased flexibility by taking into account recent market developments. Moreover, this proceeding should not address digital rights management or network security issues. Finally, a covered entity may not impede or impair accessibility of information content that is incorporated using recognized industry standards.

General Obligations/Performance Objectives/Industry Guidelines/Safe Harbors. The Commission must adhere to the statutory text and Congress’s intent as it determines the “obligations,” “performance objectives,” “industry guidance” and “safe harbors” of its rules implementing Section 716. For example, as proposed in the *NPRM*, the Commission should develop performance objectives that clearly define the outcome to be achieved without specifying how these ends should be accomplished. However, the Commission would exceed its statutory authority if it implemented performance objectives that would *require* interoperability among and between video conferencing services. The prospective guidelines developed by the Commission should be clear and understandable and provide covered entities with as much flexibility as possible. The Commission should avoid relying on or adopting the Access Board Draft Guidelines in its development of performance objectives or prospective guidelines. The Draft Guidelines are far from final at this point, and more fundamentally, the Draft Guidelines are procurement requirements, rather than generally applicable industry guidance. If necessary to facilitate compliance with Section 716, the Commission should adopt as safe harbors only those technical standards developed in a consensus-based, industry-led, open process that complies with American National Standards Institute (“ANSI”) Essential Requirements.

Recordkeeping. The Commission should refrain from making the recordkeeping requirements of Section 717 overly burdensome, unnecessarily expensive, or repetitive. Specifically, the Commission should not expand the categories of information to be maintained for recordkeeping beyond those categories specifically set forth in the statute. To help account for differences in covered entities, as well as products and services, the Commission should provide flexibility in its recordkeeping requirements, rather than mandating uniform recordkeeping procedures.

Enforcement. The Commission must ensure that the enforcement process pursuant to Section 717 satisfies basic due process considerations and must avoid unduly burdening covered entities or using the process to micromanage the development of new technologies. In transitioning to the new rules, the Commission should provide at least 24 months for covered entities to phase in the accessibility requirements of Section 716 and achieve compliance with the Commission’s rules. In developing the informal complaint process, the Commission should first ensure that such complaints state a *prima facie* claim and contain enough detail to ensure the

defendant can ascertain the alleged violation before requiring the defendant to respond. The proposed 20-day response period for an answer to a complaint is inadequate and should be extended to at least 40 days. To further ensure covered entities are not unduly burdened, the Commission should more narrowly craft the content requirements for an answer to focus on (i) whether the device or service in question is accessible, and (ii) if not accessible, whether accessibility is achievable.

Mobile Browsers. Sections 718 and 716 use nearly identical language, and the Commission should apply Section 718 consistent with Section 716 to provide covered entities with maximum flexibility in meeting Section 718's requirements. Fundamentally, the Commission must recognize that the requirements of Section 718 are limited to Internet browsers incorporated in telephones used with public mobile service and do not extend to data-only devices such as laptops, tablets, or other products using mobile wireless data services.

In sum, the Commission should implement the CVAA in a manner that clearly adheres to Congress's directive to balance increased accessibility with the preservation of innovation. The *NPRM* laudably represents an intensive effort by the Commission to meet Congress's first goal: ensuring access by individuals with disabilities to new technologies and services. However, in adopting rules, the Commission must also focus on Congress's second goal: ensuring manufacturers' and service providers' continued ability to innovate for the benefit of all consumers. The Commission thus should reject proposals in the *NPRM* that would extend beyond the scope of the statute and promote accessibility only at the cost of innovation. Instead, the Commission should follow Congress's flexible, practical roadmap that is based on marketplace realities and will ensure that *all* consumers benefit from the CVAA.

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To: The Commission

COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION

The Consumer Electronics Association (“CEA”) hereby responds to the Notice of Proposed Rulemaking (“*NPRM*”)¹ seeking comment on rules proposed to implement the provisions of the “Twenty-First Century Communications and Video Accessibility Act of 2010” (“*CVAA*”) governing advanced communications services (“*ACS*”).² The primary *ACS*

¹ *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd 3133 (2011) (“*NPRM*”).

² Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of Title 47 of the United States Code). The law was enacted on October 8, 2010 (S. 3304, 111th Cong.). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on Oct. 8, 2010, to make technical corrections to the *CVAA* and the *CVAA*’s amendments to the Communications Act of 1934.

provisions are codified in Sections 716 and 717 of the Communications Act of 1934, as amended (“the Act”).³

I. INTRODUCTION AND GENERAL PRINCIPLES

CEA is the principal U.S. trade association of the consumer electronics and information technologies industries.⁴ As discussed in CEA’s accessibility comments last November,⁵ CEA was very involved during the CVAA legislative process and continues to engage in regulatory and standards activities relating to accessibility.⁶ CEA helped craft – and now seeks to help

³ See 47 U.S.C. §§ 617, 618. The *NPRM* also briefly requests comment on Section 718 of the Act, 47 U.S.C. § 619.

⁴ CEA’s more than 2,000 member companies lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold through consumer channels. Ranging from giant multi-national corporations to specialty niche companies, CEA members cumulatively generate more than \$186 billion in annual factory sales and employ tens of thousands of people.

⁵ See Comments of Consumer Electronics Association, CG Docket No. 10-213 (filed Nov. 22, 2010) (“CEA Comments”). Hereinafter, other parties’ comments and reply comments filed in CG Docket No. 10-213 in response to the FCC Public Notice, *Consumer & Governmental Affairs Bureau and Wireless Telecommunications Bureau Seek Comment on Advanced Communication Provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 25 FCC Rcd 14589 (2010) are short-cited.

⁶ During the development and passage of the CVAA, CEA worked closely with various Members of Congress and engaged with representatives of the accessibility community, including meeting with representatives from the Coalition of Organizations for Accessible Technology (“COAT”) to gain a better understanding of the issues. CEA’s contributions throughout the legislative process have had a meaningful result, as reflected in the new law. In addition, beyond its participation in the legislative process, CEA has been and remains engaged in regulatory and standards activities, including membership in all four working groups of the Video Programming Accessibility Advisory Committee (“VPAAC”). CEA also (i) has served on the FCC’s Consumer Advisory Committee for three consecutive terms, starting in 2004; (ii) is working, through its Video Systems Committee, with CE manufacturers and users with disabilities on a standard to address tactile feedback features for remote controls (CEA-2041); and (iii) is meeting regularly, through its Television Manufacturers Caucus (“TVMC”) Accessibility Working Group, to research and develop best practices, bulletins, and/or checklists regarding accessibility for television sets and related video source devices.

implement – a law that reflects Congress’s careful approach toward balancing the twin goals of accessibility and preserving technology innovation.

Specifically, in implementing this landmark legislation, the Commission must adhere to the Congressional directive to balance the need to ensure access by individuals with disabilities to new technologies and services with the need to preserve service providers’ and manufacturers’ continued ability to innovate for the benefit of all consumers. Some of the proposals in the *NPRM*, however, would not preserve these twin goals. Such proposals purport to promote accessibility, but would do so at the cost of innovation, as well as potentially compromising accessibility by minimizing incentives to employ innovative third-party solutions. Although the Commission is charged with implementing the CVAA and necessarily has some discretion in this regard, it may not act in a manner that exceeds the scope of the statute or Congress’s intent.

The Commission need not guess at Congress’s intent here. An analysis of earlier versions of the CVAA versus the law that Congress ultimately passed and President Obama signed demonstrates that the CVAA has a far more limited focus than many proposals in the *NPRM*. For example, Congress added Section 2(a) to limit the liability of covered entities to the equipment and services they control,⁷ inserted the terms “interoperable” and “service” to limit the forms of video conferencing subject to the CVAA⁸ and added the Commission’s waiver

⁷ Compare CVAA § 2(a) (setting forth the liability limitation for covered entities) with H.R. 3101, 111th Cong. (as introduced in the House, June 26, 2009) (containing no liability limitation for covered entities).

⁸ Compare CVAA § 101 (defining “interoperable video conferencing service” as a form of “advanced communications services”) with H.R. 3101, 111th Cong. § 101 (as introduced in the House, June 26, 2009) (defining “video conferencing” as a form of “advanced communications”).

authority,⁹ to name just a few of the changes made to narrow the focus from that provided in the bill, as originally introduced.

CEA urges the Commission to implement this landmark law in the careful, balanced manner Congress intended, so that the benefits of the CVAA can be realized as soon as possible.

Specifically, as discussed in more detail herein, the Commission's implementing rules should:

- Not apply to equipment or services with only a purely incidental feature that, standing alone, would be considered ACS (*e.g.*, an incidental VoIP or non-voice messaging component);
- Cover only the subset of video conferencing services that are genuinely interoperable and not require interoperability among and between video conferencing services;
- Apply to a device only to the extent that the device offers ACS and not apply to the device's non-ACS capabilities;
- Apply to third-party developers of ACS applications;
- Only protect the accessibility of information content that is incorporated using recognized industry standards;
- Allow the adoption of blanket and prospective waivers of the Section 716's requirements;
- Not categorically exclude particular classes of services or products from the "Customized Equipment or Services" exemption;
- Consider only the four achievability factors specified in the statute and afford them equal weight;
- Not prefer built-in over third-party accessibility solutions, and avoid including requirements that effectively nullify third-party accessibility solutions;
- Give full force to Section 716's rule of construction, recognizing that not every individual product or service must be accessible for all disabilities, as well as the limitation on liability and use of proprietary technology found in Sections 2(a) and 3 of the CVAA;
- Provide a transition period of at least 24 months for covered entities to phase in the accessibility requirements and achieve compliance with the Commission's rules;

⁹ Compare CVAA § 104(a) (setting forth the Commission's waiver authority) *with* H.R. 3101, 111th Cong. § 104(a) (as introduced in the House, June 26, 2009) (containing no similar waiver authority provision).

- Not expand the categories of information required to be retained for recordkeeping beyond those specified in the statute;
- Provide flexibility in recordkeeping to account for the differences in covered entities as well as covered products and services, rather than mandating uniform recordkeeping procedures;
- Provide a defendant with at least 40 days to respond to an informal complaint;
- Require that informal complaints state a *prima facie* claim and contain enough detail to ensure the defendant can ascertain the alleged violation before requiring the defendant to respond;
- Narrowly focus requirements for answers to complaints on (i) whether the device or service in question is accessible, and (ii) if not accessible, whether accessibility is achievable; and
- Explicitly recognize that the requirements of Section 718 are limited to Internet browsers incorporated in telephones used with public mobile service and do not extend to data-only devices such as laptops, tablets, or other products using mobile wireless data services.

The danger of exceeding statutory authority here is especially grave, particularly in light of the short time frame in which the Commission is directed to adopt new rules. In addition to addressing the proposals in the *NPRM*, these Comments include substantial discussion of the statutory text, the legislative history, and the ways in which the *NPRM* deviates from these clear roadmaps. Rather than propose overbroad, uncertain and burdensome requirements not contemplated by the statute, the Commission should tailor its rules within the parameters clearly established by Congress. This will result in more balanced requirements, less regulatory uncertainty, and an expeditious rulemaking, so that the benefits of the CVAA can be realized as soon as possible. Given CEA's substantial experience throughout development of the CVAA, CEA welcomes the opportunity to serve as a resource for the Commission as it implements the statute in the more balanced manner Congress intended.

II. THE SCOPE OF PRODUCTS, SERVICES, AND PROVIDERS COVERED BY SECTION 716 MUST COMPORT WITH THE CVAA AND RELATED PRECEDENT.

CEA recommends that the Commission determine the scope of Section 716 for specific types of services and products by analyzing the plain language of the CVAA read as a whole, including Section 2(a) of the CVAA, which limits the liability of covered entities, and Section 716(j), the Rule of Construction for Section 716, which provides that not every individual product or service must be accessible for all disabilities.¹⁰ Although the Commission should provide general guidance to promote regulatory certainty without unduly limiting innovation, it also will have to apply the CVAA's plain language, informed by the legislative history and existing Commission precedent,¹¹ as specific situations arise.¹²

¹⁰ 47 U.S.C. § 617(j). Although the *NPRM* includes multiple detailed questions about the potential scope of the products, services, and entities subject to Section 716, *See NPRM* ¶¶ 14-66, the Commission should not seek to parse the language of the statute in order to adopt rules that try to anticipate all possible meanings of that language. Doing so may cause the Commission to stray from a reasonable, common-sense reading of the CVAA.

¹¹ In particular, Part 6 of the Commission's rules, implementing Section 255 of the Act, and its adopting order provide valuable guidance in the ACS context. *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999) (“*Section 255 Order*”).

¹² To preserve flexibility in such case-by-case analyses and to avoid creating confusion, the Commission should not introduce new *a priori* criteria to supplement the statutory language, like considering whether equipment that “merely support[s] ACS in some way” should be subject to Section 716(a), *NPRM* ¶ 22, or whether “making software available for download” should be treated as “distribution” under the statute. *Id.* ¶ 23. These criteria are far from helpful; rather they beg further questions, such as the meaning of “merely support[s]” or “making software available.” The Commission should not embroider the plain language of the statute; such additional criteria only add uncertainty and complexity to the necessary case-by-case determinations.

In interpreting the scope of Section 716, the Commission must particularly acknowledge the limitations on liability provided in Section 2(a) of the CVAA.¹³ For instance, Section 2(a) precludes holding manufacturers liable for software downloaded by consumers, where a third party controls the specification of the downloaded software. The statute imposes obligations and duties on the provider of software that gives consumers access to ACS. The Commission should hold the developer of any “third-party applications” – including applications available through an app store – responsible for the accessibility of the software they develop.¹⁴ Section 2(a) of the CVAA drives this conclusion, which also is sound public policy. Otherwise, service providers and/or equipment manufacturers may be forced to limit offerings or only provide closed rather than open platforms, inhibiting rather than facilitating innovation.¹⁵

In the following subsections, CEA uses this approach to discuss the scope of Section 716 for manufacturers and for the services that the CVAA defines to be ACS: interconnected Voice over Internet Protocol (“VoIP”) service, non-interconnected VoIP service, electronic messaging service, and interoperable video conferencing service. CEA also relies on the plain language of the CVAA and its legislative history in discussing the waiver and exemption provisions of Section 716.

¹³ As a general matter, the terms of Section 716, such as “used for advanced communications services” and “otherwise distributes in interstate commerce,” are general statutory standards that must be interpreted in a manner consistent with Section 2(a).

¹⁴ Similarly, the Commission should recognize that manufacturers and service providers often will include a preloaded or downloadable app as a convenience to customers because consumers demand it (*e.g.*, pre-loaded Skype), and a straightforward application of the statute would indicate that the application provider is responsible for its own CVAA compliance.

¹⁵ Moreover, a manufacturer should only be responsible for providing accessibility for “upgrades to the software” that it controls. *NPRM* ¶ 21. The Commission may not extend the liability of a manufacturer beyond that envisioned in the CVAA. An equipment manufacturer should not be held responsible for the impact of an operating system upgrade on the accessibility of third-party applications.

A. The Definition of “Manufacturer” Should Be That In the Section 255 Rules.

CEA agrees that the Commission should adopt for ACS purposes the definition of “manufacturer” used in the Section 255 rules: “an entity that makes or produces a product.”¹⁶ Doing so will provide substantial certainty to the industry without harm to innovation.¹⁷

B. The New Rules’ Definition of ACS Must Be Consistent with Congress’s Intended Scope.

Congress provided clear direction in the CVAA and legislative history to define the scope of the four types of services that comprise ACS: (a) interconnected VoIP service, (b) non-interconnected VoIP service, (c) electronic messaging service, and (d) interoperable video conferencing service. The scope of ACS will in turn determine the scope of the equipment, including end user equipment, network equipment, and software, covered by Section 716¹⁸ and the extent to which such equipment is covered.

The Commission was given authority by Congress to regulate equipment offering ACS and it should make clear in its rules that accessibility requirements apply to devices only *to the extent that* a device offers ACS capabilities.¹⁹ The Commission’s rules, therefore, would not apply to a device’s non-ACS capabilities. Moreover, if a device is not primarily designed or

¹⁶ *Id.* ¶ 20 (quoting 47 C.F.R. § 6.3(f)). See *Section 255 Order*, 16 FCC Rcd at 6454 ¶ 90.

¹⁷ As provided in the *Section 255 Order* this definition recognizes the concept of “co-manufacturer.” See *id.* (finding that “[i]n appropriate circumstances . . . where an entity is otherwise extensively involved in the manufacturing process – for example, by providing product specifications – we may, as the individual circumstances warrant, deem such an entity to be a co-manufacturer of the product involved”).

¹⁸ 47 U.S.C. § 617(a) (“[A] manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, shall ensure that the equipment and software that such manufacturer offers for sale . . . shall be accessible . . . , unless the requirements of this subsection are not achievable.”).

¹⁹ See *e.g., id.* § 153(51) (providing that a telecommunications carrier is treated as a common carrier under the Act only to the extent that it is providing telecommunications services); 47 C.F.R. § 54.706 (requiring that an entity contribute to the Universal Service Fund only to the extent of its end-user telecommunications revenues).

offered for purposes of providing ACS but includes incidental communications functions as a helpful capability, the manufacturer should not be obligated under the CVAA to make the device accessible. This formulation is grounded in the statute and is vital to achieving the goals of increasing accessibility and preserving innovation.

Interconnected VoIP Service. CEA supports the Commission’s proposal to continue to define “interconnected VoIP service” in accordance with section 9.3 of its rules.²⁰ This is consistent with Congress’s intent that interconnected VoIP equipment and services remain subject to Section 255.²¹ The statutory definition expressly incorporates the existing rule,²² and Section 716(f) expressly provides that services subject to the accessibility requirements of Section 255 prior to enactment remain subject to Section 255 of the Act.²³ In addition, Congress clearly intended that interconnected VoIP services initiated after October 8, 2010, the date that the CVAA became law, would be subject to Section 255 as well; the statute expressly relates to the service in question, not when the equipment was manufactured or when an individual service provider began offering interconnected VoIP service.²⁴ Thus, the requirements of Section 255 should apply to any interconnected VoIP service that meets the existing definition of such a service.

For multi-purpose devices and services, CEA agrees that the Commission should apply Section 255 only to the extent that elements of the device or service would be subject to Section 255 and apply Section 716 only to the extent that the device provides ACS that is not otherwise

²⁰ *NPRM* ¶ 29.

²¹ *See, e.g.*, Verizon/Verizon Wireless Comments at 2.

²² 47 U.S.C. § 153(25).

²³ *Id.* § 617(f).

²⁴ *See id.*

subject to Section 255.²⁵ This is critically important to providing manufacturers with the certainty to determine what features and functions must comply with the relevant accessibility requirements. Moreover, this approach is consistent with how the Commission interprets the scope and applicability of defined terms in the Act, such as “telecommunications service,” “telecommunications carrier,” and “carrier,” and the Commission should not depart from that approach here.²⁶

Non-Interconnected VoIP Service. The Commission should not adopt the overly inclusive interpretation of “non-interconnected VoIP service” proposed in the *NPRM*.²⁷ Specifically, the Commission may not include in the definition services that only have a “purely incidental VoIP component,” such as gaming systems.²⁸ Although the CVAA defines “non-interconnected VoIP service” more broadly than “interconnected VoIP service,”²⁹ the language of Section 716 makes clear that the accessibility obligations of the CVAA only apply to an “offer” of a non-interconnected VoIP service as determined from the perspective of the end user.³⁰ Thus, Congress clearly did not intend that every device or service with incidental VoIP

²⁵ *NPRM* ¶ 30; *see, e.g.*, AT&T Comments at 5; NAD Reply Comments at 12.

²⁶ *See, e.g.*, 47 U.S.C. § 153(51) (providing that a telecommunications carrier is treated as a common carrier under the Act only to the extent that it is providing telecommunications services).

²⁷ *NPRM* ¶¶ 31-32.

²⁸ *Id.* ¶ 32.

²⁹ *See* 47 U.S.C. § 153(36) (“The term ‘non-interconnected VoIP service’ (A) means a service that (i) enables real-time voice communications that originate from or terminate to the user’s location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment; and (B) does not include any service that is an interconnected VoIP service.”).

³⁰ *See id.* § 617(a)(1) (“[A] manufacturer of equipment used for advanced communications services . . . shall ensure that the equipment and software that such manufacturer **offers** for sale . . . shall be accessible . . . , unless the requirements of this subsection are not achievable.” (emphasis added)); § 617(b)(1) (“[A] provider of advanced communications services shall ensure

capability ultimately would be subject to the “achievable” standard. In fact, a VoIP capability incidentally included in a product or service cannot reasonably be considered to be an “offer” of non-interconnected VoIP to end users.

For example, the incorporation of a VoIP component as an incidental part of a gaming service does not transform the gaming service into non-interconnected VoIP service from the perspective of the end user.³¹ Although the *NPRM* cites hypothetical uses of gaming for education, rehabilitation, and social interaction, apparently as policy justifications for declaring gaming to be a non-interconnected VoIP service,³² nowhere in the CVAA are these relevant factors for explicating the statutory definition of “non-interconnected VoIP service.”

To comply with the CVAA, the Commission should determine whether a service is included within the definition of “non-interconnected VoIP service” based on how that service is offered to, and generally perceived by, consumers, not through the broad reading of the definition contemplated in the *NPRM*. Examining how the service is offered to the end user is also consistent with how the Commission interprets “service” and “offering” under the Act, of which Section 716 is a part.³³ As the Commission has previously stated, “[i]t is settled law that

that such services **offered** by such provider . . . are accessible . . . , unless the requirements of this subsection are not achievable.” (emphasis added).

³¹ See, e.g., TIA Comments at 6; Microsoft Comments at 5; VON Coalition Comments at 10; ESA Reply Comments at 2.

³² See *NPRM* ¶ 54.

³³ The Commission evaluates the Act’s service definitions based on the manner in which the service is offered to the end user. See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4823-24 ¶¶ 40-41 (2002) (“*Cable Modem Order*”), *aff’d sub. nom. NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005). Moreover, this is unlike CALEA, where the Commission has interpreted the terms differently. In that context, the courts held the Commission’s interpretation to be permissible because CALEA is not part of the Act and has its own statutory definitions. See *Am. Council on Educ. v. FCC*, 451 F.3d 226, 233

the determination of what is ‘offered,’ under the Act’s definitions, ‘turns on the nature of the functions the **end user** is offered.’”³⁴

Commission adoption of the *NPRM*’s overly inclusive interpretation of “non-interconnected VoIP service” would only increase the costs and delays associated with the development of products and services that contain a purely incidental VoIP component by requiring covered entities to seek waivers unnecessarily. Moreover, as the Commission acknowledges, the waiver process itself could have an impact on innovation because either the waiver request will be made public or else the Commission will have to permit confidential waiver applications.³⁵

Adopting a narrower definition of “non-interconnected VoIP services” that would exclude services with only a purely incidental VoIP component would also ensure that such services would not be subject to TRS contribution obligations. Even with a waiver, a product with a purely incidental VoIP component (*e.g.*, a gaming system) that is classified as providing a “non-interconnected VoIP service” may be subject to a *de facto* tax under the TRS Fund provisions, which are being addressed in a separate proceeding.³⁶ Using the waiver process to exclude such a product from the scope of Section 716 while subjecting it to the burdens of TRS Fund contributions and Form 499-A reporting, as would potentially occur under the

(D.C. Cir. 2006) (“CALEA’s definition of ‘telecommunications carrier’ is broader than the definition used in the 1996 Act.”).

³⁴ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7539 ¶ 40 (2006) (emphasis added) (quoting *Cable Modem Order*, 17 FCC Rcd at 4822 ¶ 38).

³⁵ See *NPRM* ¶ 56.

³⁶ See generally *Contributions to the Telecommunications Relay Services Fund*, Notice of Proposed Rulemaking, 26 FCC Rcd 3285 (2011).

Commission’s proposed regime, would create an anomaly that Congress did not intend.³⁷ The Commission should make clear that a product or service that only incorporates a purely incidental VoIP component falls outside of the definition of a “non-interconnected VoIP service.”

Electronic Messaging Service (“EMS”). The CVAA defines EMS as “a service that provides real-time or near real-time non-voice messages in text form *between individuals* over communications networks.”³⁸ CEA generally agrees with the Commission that the definition of EMS covers traditional email, instant messaging, and text messaging but not blog posts, online publishing, or messages posted on social networking websites.³⁹ By definition, EMS should also not include the following forms of communication: device-to-device (“D2D”), machine-to-machine (“M2M”), human-to-machine, automatic software updates, or any other communication that does not involve communications “between individuals.”⁴⁰

³⁷ To the extent non-interconnected VoIP service providers are required to report their revenue for TRS contribution purposes, the Commission should require them to report their TRS revenues in block 5 rather than block 4 of Form 499-A. Reporting these revenues in block 5 clarifies that non-interconnected VoIP service is not a telecommunications service. This has been an issue before. When the Commission expanded universal service fund (“USF”) contribution requirements to include interconnected VoIP providers, some states incorrectly assumed that merely filing Form 499-A meant such providers were subject to state USF obligations and, in some cases, state telecommunications taxes.

Congress did not classify non-interconnected VoIP service as a telecommunications service in the CVAA – rather it merely created a separate section authorizing the Commission to impose contribution requirements for TRS on these revenues. To prevent any confusion, the Commission therefore should include these revenues as “other revenues” under block 5. Also, in block 105 of Form 499-A, the Commission should create a new category of provider as “non-interconnected VoIP TRS” to further clarify this status.

³⁸ 47 U.S.C. § 153(19) (emphasis added).

³⁹ *NPRM* ¶ 33.

⁴⁰ *See* 47 U.S.C. § 153(19).

The Commission also should make clear that products and services that include only a purely incidental non-voice messaging component are excluded from the definition of EMS. Similar to the purely incidental VoIP component, discussed above, the Commission should also evaluate whether a product should be considered EMS based on how that product is offered to, and generally perceived by, consumers, not through a broad reading of the EMS definition.

In addition, Section 2(a) of the CVAA does not permit the Commission to define as EMS those services or applications that merely provide access to EMS,⁴¹ such as a broadband platform or a browser. A number of devices today, and many more in the future, will include a browser in order to enable consumers to access information. End users do not perceive these devices as providing them with EMS capability. The Commission should clarify that mere access to the Internet via a browser on a device does not necessarily mean that the device offers EMS. Instead, consistent with the CVAA, the Commission should consider the purpose for which the device was primarily designed on whether the device is “offering” EMS.

Interoperable Video Conferencing Service. The Commission should abandon its strained analysis of “interoperable video conferencing service” in the *NPRM* and give meaning to the word “interoperable” in the statute, applying the requirements of the CVAA to only those video conferencing services that are genuinely interoperable. The *NPRM* attempts to effectively read the term “interoperable” out of the statutory definition.⁴² However, Congress explicitly and intentionally added “interoperable” to narrow the scope of video conferencing services covered by the CVAA.⁴³ Thus, the Commission should interpret “interoperable” in a reasonable manner

⁴¹ See TIA Comments at 8.

⁴² See *NPRM* ¶¶ 44-47.

⁴³ Compare CVAA § 101 (defining “interoperable video conferencing service” as a form of “advanced communications services”) with H.R. 3101, 111th Cong. § 101 (as introduced in the

– *i.e.*, by applying the Section 716 accessibility obligations to only those video conferencing services that can operate between and among different platforms, networks, and providers.⁴⁴ Merely being capable of “point-to-point” calls to other users of like equipment from the same manufacturer does not make the equipment “interoperable” in the plain sense of the word. For this reason, most nascent two-way video services and applications commercially available in the marketplace have not yet reached true interoperability and are not covered by the statute at this time.⁴⁵

Any consideration of video mail is highly premature and inappropriate.⁴⁶ Video mail is not a service that is generally available today for video conferencing services and is definitely not “interoperable.” More fundamentally, the definition of “interoperable video conferencing services” does not include video mail. The definition only extends to “real-time video communications” which by definition would exclude recorded video communications, such as video mail.⁴⁷

In addition, the *House Committee Report* clarified that the focus of this provision is accessibility to “access and control these services,” *i.e.*, the activation/initiation of a video communications session.⁴⁸ The Commission should follow Congress’s intent and make clear

House, June 26, 2009) (defining “video conferencing” as a form of “advanced communications”).

⁴⁴ *See, e.g.*, ITI Comments at 3; VON Coalition Comments at 11 & n.17.

⁴⁵ *See, e.g.*, VON Coalition Comments at 11-12. In addition, “webinars” are not ACS under Section 716. *See NPRM* ¶ 41. Webinars provide principally unidirectional communications rather than “enabl[ing] users to share information.” *See* 47 U.S.C. § 153(27); *see also* VON Coalition Comments at 11.

⁴⁶ *NPRM* ¶ 42.

⁴⁷ *See* 47 U.S.C. § 153(27).

⁴⁸ *See* H.R. Rep. No. 111-563, at 23 (2010) (“The Committee notes that such services may, by themselves, be accessibility solutions. The inclusion, however, of these services within the scope

that the obligations of Section 716 do not extend to making the content or the communication itself accessible.

C. The “Customized Equipment or Services” Exemption Should Apply Broadly.

The CVAA provides that the provisions of Section 716 “shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁴⁹ This provision was expressly added by Congress during its deliberations on accessibility legislation and was not in H.R. 3101 as first introduced in the 111th Congress.⁵⁰ Congress intended that this provision would be significant in balancing the need for accessibility and the need for continued innovation. Thus, the Commission should not attempt to narrow the exemption by categorically excluding particular classes of services or products. The Commission should generally use a case-by-case analysis to determine whether the exemption is applicable to a particular device or service.⁵¹ Not all equipment or services designed to be used for consumers is *per se* “designed for and used by members of the general public.”⁵² The Commission should, however, make clear that if a manufacturer produces a custom product for an enterprise customer, and does not

of the requirements of this act is to ensure, in part, that individuals with disabilities are able to access and control these services.”) (“*House Committee Report*”).

⁴⁹ 47 U.S.C. § 617(i).

⁵⁰ Compare CVAA § 104(a) (adding that “[t]he provisions of this section shall not apply to customized equipment or services . . .”) with H.R. 3101, 111th Cong. § 104(a) (as introduced in the House, June 26, 2009) (containing no similar exemption).

⁵¹ For instance, a manufacturer may produce a non-interconnected VoIP capability that operates only on its televisions, set-top boxes, or gaming systems. Section 716 would not apply to such a capability since it is not “effectively available to the public” in the same way that traditional voice telephony or MVPD service is available to the public.

⁵² See *NPRM* ¶ 48.

offer this product to the general public, then the product is outside the scope of the CVAA, even if such customized product is used by the general public.⁵³

D. The Commission Must Use Its Waiver Authority as Congress Intended, to Facilitate Innovation and to Avoid Acting as a Gatekeeper for New Technologies.

The Commission is expressly authorized either “on its own motion or in response to” a specific petition “to waive the requirements of this section for any feature or function of equipment used to provide or access [ACS], or for any class of such equipment, for any provider of [ACS], or for any class of such services” for otherwise covered equipment or services designed primarily for other purposes.⁵⁴ This provision was not part of the bill as first introduced in the House.⁵⁵ Congress expressly added it to reinforce the balance between accessibility and promoting innovation.⁵⁶ The Commission’s timely exercise of its waiver authority will be critical to whether implementation of the CVAA fulfills Congress’s innovation policy objectives.

Contrary to the earlier suggestions of some parties,⁵⁷ the CVAA does not favor individualized over broad waivers, and does not limit the duration or scope of potential waiver relief. The Commission should consider the merits of each waiver request on a case-by-case basis. Suggestions that blanket waivers (*i.e.*, waivers for an entire “class” of service or

⁵³ An enterprise customer that specifies the customization of products or services used under its control assumes responsibility for the accessibility of the implementation.

⁵⁴ 47 U.S.C. § 617(h)(1).

⁵⁵ Compare CVAA § 104(a) with H.R. 3101, 111th Cong. § 104(a) (as introduced in the House, June 26, 2009).

⁵⁶ See *House Committee Report* at 26.

⁵⁷ *NPRM ¶¶* 58-60.

equipment)⁵⁸ should be prohibited or otherwise looked upon with disfavor⁵⁹ are contrary to the plain language of the statute⁶⁰ and Congress's intent. In the event that certain equipment or services, which were designed for some purpose other than providing ACS, fall as a technical matter within the scope of the definitions, blanket waivers will serve to facilitate innovation and new product and service development. Requiring individual companies to individually seek a waiver for each product (no matter how similar) will only increase costs and administrative burdens and delay introduction of new innovative products to consumers.

Similarly, claims that waivers should be of limited duration⁶¹ have no basis in the statutory text. The Commission should grant permanent waivers to help reduce the burden on industry by eliminating the need to renew waivers.

When processing waiver requests, the Commission must readily provide confidentiality protections to manufacturers and service providers in highly competitive markets such as those for consumer devices. Waiver requests will necessarily contain information on future products, and the public release of such information would likely cause competitive harm to the petitioner. In similar contexts, such as equipment authorizations by the Office of Engineering and Technology, the Commission has recognized this concern and provided the necessary protections.⁶²

⁵⁸ 47 U.S.C. § 617(h)(1).

⁵⁹ ACB Comments at 23.

⁶⁰ 47 U.S.C. § 617(h)(1).

⁶¹ AAPD Reply Comments at 6; ACB Comments at 24.

⁶² *See, e.g.*, 47 C.F.R. §§ 0.457(d)(1)(ii) & 0.459(a)(3).

In considering whether to grant a waiver, the Commission must use the test set forth in the statute and should not deviate from it.⁶³ Thus, the Commission should not engage in speculation as to whether a service or device may be used for, *e.g.*, education, rehabilitation, or social interaction,⁶⁴ none of which are mentioned in the relevant statutory provisions. The only relevant consideration is whether the device or service is “designed primarily for purposes other than using advanced communications services.”⁶⁵ Expanding the waiver analysis beyond the statutory text would have the unintended consequence of harming consumers and limiting technological innovation. In addition, the Commission should not give weight to whether advanced communications features and functions can be operated apart from the device’s primary functions.⁶⁶ In that environment, device manufacturers would have strong incentives to reduce the functionality and flexibility of a device and eliminate rather than incorporate new communications features to better ensure a waiver will be granted.⁶⁷

In considering a waiver application, the Commission should look at the “core” function, as ***designed and intended by the manufacturer***. The statute refers to services or equipment that is “designed primarily for purposes other than using [ACS].”⁶⁸ The Commission should make clear that this “primary design” question is answered from the perspective of the manufacturer, and not from the perspective of the end user. A manufacturer is responsible for determining the primary design of a device. The Commission can examine how a product is marketed to confirm

⁶³ See 47 U.S.C. § 617(h)(1).

⁶⁴ See NPRM ¶ 54.

⁶⁵ 47 U.S.C. § 617(h)(1)(B).

⁶⁶ *Id.*

⁶⁷ See, *e.g.*, ITI Comments at 3; VON Coalition Comments at 12.

⁶⁸ 47 U.S.C. § 617(h)(1)(B).

the manufacturer's statements as to the primary design of a product.⁶⁹ If a function that technically falls within the ACS definition is incidentally offered as part of a product or service, a blanket waiver may still be appropriate where ACS was not the primary purpose of the product or service. In addition, if a manufacturer makes ACS accessible on a device that is not primarily an ACS device but incidentally includes such a capability, the manufacturer is not obligated under the CVAA to make the non-ACS features accessible.⁷⁰

E. Small Entities Should Not Be Unduly Burdened While Providing Accessibility by the Commission's Implementation of the CVAA.

Section 716(h)(2) provides that "[t]he Commission may exempt small entities from the requirements of this section."⁷¹ Congress directed the Commission to consult with the Small Business Administration ("SBA") in defining "small entity," thus indicating that the SBA definitions of "small entity" are appropriate starting points for the Commission's consideration and adoption.⁷² Congress also recognized that the application of the accessibility requirements to small businesses and entrepreneurial organizations "may slow the pace of technological

⁶⁹ VON Coalition Comments at 12. As discussed in Section II.B. above, CEA also supports the position, expressed by the Entertainment Software Association ("ESA") and others, that equipment or services that make incidental use of ACS should not be subject to the CVAA. *See* ESA Reply Comments at 2.

⁷⁰ In addition, the Commission should make clear that the waiver provision in the CVAA complements, and does not supplant or replace, the Commission's general waiver and forbearance authority under the Act. *See Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)) (discussing the Commission's general waiver authority under 47 C.F.R. § 1.3); 47 U.S.C. § 160 (setting forth the Commission's forbearance authority).

⁷¹ 47 U.S.C. § 617(h)(1).

⁷² *House Committee Report* at 26.

innovation.”⁷³ In determining how best to implement this exemption, the Commission should consider as relevant factors the limits on a company’s “legal, financial, or technical capability.”⁷⁴

III. THE COMMISSION SHOULD APPLY THE STATUTORY REQUIREMENTS IN A MANNER THAT PROVIDES INDUSTRY WITH MAXIMUM FLEXIBILITY TO MEET THE CVAA’S OBJECTIVES.

A. In Making an Achievability Determination, the Commission Should Only Consider the Factors Specified in the Statute and Should Weigh Each Factor Equally.

The CVAA creates a new standard, “achievable,” to measure compliance with the statute’s accessibility requirements. “[T]he term ‘achievable’ means with reasonable effort or expense”⁷⁵ “In determining whether the requirements of a provision are achievable,” Section 716(g) provides that “the Commission *shall* consider” four statutory factors.⁷⁶ As the Commission recognizes, Congress intended that the Commission “give[] equal weight to each of the four achievability factors and appl[y] them on a flexible, case-by-case basis.”⁷⁷ CEA also agrees with the Commission that it should interpret the Section 716 achievability requirements consistent with the Section 255 “fundamental alteration” principle, under which “if the inclusion of a feature in a product or service results in a fundamental alteration of that service or product, it is *per se* not achievable to include that [feature].”⁷⁸

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ 47 U.S.C. § 617(g).

⁷⁶ *Id.* (emphasis added).

⁷⁷ *NPRM* ¶ 75.

⁷⁸ *Id.* ¶ 69 (quoting *House Committee Report* 25). *See also House Committee Report* at 24-25 (“[T]he Committee intends that the Commission interpret the accessibility requirements in this provision in the same way as it did for section 255”).

Factor 1: “*The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question.*”⁷⁹ In determining whether accessibility is achievable for a product, the Commission should not consider the accessibility of a product made by a competitor or of a similar product made by the same manufacturer. The plain language of the statute requires that the Commission only consider the “specific” product or service in question.⁸⁰ Although competing products may offer similar functionality, they frequently do so by radically different means, with accordingly different costs of implementing accessibility features. The Commission should not assume, for example, that the cost of implementing accessibility will be the same for different gaming, television, or mobile platforms. If the Commission were to engage in competing product comparisons, the result could well be forced standardization on proprietary technologies, in violation of the prohibition on “mandat[ing] the use or incorporation of proprietary technology”⁸¹ and the prohibition on “mandat[ing] technical standards.”⁸²

A more appropriate analysis of this factor would consider the entire cost of implementing the required accessibility functionality relative to the production cost of the product. The cost of implementing accessibility includes extra design, testing and customer support, in addition to the ongoing per unit cost of the functionality.⁸³

⁷⁹ 47 U.S.C. § 617(g)(1).

⁸⁰ *Id.*

⁸¹ CVAA § 3.

⁸² 47 U.S.C. § 617(e)(1)(D).

⁸³ If, contrary to the plain language of the statute, the Commission were to consider a competing product in performing an achievability analysis, there is no basis under the CVAA for such a comparison to be a determining factor in its analysis.

The Commission should reject ACB’s suggestion that the cost of accessibility should be compared with the “organization’s entire budget.”⁸⁴ ACB’s suggested approach is inconsistent with the CVAA. Congress considered and rejected this very suggestion; the Commission’s rules cannot add it back. As introduced, H.R. 3101 explicitly included as a factor “the financial resources of the manufacturer or provider.”⁸⁵ However, Congress deleted this factor from the CVAA as enacted into law, making clear that an “organization’s entire budget” is not a relevant factor for the Commission to consider.⁸⁶

In addition to its legislative infirmity, ACB’s suggestion is poor policy because it would bias this factor toward supporting a conclusion that accessibility is “achievable” for any large manufacturer, regardless of the specific circumstances. Even in a large company, the resources (human, as well as financial and technical) that are devoted to a device to achieve accessibility ultimately will be funded by the purchaser of that device. Moreover, manufacturers will necessarily base product-related decisions on the costs that can be recouped from sales of the device. The more resources that are put into the device, the more consumers will have to pay for that device. However, customers may not be willing to pay more for resource-intensive devices, which may result in fewer devices and services being offered. The fact that a new device is offered by a large entity does not *per se* override issues of technical feasibility and product marketability. Such an approach would obviate the need for case-by-case review, inconsistent with Congress’s intent.

Factor 2: “*The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on*

⁸⁴ ACB Comments at 10.

⁸⁵ H.R. 3101, 111th Cong. § 104(a) (as introduced in the House, June 26, 2009).

⁸⁶ 47 U.S.C. § 617(g).

the development and deployment of new communications technologies.”⁸⁷ In determining whether accessibility is achievable in a given product or service, the Commission must expressly consider the impact on the “development . . . of new communications technologies.”⁸⁸ In other words, the Commission must consider whether a determination of achievability would negatively impact innovation generally.⁸⁹ Such an approach is consistent with Congress’s intent to balance accessibility with promoting innovation.

Factor 3: “*The type of operations of the manufacturer or provider.*”⁹⁰ As indicated in the legislative history, the Commission should “consider whether the entity offering the product or service has a history of offering advanced communication services or equipment or whether the entity has just begun to do so.”⁹¹ Failure to do so would essentially read this factor out of the statutorily mandated analysis. CEA agrees that the Commission should give little, if any, weight to the fact that a new entrant has experience in other unrelated markets when evaluating this factor.⁹²

Factor 4: “*The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.*”⁹³ Congress viewed the Commission’s hearing aid

⁸⁷ *Id.* § 617(g)(2).

⁸⁸ *Id.*

⁸⁹ *See NPRM* ¶ 72.

⁹⁰ 47 U.S.C. § 617(g)(3).

⁹¹ S. Rep. No. 111-386, at 8 (2010) (“*Senate Committee Report*”); *House Committee Report* at 25-26.

⁹² *See, e.g.,* TIA Comments at 12.

⁹³ 47 U.S.C. § 617(g)(4).

compatibility rules as a model to guide the Commission’s application of this fourth factor.⁹⁴ When viewed in this context, CEA agrees that the Commission should look favorably on a company when it makes “a good faith effort to incorporate accessibility features in different products across multiple product lines.”⁹⁵ This approach also is consistent with Section 716’s Rule of Construction, which states that not every individual product or service must be accessible for all disabilities.⁹⁶

The Commission should not specify individual, mandatory accessibility features in its rules.⁹⁷ The codification of specific accessibility features would undermine Congress’s express emphasis on industry flexibility, and preference for performance objectives over one-size-fits-all technical standards.⁹⁸ Moreover, as technologies evolve, there is a substantial risk that such mandated features quickly will become outdated. As such, manufacturers would be forced to seek waivers from the requirements to provide such features, potentially delaying or completely preventing the release of new innovative products. Although not appropriate for the Commission’s rules, the inclusion of specific accessibility features may be more appropriate for the Commission’s non-binding guidelines.

The Commission should reject ACB’s suggestion that the Commission require manufacturers to divide devices into classes and make certain that each class has at least one

⁹⁴ See *House Committee Report* at 26 (“The Committee intends that the Commission interpret this factor in a similar manner to the way it has implemented its hearing aid compatibility rules.”).

⁹⁵ *NPRM* ¶ 75.

⁹⁶ See 47 U.S.C. § 617(j). As a corollary, when a product such as an instant messaging application has multiple modes for providing ACS, the Commission should also interpret the Rule of Construction to find such a product compliant with Section 716 if at least one mode is accessible.

⁹⁷ *NPRM* ¶ 76.

⁹⁸ 47 U.S.C. § 617(a)(2).

device that is “fully accessible.”⁹⁹ As an initial matter, this suggestion effectively would force the Commission to micro-manage the marketplace, a result not contemplated in Section 716 or the CVAA. It also would effectively turn the Rule of Construction on its head.¹⁰⁰ The CVAA does not provide the Commission with the authority to undertake ACB’s suggested approach; rather, the Commission is required to evaluate whether accessibility is achievable on a case-by-case basis. Even if Congress had provided the necessary authority, which it did not, such an approach is completely unworkable. With constantly changing consumer preferences, an ever increasing pace of technological change, and a nearly continuous stream of new devices, the Commission would struggle to manage such a classification system. Any such required classification system would have the unintended consequence of chilling innovation in the vibrant and dynamic marketplace for wireless devices and harming consumers.

The Commission should recognize that high-end, more costly products will often have greater accessibility features than low-end inexpensive products. Mandating a “fully accessible” low-end, inexpensive device is completely outside the scope of the CVAA and would not be economically viable in light of the significant price pressures for such devices.

B. The Final Rules Should Comply With the CVAA’s Requirement That the Commission Is Precluded From Preferring Built-In Over Third-Party Accessibility Solutions.

Recognizing the significant changes in technology and the potential of the marketplace to improve accessibility in innovative ways, Congress incorporated into the CVAA a fundamental change into the traditional approach to “accessibility” under Section 255 by allowing covered

⁹⁹ ACB Comments at 13.

¹⁰⁰ See 47 U.S.C. § 617(j) (“Rule of Construction. This section shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.”).

entities to provide accessibility through either built-in solutions or third-party solutions, if third-party solutions are available at “nominal cost” to consumers.¹⁰¹ The House Committee Report emphasizes that: “For each of these obligations, the Committee intends that the Commission afford manufacturers and service providers as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors.”¹⁰² In implementing Congress’s intent to preserve flexibility, the Commission should thus ensure it does not adopt any regulation that would foreclose the use of any particular type of third-party solution.

Nominal Cost. The Commission should determine the “nominal cost” associated with a third-party solution on a case-by-case basis, considering the nature of the service or product, including its total lifetime cost. The Commission should reject suggestions that seek to limit “nominal cost” to a set percentage or amount.¹⁰³ Congress specifically avoided providing a “percentage or amount for the purpose of defining what constitutes a nominal fee,”¹⁰⁴ and the Commission may not impose such requirements by rule.

Permissible Third-Party Solutions. The Commission should reject ACB’s proposed limitations on third-party solutions.¹⁰⁵ For instance, according to ACB, a third-party solution “cannot be an after-market sale for which the user must perform additional steps to obtain.”¹⁰⁶ The Commission should reject this radical limitation. By its very nature, a third-party solution may have to be acquired by the user in a manner different from a built-in solution. If incorporated in the new rules, the proposed limitation would effectively eliminate a

¹⁰¹ Compare 47 U.S.C. § 255(b)-(d) with 47 U.S.C. § 617(a)(2) & (b)(2).

¹⁰² House Committee Report at 24.

¹⁰³ See, e.g., NPRM ¶ 78.

¹⁰⁴ House Committee Report at 24

¹⁰⁵ ACB Comments at 14.

¹⁰⁶ *Id.*

manufacturer's ability to use third-party solutions, contrary to Section 716. Moreover, this limitation would have a deleterious effect on innovation and investment by persons highly motivated to solve specific problems for well-understood and identified communities. Contrary to ACB's suggested approach, Congress explicitly allowed industry to provide accessibility through either built-in solutions or third-party solutions.¹⁰⁷ Congress did not prefer one approach over the other and neither should the Commission.

Similarly, the Commission should not require covered entities to bundle their products with a third-party solution.¹⁰⁸ Such a mandate would effectively create a built-in requirement, contrary to the plain language of the statute. Mandatory bundling is also unworkable. It would impose a particular business model and relationship between covered entities and third-party vendors that undermines Congress's intent to provide industry flexibility.

In addition, the Commission should not adopt a standard that a third-party solution cannot be "more burdensome to a consumer than a built-in solution."¹⁰⁹ Such a requirement is unworkable. If no built-in solution exists, neither industry nor the Commission would be able to make the proposed comparison. The end result could well be that no accessibility solution is offered.

The Commission should also not require the covered entity to "support[] the [third-party] solution over the life of the product."¹¹⁰ The covered entity often has no direct involvement with such support, which generally is undertaken directly by the third-party vendor.

¹⁰⁷ 47 U.S.C. § 617(a)(2) & (b)(2).

¹⁰⁸ *NPRM* ¶ 80.

¹⁰⁹ *Id.* ¶ 8.

¹¹⁰ *Id.* ¶ 80.

C. “Accessible” and “Usable” Should Be Defined Consistent With the Current Part 6 Rules.

Section 716 requires that covered equipment and services be “accessible to and usable by individuals with disabilities, unless the requirements of this subsection are not achievable.”¹¹¹ The Part 6 definitions of “accessible” and “usable” are well-established in this context and their adoption would provide regulatory certainty for all parties.¹¹² In comparison, the definitions proposed in the Access Board Draft Guidelines (“Draft Guidelines”)¹¹³ are a work in progress and are not suitable for incorporation at this time. Once the Access Board has completed its deliberations, the Commission can revisit the issue of whether to revise these definitions. In addition, the Commission should recognize that the usability of enterprise products should not extend to the installation of these products since they are designed to be professionally installed by qualified technicians, rather than by end users.

D. The Definition of “Compatibility” Should Permit Flexible Implementation.

If a built-in or third-party solution is not achievable, the covered entity must “ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, unless the requirement of this subsection is not achievable.”¹¹⁴ The Commission should provide covered entities with maximum flexibility in meeting their compatibility obligation. For instance, CEA agrees with the Commission that mainstream technologies and devices may qualify as

¹¹¹ 47 U.S.C. § 617(a)(1), (b)(1).

¹¹² *NPRM* ¶ 82.

¹¹³ United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines* (Mar. 17, 2010) (“Draft Guidelines”), available at <http://www.access-board.gov/sec508/refresh/draft-rule.pdf>.

¹¹⁴ 47 U.S.C. § 617(c).

compatible.¹¹⁵ Also, CEA generally agrees that the Commission should phase out the TTY requirements and not require ACS products to be backward compatible with TTY.¹¹⁶ However, the Commission should not require real-time text (“RTT”) to be in place before phasing out the TTY requirements.¹¹⁷ At this time, RTT is not a sufficiently mature technology to be either mandated by the Commission or tied to a phase-out of TTY.

In addition, the Commission should allow the Access Board to complete its process before considering whether to incorporate any specific criteria related to accessibility application programming interfaces (“APIs”).¹¹⁸ CEA agrees that APIs can play an important role in facilitating compatibility.¹¹⁹ Moreover, APIs can facilitate both accessibility (via third-party solutions) as well as compatibility, and the Commission should recognize that a manufacturer’s use of APIs in its product(s) can contribute to an individual product’s accessibility or compatibility showing, as applicable. However, it would be premature to adopt rules governing their use while the Access Board is considering related issues.

E. This Proceeding Should Not Address Digital Rights Management (“DRM”) or Network Security.

Section 716 provides that “[e]ach provider of advanced communications services has the duty not to install network features, functions, or capabilities that impede accessibility or usability.”¹²⁰ Without a specific showing that DRM or network security “impedes” accessibility, the Commission should avoid limiting or otherwise addressing DRM or network security as part

¹¹⁵ *NPRM* ¶ 87.

¹¹⁶ *Id.* ¶ 88.

¹¹⁷ *See id.*

¹¹⁸ As part of developing the Draft Guidelines, the Access Board is considering the role of accessibility APIs. *See, e.g.*, Draft Guidelines at 38.

¹¹⁹ *NPRM* ¶ 90.

¹²⁰ 47 U.S.C. § 617(d).

of this proceeding.¹²¹ DRM and network security are not relevant to the present proceeding, and this *NPRM* is not the proper place to consider these issues. Specifically, DRM is only implicated in the transmission or storage of protected content. However, the present proceeding relates only to ACS accessibility, which does not involve the transmission or storage of protected content.

F. A Covered Entity May Not Impede or Impair Accessibility of Information Content That is Incorporated Using Recognized Industry Standards.

The *NPRM* seeks comment on implementing Section 716(e)(1)(B),¹²² which states:

[ACS], the equipment used for [ACS], and networks used to provide [ACS] may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through [ACS], equipment used for [ACS], or networks used to provide [ACS].¹²³

As the *NPRM* notes, Congress intended the requirements of this subsection to apply where “the accessibility of such content has been incorporated in accordance with recognized industry standards.”¹²⁴ However, the *NPRM* goes on to seek comment on “what these standards should be and how they should be developed and reflected in the Commission’s rules.”¹²⁵

Neither the statutory language nor the legislative history provides support for the Commission to codify standards for the accessibility of content or require the creation of any particular standard. Section 716(e)(1)(B) only establishes a duty not to impede or impair the accessibility of content. The legislative history simply clarifies that, pursuant to Section 716(e)(1)(B), a device or service cannot be expected to protect the accessibility of information

¹²¹ See *NPRM* ¶ 94.

¹²² See *id.* ¶¶ 95-98.

¹²³ 47 U.S.C. § 617(e)(1)(B).

¹²⁴ *NPRM* ¶ 95 (citing *Senate Committee Report* at 8; *House Committee Report* at 25).

¹²⁵ *Id.* ¶ 96.

content unless that accessibility has been provided for through a recognized industry standard. There is no logical or legal justification from these provisions for the Commission even to consider mandating standards in this area.

At most, the Commission is justified in exploring what constitutes “recognized industry standards” in these circumstances. CEA believes that recognized industry standards are only those developed in consensus-based, industry-led, open processes that comply with American National Standards Institute (“ANSI”) Essential Requirements.¹²⁶

The *NPRM* seeks comment on RERC-IT’s three-part proposal with respect to the accessibility of information.¹²⁷ The Commission should reject RERC-IT’s proposal in its entirety. The first part of RERC-IT’s proposal, which would require that “the accessibility information (*e.g.*, captions or descriptions) are not stripped off when information is transitioned from one medium to another,”¹²⁸ is already addressed by the statute, and the Commission should decline to codify RERC-IT’s formulation. Under the terms of Section 716(e)(1)(B), as long as the accessibility information is incorporated in accordance with recognized industry standards, the device or service may not impair or impede the accessibility information.¹²⁹ Introducing a vague requirement regarding the transitioning of information from “one medium to another” would only cause uncertainty as to the obligations of service providers and manufacturers alike.

¹²⁶ See generally American National Standards Institute (“ANSI”), *ANSI Essential Requirements: Due process requirements for American National Standards* (Jan. 2010) (“ANSI Essential Requirements”), available at <http://www.ansi.org/essentialrequirements/>.

¹²⁷ See *NPRM* ¶ 96 (quoting RERC-IT Comments at 7).

¹²⁸ *Id.*

¹²⁹ See 47 U.S.C. § 617(e)(1)(B).

The second part of RERC-IT’s proposal, a requirement that “parallel and associated media channels are not disconnected or blocked,”¹³⁰ is impermissibly overbroad. Section 716(e)(1)(B) only requires that ACS, equipment used for ACS, and networks used to provide ACS do not impair or impede the accessibility of information content when accessibility “has been incorporated into *that content* for transmission through” ACS services, equipment or networks.¹³¹ “That content” cannot be read to include some additional category of “parallel and associated media channels,” and ACS services, equipment and networks cannot reasonably be expected to protect loosely associated accessibility content. As previously demonstrated with captioning and other similar services, the accessibility information must be tightly linked to the content to be timely and useful.

The third part of RERC-IT’s proposal, which would mandate that consumers be able to “combine text, video, and audio streaming from different origins,”¹³² is unsupported by the plain language of the statute. No reasonable reading of Section 716(e)(1)(B) would provide the Commission with the authority to synthesize accessibility by combining information from different origins. Rather, the statute makes clear that ACS services, equipment and networks may not impede or impair the accessibility of information content when such accessibility “has been incorporated into *that content* for transmission.”¹³³

In addition, the Commission should not consider the Draft Guidelines for inclusion in the any rules related to the accessibility of information content and it should not require that the

¹³⁰ RERC-IT Comments at 7.

¹³¹ 47 U.S.C. § 617(e)(1)(B) (emphasis added).

¹³² RERC-IT Comments at 7.

¹³³ 47 U.S.C. § 617(e)(1)(B) (emphasis added).

Draft Guidelines be incorporated in industry-recognized standards.¹³⁴ As stated throughout these comments, the Draft Guidelines are far from final and may still change significantly. Moreover, the Draft Guidelines are not being developed to address the specifics of the CVAA, but rather are being developed to implement Section 508 of the Rehabilitation Act.¹³⁵ More importantly, Section 716(e)(1)(B) does not provide the Commission with the authority to develop or even identify standards.¹³⁶ The purpose of the legislative history’s reference to “recognized industry standards”¹³⁷ is to clarify how ACS equipment, services, and networks can satisfy the statute’s requirement not to impede or impair the accessibility of information content. It does not authorize Commission control of the standards process.¹³⁸

IV. THE “OBLIGATIONS,” “PERFORMANCE OBJECTIVES,” “INDUSTRY GUIDANCE,” AND “SAFE HARBORS” ESTABLISHED FOR COVERED ENTITIES MUST ADHERE TO THE INTENT OF THE CVAA.

A. The Commission Should Narrow the Applicability of Its “Accessibility” Obligations.

As a general matter, the Commission must make clear that the accessibility obligations established in Section 716 apply to the provider of the specific service or application in question that provides ACS, rather than the underlying manufacturer or network service provider.¹³⁹ The determination of who is a “provider of applications or services”¹⁴⁰ will necessarily depend on

¹³⁴ See *NPRM* ¶ 97.

¹³⁵ Draft Guidelines at 1.

¹³⁶ See 47 U.S.C. § 617(e)(1)(B).

¹³⁷ *Senate Committee Report* at 8; *House Committee Report* at 25.

¹³⁸ The legislative history thus helps keep ACS equipment, services, and networks from the impossible task of guarding unknown accessibility information.

¹³⁹ See *NPRM* ¶ 103.

¹⁴⁰ 47 U.S.C. § 617(e)(1)(c) (“[T]he Commission shall . . . determine the obligations under this section of manufacturers, service providers, and providers of applications or services accessed over service provider networks . . .”).

how the statutory definitions for covered services apply to a particular application or services on a case-by-case basis. A manufacturer or service provider is liable with respect to a third-party product, however, only to the extent that the manufacturer or service provider offers the third-party product to consumers or seeks to rely on the third-party product for its own compliance purposes. Consistent with the third-party liability limitation and other statutory provisions, each individual entity offering a covered application or service is subject to its own accessibility obligations independent of the underlying equipment or service platform that enables a user to access the application or service.¹⁴¹

B. As Proposed in the *NPRM*, the Commission’s Performance Objectives Should Define the Outcomes to Be Achieved.

Section 716 provides that “the Commission shall . . . include performance objectives to ensure the accessibility, usability, and compatibility of advanced communications services and the equipment used for advanced communications services by individuals with disabilities.”¹⁴² CEA supports the proposed outcome-oriented definitions of “accessible,” “compatible,” and “usable.”¹⁴³ CEA agrees with the Commission that performance objectives should “clearly define the outcome needed to be achieved without specifying how these ends should be accomplished.”¹⁴⁴ The *NPRM* appropriately relies on the Part 6 rules in proposing performance objectives.

¹⁴¹ In addition, the Commission should make clear that the accessibility obligations of Section 716 do not apply to pre-release or Beta software. Such software does not constitute a product or service for purposes of the Act or the CVAA because pre-release or Beta software is still under development and not fully finalized.

¹⁴² 47 U.S.C. § 617(e)(1)(A).

¹⁴³ *NPRM* ¶ 105.

¹⁴⁴ *Id.*

C. The Commission Would Exceed Its Statutory Authority If It Implemented Performance Objectives That Would Require Interoperability Among Video Conferencing Services.

Nowhere in the CVAA did Congress provide the Commission with the authority “to require interoperability among all video conferencing services”¹⁴⁵ Rather, Congress specifically narrowed the Commission’s authority by limiting the applicability of the CVAA to “interoperable” video conferencing services.¹⁴⁶ The Commission only has authority to promulgate “performance objectives to ensure the accessibility, usability and compatibility of [ACS] and the equipment used for [ACS].”¹⁴⁷ It does not have the authority to create, or require others to create, a specific form of ACS.¹⁴⁸ The Commission should not use this proceeding, which is focused on implementing ACS accessibility, to address the issue of mandated interoperability. That is a fundamentally different issue far outside of the scope of the CVAA, implicating complex technical and business issues.

Rather than improperly mandating interoperability, the Commission should rely on open, consensus-based, industry-led, standards-setting processes that comply with ANSI Essential Requirements to develop standards for interoperable video conferencing services. A Commission-sanctioned working group of stakeholders would be helpful only to provide input on requirements and use cases that would facilitate the standards development process.¹⁴⁹

¹⁴⁵ *Id.* ¶ 108.

¹⁴⁶ Compare CVAA § 101 (defining “interoperable video conferencing service” as a form of “advanced communications services”) with H.R. 3101, 111th Cong. § 101 (as introduced in the House, June 26, 2009) (defining “video conferencing” as a form of “advanced communications”).

¹⁴⁷ 47 U.S.C. § 617(e)(1)(A).

¹⁴⁸ See *id.* § 153(1) (“The term ‘advanced communications services’ means (A) interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) *interoperable video conferencing service.*” (emphasis added)).

¹⁴⁹ *NPRM* ¶ 110.

D. The Prospective Guidelines Developed By the Commission Should Be Clear and Understandable and Provide Covered Entities With As Much Flexibility As Possible.

Section 716 provides that the Commission “shall issue prospective guidelines for a manufacturer or provider regarding the requirements of this section.”¹⁵⁰ CEA agrees with the *NPRM* that “the prospective guidelines . . . must be clear and understandable and provide service providers and manufacturers as much flexibility as possible”¹⁵¹ More specifically, the prospective guidelines should not be as standards-driven as the Draft Guidelines. Rather, the Commission should look to the Access Board’s non-binding Section 255 guidelines, which provide concrete real-world examples of compliance alternatives, as a possible model for the prospective guidelines.¹⁵²

The Commission also seeks comment on whether it should use an approach similar to that taken by W3C’s Web Content Accessibility Guidelines (“WCAG”).¹⁵³ The WCAG are a valuable resource for product designers when working with HTML content, but do not have broad applicability to ACS accessibility. Thus, the Commission should generally avoid relying on the WCAG as a basis for the prospective guidelines.

¹⁵⁰ 47 U.S.C. § 617(e)(2).

¹⁵¹ *NPRM* ¶ 115.

¹⁵² 36 C.F.R. Part 1193 Appendix (“This appendix provides examples of strategies and notes to assist in understanding the guidelines and are a source of ideas for alternate strategies for achieving accessibility. These strategies and notes are not mandatory. A manufacturer is not required to incorporate all of these examples or any specific example. Manufacturers are free to use these or other strategies in addressing the guidelines.”).

¹⁵³ *NPRM* ¶ 115.

E. The Commission Should Avoid Relying on or Adopting the Access Board Draft Guidelines in Its Development of “Performance Objectives” or “Prospective Guidelines.”

The Commission seeks comment on whether any parts of the Draft Guidelines would be useful in the development of specific performance objectives¹⁵⁴ or whether any parts of the Draft Guidelines should be adopted as prospective guidelines.¹⁵⁵ In both cases, the Commission should avoid relying on the Draft Guidelines. As noted above, the Draft Guidelines are far from final and still may change significantly.¹⁵⁶ More fundamentally, the Commission’s proposed reliance on the Draft Guidelines is misguided. The Commission fails to recognize that the requirements of Section 508 of the Rehabilitation Act¹⁵⁷ in particular are procurement requirements akin to a buyer’s specification, which a company can choose to adhere to or not depending on its sales focus, and such procurement requirements serve a fundamentally different purpose than binding performance objectives or prospective guidelines. Nevertheless, the Commission should allow the Access Board process to run its course and then evaluate whether or to what extent to harmonize the performance objectives and/or prospective guidelines with the final Access Board Guidelines.

¹⁵⁴ *Id.* ¶ 106.

¹⁵⁵ *Id.* ¶ 115.

¹⁵⁶ The Notice of Proposed Rulemaking in the Access Board’s proceeding has still not been released. *See* Architectural and Transportation Barriers Compliance Board, Advance NPRM, 75 Fed. Reg. 13,457 (Mar. 22, 2010).

¹⁵⁷ 29 U.S.C. § 794d.

F. If Necessary to Facilitate Compliance With Section 716, the Commission Should Adopt as Safe Harbors Only Those Technical Standards Developed in a Consensus-Based, Industry-Led, Open Process That Complies With ANSI Essential Requirements.

Congress provided the Commission with the discretion to adopt safe-harbor technical standards but intended that such safe harbors would only be used in limited circumstances.¹⁵⁸

The Commission should seek to establish a process to adopt such safe-harbor standards without locking in outdated technologies or imposing implicit mandates. The process should enable proponents to petition for the adoption of a safe-harbor technical standard and allow for the timely review and approval of such safe-harbor standards. As an initial matter, the Commission should only consider technical standards that have been developed in a consensus-based, industry-led, open process that complies with ANSI Essential Requirements. Where industry participants use a safe-harbor technical standard, they would receive immunity from both informal and formal complaints.

V. THE COMMISSION SHOULD IMPLEMENT THE CVAA’S RECORDKEEPING AND ENFORCEMENT REQUIREMENTS TO ADVANCE ACCESSIBILITY WITHOUT UNDULY BURDENING COVERED ENTITIES.

A. Covered Entities Must Have the Necessary Time to Incorporate the Requirements Associated With the CVAA.

Consistent with its mandate in a variety of areas involving consumer electronics, for covered equipment and services designed after the effective date of the rules, the Commission should provide covered entities with at least 24 months to phase in the accessibility requirements of Section 716 and achieve compliance with the Commission’s rules. The Commission has similarly recognized in the HAC context that it can take time to incorporate new features into

¹⁵⁸ See 47 U.S.C. § 617(e)(1)(D) (“[T]he Commission may adopt technical standards as a safe harbor for such compliance if necessary . . .”).

handset products, and the same principle should apply to accessibility more broadly.¹⁵⁹ In determining how much time is needed, the Commission should also consider product cycles and selling seasons. For example, if a product will be in the marketplace within a year and the product development cycle is generally three years, it will be difficult to incorporate the regulatory requirements in the single remaining year prior to the product's release. In addition, the Commission presumably will receive waiver requests after the rules are adopted. It should establish an effective date that allows time for the waiver requests to be considered and ruled upon and for the applicants to comply if a waiver is denied.

The Commission also should explicitly grandfather any products or services designed before the effective date of the rules, exempting them from the rules. Such an approach is consistent with CVAA's exclusion of retrofitting as an appropriate remedy.¹⁶⁰

The statute makes clear that the recordkeeping requirements begin "one year after the effective date of the regulations promulgated pursuant to section 716(e)" ¹⁶¹ In any complaint or enforcement proceeding concerning a period prior to the effective date of the recordkeeping requirement, the Commission cannot find that a party has violated that requirement.

¹⁵⁹ *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets*, Policy Statement and Second Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11167, 11199 ¶ 92 (2010) ("Ever since the Commission adopted the first wireless hearing aid compatibility rules in 2003, we have consistently recognized that it takes time for handsets with new specifications to be designed, produced, and brought to market, and accordingly we have afforded meaningful transition periods before new hearing aid-compatible handset deployment benchmarks and other requirements have become effective.").

¹⁶⁰ *See House Committee Report* at 26.

¹⁶¹ 47 U.S.C. § 618(a)(5)(A).

B. The Commission Should Refrain From Making the Recordkeeping Requirements Overly Burdensome, Unnecessarily Expensive, or Repetitive.

Section 717 requires that each covered entity “shall maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such [covered entity] to implement sections 255, 716, and 718”¹⁶² Section 717 goes on to provide three categories of information to be maintained by the covered entity:

(i) Information about the manufacturer’s or provider’s efforts to consult with individuals with disabilities. (ii) Descriptions of the accessibility features of its products and services. (iii) Information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.¹⁶³

To avoid increasing burdens on covered entities, CEA urges the Commission to refrain from expanding the recordkeeping requirements beyond the above three categories specified in the statute.¹⁶⁴ During the legislative process, Congress was well-informed about the core types of information that covered entities should maintain to fulfill the goals of the CVAA. There is no need for the FCC to require the maintenance of other types of records.

As a general matter, the Commission should provide flexibility in how covered entities implement the record keeping requirements to help account for the differences in the size and scope of various manufacturers and service providers as well as the inherent differences in the products and services provided. Contrary to the language of the *NPRM*,¹⁶⁵ nowhere in Section 717 does Congress provide the Commission with the authority to require “uniform”

¹⁶² *Id.*

¹⁶³ *Id.* § 618(a)(5)(A)(i)-(iii).

¹⁶⁴ *See NPRM* ¶ 121.

¹⁶⁵ *Id.* ¶ 119 (“Section 717 requires the Commission to establish *uniform* recordkeeping and enforcement procedures for entities subject to Sections 255, 716, and 718.” (emphasis added)).

recordkeeping procedures.¹⁶⁶ Requiring a uniform approach would be inconsistent with Congress’s intent to provide flexibility and minimize the burden on covered entities.

Moreover, the Commission should provide covered entities with maximum flexibility in fulfilling their obligations pursuant to the statutorily specified categories of information. For instance, the Commission should allow records of participation in accredited standards development organizations to count toward a company’s compliance, as well as its outreach to individuals with disabilities either directly or indirectly through standards development organizations, with the requirement to document efforts to consult with individuals with disabilities.¹⁶⁷

Finally, the Commission should provide covered entities with the flexibility to determine the “reasonable time period” to retain the required records based on the circumstances of the particular product or service. The life expectancy and development cycle of covered products and services vary dramatically. As recognized in the legislative history, for instance, “many consumer devices and wireless devices have relatively short life cycles in the marketplace.”¹⁶⁸ As such, the Commission should avoid mandating any specific time period for record retention, which undoubtedly would not reflect the varied lifecycles of the covered products or services.

C. The Enforcement Process Must Satisfy Basic Due Process Considerations and Must Avoid Using the Process to Micromanage the Development of New Technologies.

Congress has largely specified the Commission’s enforcement procedures in the statutory text.¹⁶⁹ Nonetheless, in developing the enforcement process rules, the Commission should

¹⁶⁶ 47 U.S.C. § 618.

¹⁶⁷ *See id.* § 618(a)(5)(i).

¹⁶⁸ *Senate Committee Report* at 9; *House Committee Report* at 26.

¹⁶⁹ *See* 47 U.S.C. § 618(a)(1)-(4).

maintain focus on Congress’s intent to ensure compliance with the accessibility requirements of Sections 255, 716, and 718 while at the same time minimizing regulatory burdens on covered entities, including increased costs that will have to be passed on to all consumers. For example, in comparing accessibility legislation as introduced with the CVAA as finally passed, it is significant that Congress considered *and rejected* authorizing the use of cease-and-desist orders and other intrusive remedies that involve any sort of regulatory micromanagement of new technologies and their deployment.¹⁷⁰ Rather, Congress provided the Commission with the authority to consolidate the investigation and resolution of similar complaints,¹⁷¹ and the Commission should liberally exercise its consolidation authority to minimize the burden on defendants and Commission staff alike. The legislative history also makes clear that as a general matter, the Commission should craft remedies and determine sanctions on a case-by-case, product-by-product basis, taking into account the product lifecycle and other market realities.¹⁷² CEA agrees with the Commission that it “must exercise any remedial authority selectively and carefully . . . , particularly for consumer and wireless devices.”¹⁷³

Pre-Filing Notice. The Commission seeks comment on whether it should require potential complainants to notify the defendant that they intend to file a complaint.¹⁷⁴ At a minimum, the Commission should require complainants to certify that they have first contacted the covered entity (including when the contact was made) to seek to address the alleged accessibility problem. Such a simple requirement is not a significant barrier to filing, but it will

¹⁷⁰ Compare H.R. 3101, 111th Cong. § 104(a) (as introduced in the House, June 26, 2009) with CVAA § 104(a).

¹⁷¹ 47 U.S.C. § 618(a)(3)(C).

¹⁷² See *Senate Committee Report* at 9; *House Committee Report* at 26.

¹⁷³ *NPRM* ¶ 140.

¹⁷⁴ *Id.* ¶ 128.

help resolve accessibility issues quickly while deterring the filing of frivolous complaints. Pre-filing notice thus provides the Commission with an opportunity to increase the fairness and efficiency of the enforcement process while reducing its costs to consumers, covered entities, and the Commission.

Informal Complaint Procedure. The Commission must pay particular attention to the rules it adopts regarding informal complaint procedures. The proposed rules are so broad, and so onerous for covered entities, that they pose a real risk of subjecting covered entities to undue burden in responding to informal complaints.

The Commission should require each informal complaint to contain all necessary detail to ensure that possible defendants have adequate notice of the alleged violation.¹⁷⁵ The content requirements are particularly important to deter frivolous complaints because the Commission has declined to include a standing requirement.¹⁷⁶ Upon receiving an informal complaint, the Commission staff should (i) verify the informal complaint is complete and contains the requisite level of detail to enable the defendant to readily ascertain the alleged violation and (ii) confirm the complaint has stated a *prima facie* claim under Section 716. If the complaint meets these standards, the Commission staff should notify the parties and the time for filing an answer should then begin to run. If the complaint does not meet these standards, the Commission staff should dismiss the defective complaint “without prejudice to refile.”¹⁷⁷ Moreover, in light of the potential for significant sanctions and monetary forfeitures, and the important interest in informed agency decision making, the Commission must ensure that complaints are clear and

¹⁷⁵ See *id.* ¶ 136.

¹⁷⁶ See *id.* ¶ 130.

¹⁷⁷ *Id.* ¶ 136.

include an adequate level of detail to provide defendants with the necessary notice to satisfy basic due process considerations.

Section 717 requires that the Commission provide a defendant with “a reasonable opportunity to respond” to an informal complaint.¹⁷⁸ The Commission has proposed that a defendant file an answer “within twenty days of service of the complaint, unless the Commission or staff specifies another timeframe.”¹⁷⁹ Based on the proposals in the *NPRM* for the contents of an answer, a defendant will find it impossible to fully answer an informal complaint within the proposed 20-day period. CEA urges the Commission to increase the answer period to at least 40 days, a much more reasonable and realistic response period. Irrespective of the specific length, the answer period should commence at the time that the Commission staff finds the complaint to be adequate, reinforcing the need for the Commission to require a clear and detailed complaint. In addition, the Commission staff should liberally grant extensions to provide defendants with the necessary time to fully address the complaint where needed. For instance, a covered entity may need additional time to translate records from a foreign language before it is able to fully respond.

As importantly, the Commission should narrowly craft the answer content requirements to focus on (i) whether the device or service in question is accessible, and (ii) if not accessible, whether accessibility is achievable. As an initial matter, the proposed content requirements implicitly, and inappropriately, appear to presume that a product or service is not “accessible.” The Commission must provide a defendant with the opportunity to demonstrate that the identified product or service is accessible consistent with the CVAA.

¹⁷⁸ 47 U.S.C. § 618(a)(4).

¹⁷⁹ *NPRM* ¶ 138 & Appendix B, § 8.21(a)(1).

Moreover, the Commission should narrow the answer requirements to account for the operational realities of manufacturers.¹⁸⁰ For instance, requiring the names of company decision makers has no relevance to the determination of whether a product or service complies with the statutory requirements.¹⁸¹ Similarly, requiring a certification regarding the ultimate determination of accessibility (e.g., “it was not achievable to make the product or service accessible and usable”)¹⁸² is irrelevant to the Commission’s determination of whether accessibility (i) exists or (ii) was achievable. Such provisions smack of *ad hominem* regulation, not of a process designed to resolve a complaint.

In particular, requiring that a defendant provide “all documents” regarding achievability to the Commission is overly broad and unduly burdensome.¹⁸³ Such mandatory “boxcar discovery” is completely unwarranted in order to resolve a specific complaint from a consumer. In most instances, a narrative response, submitted subject to Section 1.17(a) of the Commission’s rules, will likely provide the necessary support for a defendant’s conclusions.¹⁸⁴ More specifically, a product design summary will likely better detail accessibility efforts in comparison to an unwieldy record of any and all communications by and among the product design team. Voluminous archives of designer communications will also be overly burdensome to maintain, and difficult to translate when the product design is conducted in a foreign language. In addition, the Commission must keep confidential any records maintained by a covered entity

¹⁸⁰ See *NPRM* Appendix B, § 8.21(a).

¹⁸¹ See *NPRM* ¶ 138.

¹⁸² See *id.*

¹⁸³ See *NPRM* Appendix B, § 8.21(a)(7); see also *id.* § 8.17(c).

¹⁸⁴ 47 C.F.R. § 1.17(a).

pursuant to Section 717(a)(5)(A) that are provided to the Commission in response to a complaint (either formal or informal).¹⁸⁵

CEA agrees with the Commission that it must “exercise any remedial authority selectively and carefully.”¹⁸⁶ This will help ensure the Commission avoids dictating technological solutions and chilling innovation. The Commission must also acknowledge that the statute does not require it to issue a remedial order, but rather the statute provides the Commission with discretion on when to issue such an order.¹⁸⁷ CEA further agrees that in the case of a manufacturer, any remedial order may only require compliance in the “next generation of the equipment or device”¹⁸⁸ In determining “a reasonable period of time” for compliance,¹⁸⁹ the Commission should set the compliance schedule based on a case-by-case analysis, considering the nature of the product, including, for example, the product development cycle and the size and resources of the company. Nevertheless, as starting points, CEA suggests 18 months as a reasonable timeframe to achieve compliance in the next generation of equipment or device and 12 months for a service.

¹⁸⁵ 47 U.S.C. § 618(a)(5)(C) (“After the filing of a formal or informal complaint against a manufacturer or provider, the Commission may request, and *shall keep confidential*, a copy of the records maintained by such manufacturer or provider pursuant to subparagraph (A) of this paragraph that are directly relevant to the equipment or service that is the subject of such complaint.” (emphasis added)).

¹⁸⁶ *NPRM* ¶ 140.

¹⁸⁷ “If the Commission determines that a violation has occurred, the Commission *may* . . . direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with requirements of those sections within a reasonable time established by the Commission in its order.” 47 U.S.C. § 618(a)(3)(B)(i) (emphasis added).

¹⁸⁸ *NPRM* Appendix B, § 8.22(b)(1).

¹⁸⁹ *Id.*

Section 717 also requires that the Commission provide a defendant with a “reasonable opportunity” to comment on any proposed remedial action before a final order is issued.¹⁹⁰ The Commission should only consider comments and reply comments from the parties to the complaint – the complainant and defendant. As a general matter, the Commission should provide parties with at least 30 days for initial comments and 45 days for reply comments from the date the Commission releases the proposed remedial order.

Finally, the Commission should encourage and facilitate the private resolution of complaints as contemplated by the statute.

Nothing in the Commission’s rules or this Act shall be construed to preclude a person who files a complaint and a manufacturer or provider from resolving a formal or informal complaint prior to the Commission’s final determination in a complaint proceeding. In the event of such a resolution, the parties shall jointly request dismissal of the complaint and the Commission shall grant such request.¹⁹¹

For instance, if a defendant, at its sole discretion, provides a replacement product with the accessibility features requested by the complainant, the Commission should consider this a satisfactory resolution and dismiss the complaint based on a joint motion of the parties. In addition, if the defendant chooses to provide a possible replacement product, the Commission should automatically stay the required answer while the complainant evaluates the possible replacement product.

To address the above concerns, CEA has provided suggested revisions to the proposed enforcement rules in Appendix A attached hereto. CEA looks forward to examining suggestions

¹⁹⁰ 47 U.S.C. § 618(a)(4) (“Before issuing a final order under paragraph (3)(B)(i), the Commission shall provide such party a reasonable opportunity to comment on any proposed remedial action.”).

¹⁹¹ *Id.* § 618(a)(8).

of other parties on this important topic and may submit additional or revised suggested rule changes based on that examination.

VI. THE COMMISSION SHOULD APPLY SECTION 718 CONSISTENTLY WITH SECTION 716, PROVIDING INDUSTRY WITH MAXIMUM FLEXIBILITY.

Although the requirements of Section 718 do not take effect for three years,¹⁹² CEA applauds the Commission for beginning to investigate how best to implement this section.¹⁹³ As an initial matter, the Commission must recognize the requirements of Section 718 are limited to Internet browsers provided with “telephones used with public mobile service.”¹⁹⁴ These requirements do not extend to data-only devices such as laptops, tablets, or other products using mobile wireless data services.

The language in Sections 716 and 718 is virtually identical, and the Commission should apply these provisions consistently and with “maximum flexibility” as stated by the House Committee Report.¹⁹⁵ Moreover, Section 718, when viewed in light of the Section 2 liability limitation, is clearly targeted at those features and functions of mobile browsers that provide the “on-ramp” to the Internet, and not the content, websites, or applications made available via the Internet.¹⁹⁶

To help ensure Congress’s intent is met, CEA encourages the Commission to support and work with industry forums and working groups to help promote accessibility standards for mobile browsers as well as to assist and inform covered entities on how to meet their obligations

¹⁹² CVAA § 104(b).

¹⁹³ *NPRM* ¶¶ 143-44.

¹⁹⁴ 47 U.S.C. § 619(a).

¹⁹⁵ Compare 47 U.S.C. § 619(b) with 47 U.S.C. § 617(a)(2), (b)(2); *House Committee Report* at 27; see also TIA Comments at 25; CTIA Comments at 18-19.

¹⁹⁶ 47 U.S.C. § 619(a)(2); CVAA § 2(a); see, e.g., CTIA Comments at 19; T-Mobile Comments at 8-9.

under Section 718.¹⁹⁷ Furthermore, any accessibility standards for mobile browsers should be developed in a consensus-based, industry-led, open process that complies with ANSI Essential Requirements.

VII. CONCLUSION

CEA welcomes the opportunity to serve as a resource for the Commission as it implements the CVAA and urges the Commission to follow Congress's lead in the CVAA of balancing the twin goals of promoting accessibility and preserving continued innovation.

Respectfully submitted,

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¹⁹⁷ See *NPRM* ¶ 144; see also Verizon/Verizon Wireless Comments at 7.

APPENDIX A

CEA's Suggested Revisions to the Proposed Enforcement Rules

§ 8.17 Recordkeeping

* * * *

(c) Upon the service of a complaint, formal or informal, on a manufacturer or service provider under this section, ~~a copy~~the manufacturer or service provider shall preserve copies of the records it has maintained ~~by the manufacturer or service provider~~ that are directly relevant to the equipment or service that is the subject of the complaint ~~shall be provided to the Commission.~~ Upon review of the answer submitted in accordance with section 8.21(a) ~~of this subpart. Requests for confidential treatment of~~, the Commission or its staff may require the manufacturer or service provider to submit a copy of the records directly relevant to the equipment or service that is the subject of the complaint. The Commission shall keep confidential any documents or information submitted under this subsection ~~may be filed~~ in accordance with ~~section 0.459 of this chapter.~~ § 8.33(f).

* * * *

§ 8.20 Procedure; designation of agents for service

(a) The Commission shall promptly forward any informal complaint ~~meeting the requirements of § 8.19 of this subpart~~ to each manufacturer and service provider named in or determined by the staff to be implicated by the complaint, that satisfies the following criteria:

(1) Meets the requirements of § 8.19 of this subpart; and

(2) Establishes a *prima facie* claim that the manufacturer or service provider has violated its accessibility obligations under this Part 8.

If an informal complaint does not satisfy both of the foregoing criteria, the Commission shall dismiss the informal complaint without prejudice to its refiling.

* * * *

§ 8.21 Answers and replies to informal complaints

(a) Any manufacturer or service provider to whom an informal complaint is directed by the Commission under this subpart shall file and serve an answer. The answer shall:

(1) Be filed with the Commission and served on the complainant within ~~twenty~~forty days of service of the complaint, unless the Commission or its staff specifies another time period;

(2) Respond specifically to each material allegation in the complaint;

~~(3) Set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable;~~

~~(4) Set forth the procedures and processes used by the manufacturer or service provider to evaluate whether it was achievable to make the product or service accessible and usable;~~

~~(5) Set forth the names, titles, and responsibilities of each decision maker in the evaluation process;~~~~(6) Set~~Alternatively, set forth the manufacturer's basis for determining that it was not achievable to make the product or service accessible and usable;

~~(7) Provide all documents supporting necessary to support the substance of the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable;~~answer;

~~(8) Include a certification by an officer of the manufacturer or service provider that it was not achievable to make the product or service accessible and usable;~~~~(9)~~(5) Set forth any claimed defenses;

~~(10)~~(6) Set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised;

~~(11)~~(7) Provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and

~~(12)~~(8) ~~Must be~~Be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.

* * * *

§ 8.22 Review and disposition of informal complaints.

(a) The Commission will investigate the allegations in any informal complaint filed that satisfies the requirements of section 8.18(b) of this subpart, and, within 180 days after the date on which such complaint was filed with the Commission, issue an order finding whether the manufacturer or service provider that is the subject of the complaint violated section 255, 716, or 718 of the Act, or the Commission's implementing rules, and provide a basis therefor, unless such complaint is resolved before that time.

(b) Any manufacturer or service provider served with an informal complaint may, at its discretion, provide to the complainant a replacement product with the requested accessibility features. If the complainant finds the replacement product suitable, the Commission shall consider this a satisfactory resolution and dismiss the complaint based on a joint motion of the parties. The complainant may not then refile a complaint regarding the same product. While the complainant evaluates the proposed replacement product, the Commission will automatically stay the required answer and toll the remaining answer period.

(c) If the Commission determines in an order issued pursuant to paragraph (a) that the manufacturer or service provider violated section 255, 716, or 718 of the Act, or the

Commission's implementing rules, the Commission may, in such order, or in a subsequent order:

(1) Direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with the requirements of section 255, 716, or 718 of the Act, and the Commission's rules, within a reasonable period of time; and

(2) Take such other enforcement action as the Commission is authorized and as it deems appropriate.

(ed) Any manufacturer or service provider that is the subject of an order issued pursuant to paragraph (bc)(1) shall have a reasonable opportunity, as established by the Commission, to comment on the Commission's proposed remedial action before the Commission issues a final order with respect to that action.

(1) The Commission will only consider comments and reply comments from the parties to the underlying complaint proceeding; and

(2) Comments to the proposed remedial action are due 30 days after the date the Commission releases the proposed remedial order, and reply comments are due 45 days after said date, unless the Commission or its staff specifies other time periods.

* * * *

§ 8.33 Confidentiality of information produced or exchanged by parties.

* * * *

(f) Notwithstanding the above, the Commission shall automatically keep confidential any records received from a manufacturer or service provider that were maintained pursuant to § 8.17(a) of this subpart (the "8.17(a) Records"). The submitting party will label all such records as "8.17(a) Records – Confidential." To gain access to the 8.17(a) Records, any party to the complaint (either formal or informal) proceeding for which the 8.17(a) Records were provided, other than the submitting party, must comply with paragraphs (b)-(e).