

for [S]ection 255, such that if the inclusion of a feature in a product or service results in a fundamental alteration of that service that it is *per se* not achievable to include that function.”<sup>197</sup> Accordingly, we agree with commenters who urge us to interpret the achievability requirements consistent with this directive.<sup>198</sup> We seek comment on this analysis.

70. We also seek comment on whether or to what extent we have the discretion to weigh other factors not specified in the statute in making an achievability determination. ITI urges us to do so, and specifically asks us to consider “how the lack of economies of scale and scope can sometimes hinder the development and deployment of accessibility solutions.”<sup>199</sup> We note that Congress specifically set forth in Section 716 the factors that we must consider in determining whether accessibility is achievable,<sup>200</sup> and directed us to weigh these factors equally.<sup>201</sup> In light of the statute and this legislative history, we propose to only consider the factors enumerated in the statute in making our achievability determinations. We would note, however, that we propose to construe the factors broadly and weigh any relevant considerations in determining their meaning. We believe, for example, that the “lack of economies of scale and scope” could be a relevant consideration in determining the meaning of the second factor, “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 the development and deployment of new communications technologies.”<sup>202</sup> We seek comment on this analysis.

**b. Specific Factors**

**(i) Nature and Cost of Steps Needed with Respect to Specific Equipment or Service**

71. Section 716(g)(1) of the Act states that in determining whether the statutory requirements are achievable, the Commission must consider “[t]he nature and cost of the steps needed to meet the requirements of [716(g)] with respect to the specific equipment or service in question.”<sup>203</sup> The Senate Report requires the Commission to consider “the nature and cost of the steps needed to make the specific equipment or service in question accessible” and states that “[t]he Committee intends for the Commission to consider how such steps, if required, would impact the specific equipment or service in question.”<sup>204</sup> The House Report reiterates the need for the Commission to focus on the “specific product or service in question” when conducting this analysis.<sup>205</sup> TIA and T-Mobile contend that in determining whether accessibility is achievable for the product at issue, the Commission should not consider the accessibility of a competing product.<sup>206</sup> NFB disagrees, and offers as an example, the need to take into consideration the ability of one company to provide “cost effective text-to-speech applications . . . that make the interface of a touch-screen wireless phone fully accessible to a blind user” because such capability demonstrates that “[t]he lack of accessible options in the marketplace for blind consumers is clearly not

<sup>197</sup> House Report at 25. In the *Section 255 Report and Order*, the Commission found that in order to be a fundamental alteration, the feature must “alter the product substantially or materially.” See *Section 255 Report and Order*, 16 FCC Rcd at 6444, ¶¶ 61-62.

<sup>198</sup> CTIA Comments at 8; CEA Comments at 9-10.

<sup>199</sup> ITI Comments at 7.

<sup>200</sup> 47 U.S.C. § 617(g).

<sup>201</sup> House Report at 25; Senate Report at 8.

<sup>202</sup> 47 U.S.C. 617(g)(2).

<sup>203</sup> 47 U.S.C. § 617(g)(1).

<sup>204</sup> Senate Report at 8.

<sup>205</sup> House Report at 25.

<sup>206</sup> TIA Comments at 10; T-Mobile Comments at 4.

due to a lack of accessible technology.”<sup>207</sup> We believe that it is appropriate for us to consider whether accessibility has been achieved by competing products, but agree with T-Mobile that, in doing so, we must also consider the unique circumstances of each covered entity.<sup>208</sup> We seek comments on this analysis and also seek comment on whether we should define this standard with more specificity in order to make sure that our standards are fully enforceable. We further request input on ACB’s suggestion that we consider the totality of the steps that a company needs to take in our achievability analysis, as well as the need to compare the cost of making a product accessible with the organization’s entire budget.<sup>209</sup>

**(ii) Technical and Economic Impact on the Operation**

72. The second factor in determining whether compliance with Section 716 is “achievable” requires the Commission to consider the “technical and economic impact of making a product or service accessible on the operation of the manufacturer or provider, and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies.”<sup>210</sup> We seek comment on how we should assess this factor and how our analysis should take into account the development and deployment of new communications technologies.

**(iii) Type of Operations**

73. The third factor in determining whether compliance with Section 716 is “achievable” requires the Commission to consider “[t]he type of operations of the manufacturer or provider.”<sup>211</sup> The Senate and House Reports state that this factor permits “the Commission to consider whether the entity offering the product or service has a history of offering advanced communications services or equipment or whether the entity has just begun to do so.”<sup>212</sup> TIA asserts that “a company’s status as a comparatively new market entrant in the advanced communications marketplace, regardless of what other products it offers, must be accounted for in assessing whether a particular accessibility feature is achievable.”<sup>213</sup> We seek comment on the extent to which we should consider an entity’s status as a new entrant in the ACS market in conducting our achievability analysis. How should a manufacturer or service provider’s recent entry into this market affect our analysis if such entity has significant resources or otherwise appears capable of achieving accessibility? What other criteria should we use in assessing this factor as part of our achievability analysis?

**(iv) Extent to which Offering Has Varied Functions, Features, and Prices**

74. The fourth factor in determining whether compliance with Section 716 is “achievable” requires the Commission to consider “[t]he 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.”<sup>214</sup> The Senate and House Reports state that “the Commission

<sup>207</sup> NFB Reply Comments at 7.

<sup>208</sup> T-Mobile argues that “[e]ach company has different technical, financial, and personnel resources, with different business models and distinct technology configurations and platforms that must be accounted for individually.” T-Mobile Comments at 4.

<sup>209</sup> ACB Reply Comments at 10. ACB asserts that under this factor, “in order to prove that accessibility . . . is ‘not achievable,’ an organization must show [that] . . . the totality of the steps it needs to take are extraordinary; and . . . the cost for making this one product accessible, when compared to the organization’s entire budget, is extraordinary.”

<sup>210</sup> 47 U.S.C. § 617(g)(2). See Senate Report at 8, see also House Report at 25.

<sup>211</sup> 47 U.S.C. § 617(g)(3).

<sup>212</sup> Senate Report at 8; House Report at 25-26.

<sup>213</sup> TIA Comments at 12.

<sup>214</sup> 47 U.S.C. § 716(g)(4). See also Senate Report at 8; House Report at 26.

[should] interpret this factor in a similar manner to the way that it has implemented its hearing aid compatibility rules.”<sup>215</sup> The Commission’s rules governing hearing aid compatibility (“HAC”) obligations for wireless devices require manufacturers and service providers to ensure that a range of phones comply with the HAC standards. Specifically, those rules direct such companies to ensure that hearing aid users be able to select “from a variety of compliant handset models with varying features and prices.”<sup>216</sup>

75. Several industry commenters read Congress’s directive to incorporate this criteria into the achievability analysis, in conjunction with the legislative history and Section 716(j),<sup>217</sup> as an outright rejection of the finding in the *Section 255 Report and Order* to require covered entities to consider the accessibility of every product.<sup>218</sup> On the other hand, the RERC-IT states that “if every function of a particular device can achievably be made accessible to every disability, every function should be made accessible.”<sup>219</sup> We question whether any of these proposed interpretations appropriately take into account the more balanced approach contemplated by Congress, which gives equal weight to each of the four achievability factors and applies them on a flexible, case-by-case basis. We do, however, generally agree with TIA that this factor should be interpreted to “give individuals with disabilities meaningful choices in accessible products, and to reward those companies who provide such choices.”<sup>220</sup> While Section 716’s flexible approach is not amenable to the fixed number or percentage approach the Commission has employed in the HAC context, Section 716(g)(4) seems to require that where a company has made a good faith effort to incorporate accessibility features in different products across multiple product lines, this should count favorably toward a determination that the company is in compliance with Section 716 for the product in question. Where companies offer a range of accessible products that perform different functions at varied price points, consumers with disabilities will have a range of devices from which to make their purchases. In those instances, so long as other criteria under the achievability analysis are met, a company charged with having an inaccessible product might not have to make that specific product accessible. This approach would appropriately reward companies that make substantial investments in accessible products, while allowing flexibility to account for marketplace realities.<sup>221</sup>

76. Accordingly, we seek comment on whether covered entities generally should not have to consider what is achievable with respect to every product, if the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at differing price points. At the same time, we also seek comment on whether there are some accessibility features that are so important or easy to include (like a “nib” on the 5 key)<sup>222</sup>

<sup>215</sup> House Report at 26; Senate Report at 8.

<sup>216</sup> *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets, Petition of American National Standards Institute Accredited Standards Committee C63*, WT Docket No. 07-250, First Report and Order, 23 FCC Rcd 3406, 3426 ¶ 51 (2008). The rules also require that manufacturers meet a “product refresh” mandate that requires the inclusion of hearing aid compatibility in some of their new models each year. *Id.* at 3425, ¶ 48. The Commission explained that this rule, together with the requirement for service providers to offer handset models with different functionality levels, was designed to ensure that consumers would have access to HAC handsets “with the newest features, as well as more economical models.” *Id.* at 3425, ¶ 47.

<sup>217</sup> Section 716(j) provides that “[t]his 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.” 47 U.S.C. § 617(j).

<sup>218</sup> *See, e.g.*, VON Coalition Comments at 15; *see also* ITI Comments at 6.

<sup>219</sup> RERC-IT Comments at 9.

<sup>220</sup> TIA Comments at 12-13.

<sup>221</sup> *Id.* at 13.

<sup>222</sup> To help individuals who are visually impaired locate the keys on a standard number pad arrangement, the 5-key dial pad has a raised nib or projecting point that provides a tactilely discernible home key.

that they should be deployed on every product, unless it is not achievable to do so. If so, we seek comment on whether we should identify in our rules some of these specific accessibility features that are currently available, to provide clarity on what accessibility features should be universally deployed, if achievable. We further express our general belief that Section 716(j), *supra* note 217, does not preclude our identifying “easy” accessibility features that must be included on every product, if achievable. While the Senate Report did not address this specific provision, our belief is confirmed by the House Report, which states that the Commission’s approach to Section 255 is consistent with Section 716(j).<sup>223</sup> Finally, we seek comment on whether we should define with more specificity the meaning of “varying degrees of functionality and features” and “differing price points.” In particular, we seek comment on ACB’s assertion that “[i]t is essential that manufacturers and service providers make available a range of devices that fit various price ranges along with corresponding accessible features . . . this may be accomplished by dividing devices into classes and making certain that each class has at least one option that is fully accessible.”<sup>224</sup>

## 2. Industry Flexibility

77. Sections 716(a)(2) and (b)(2) of the Act provide manufacturers and service providers, respectively, flexibility on how to ensure compliance with the accessibility requirements of the CVAA.<sup>225</sup> Specifically, a manufacturer or service provider may comply with these requirements either by building accessibility features into the equipment or service or “by relying on third party applications, peripheral devices, software, hardware, or [CPE] that is available to consumers at nominal cost and that can be accessed by people with disabilities.”<sup>226</sup> While the Senate Report did not discuss these provisions, the House Report makes clear that the choice between these two options “rests solely with the provider or manufacturer.”<sup>227</sup> We believe that the statutory language and legislative history preclude us from preferring built-in accessibility over third party accessibility solutions, as some consumer commenters urge us to do.<sup>228</sup> We acknowledge the integral role that universal design has played in ensuring that mainstream products and services are accessible to people with disabilities, and we believe that universal design will continue to play an important role in providing accessibility to people with disabilities. We believe, however, that the industry flexibility provisions of the CVAA reflect the fact that there are new ways to meet the needs of people with disabilities that were not envisioned when Congress passed Section 255, which relied primarily on universal design principles.<sup>229</sup> With new and innovative technologies, in some cases personalized services and products may now be able to more efficiently and effectively meet individual needs than products built to perform in the same way for every person. Sometimes called “auto-personalization,” where available, this allows devices to adapt to individual needs based on the user’s preferences, according to the device’s capabilities. In a growing and increasingly mobile computing environment, for example, consumers may be able to set their preferences so that the interfaces on a device or the content produced by that device automatically become accessible for that

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<sup>223</sup> See House Report at 24.

<sup>224</sup> ACB Reply Comments at 13.

<sup>225</sup> 47 U.S.C. § 617(a)(2), (b)(2).

<sup>226</sup> 47 U.S.C. § 617(a)(2), (b)(2).

<sup>227</sup> House Report at 24.

<sup>228</sup> RERC-IT Comments at 5; NFB Reply Comments at 8; ACB Reply Comments at 14; and AAPD Reply Comments at 3-4.

<sup>229</sup> See *Section 255 Report and Order*, 16 FCC Rcd at 6441, ¶ 50, n.138 (citing Pub. L. No. 105-394, Section 3(a)(17), November 13, 1998 (Assistive Technology Act of 1998), which defines “universal design” as “a concept or philosophy for designing products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies), and products and services that are made usable with assistive technologies”). 29 U.S.C. § 3003(a)(17).

individual's disability needs.

78. We do, however, seek comment on what actions we should take to ensure that third party accessibility solutions meet the needs of consumers in a manner comparable to solutions that are built into the equipment. First, we seek comment on the meaning of the requirement that the third party accessibility solutions “must be available to the consumer at nominal cost.”<sup>230</sup> Some commenters assert that “nominal cost” cannot be a static definition or constitute a set amount or percentage of total cost, but rather should be determined on a case-by-case basis.<sup>231</sup> In contrast, the RERC-IT, noting that people with disabilities are “poor at alarming rates,”<sup>232</sup> urges the Commission to limit “nominal cost” to one percent (1%) of the total cost of the device or service, or the total cost of the device plus service, as applicable.<sup>233</sup> AFB notes further that ongoing costs to keep third party software and hardware up to date and in good working order should be included, such that the total cost to the consumer cannot be more than nominal.<sup>234</sup> While Congress did not prescribe a percentage or amount, it did intend that any fee for third-party software or hardware accessibility solutions be “small enough so as to generally not be a factor in the consumer’s decision to acquire a product or service that the consumer otherwise desires.”<sup>235</sup> We propose to adopt this definition of “nominal cost” and seek comment on this proposed definition. We are concerned, however, that this definition, by itself, might not ensure that the cost of accessibility for the consumer is truly nominal, and we seek comment on whether we need to provide further guidance on the issue.

79. We believe that manufacturers and service providers can rely on a range of third party solutions, subject to the requirements that we discuss further below, including the use of third party applications, peripheral devices, software, hardware, and CPE. We propose to adopt the following definitions of these potential third party accessibility solutions:

- (a) “applications” means “computer software designed to perform or to help the user perform a specific task or specific tasks, such as communicating by voice, electronic text messaging, or video conferencing”;
- (b) “peripheral devices” means “devices employed in connection with equipment covered by this [proceeding] to translate, enhance, or otherwise transfer advanced communications services into a form accessible to individuals with disabilities”;
- (c) “software” means “computer programs, procedures, rules, and related data and documentation that direct the use and operation of a computer or a related device and instruct it to perform a given task or function”;
- (d) “hardware” means “a tangible communications device, equipment, or physical component of communications technology, including peripheral devices, such as a smart phone, a laptop computer, a desktop computer, a screen, a keyboard, a speaker, or an amplifier”; and
- (e) “customer premises equipment” means “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.”

We seek comment on these definitions and whether they are sufficiently inclusive of third party solutions available to manufacturers and service providers.

<sup>230</sup> 47 U.S.C. §§ 617(a)(2)(B) and 617(b)(2)(B).

<sup>231</sup> CEA Comments at 12; Microsoft Comments at 13-14; TIA Comments at 15; VON Coalition Comments at 16.

<sup>232</sup> RERC-IT Comments at 6.

<sup>233</sup> *Id.*

<sup>234</sup> See AFB Reply Comments at 5.

<sup>235</sup> House Report at 24.

80. Second, we seek comment on the requirement that individuals with disabilities must be able to “access” the third-party solutions. Specifically, we seek comment on ACB’s assertions that the third party solutions (i) “cannot be an after-market sale for which the user must perform additional steps to obtain;” (ii) “must be fully operable by a person with a disability without having to turn to people without disabilities in order to perform setup or maintenance;” and (iii) “must be fully documented and supported.”<sup>236</sup> We believe that for covered entities to meet the “access” requirement of this provision, they must ensure that the third party solution not be more burdensome to a consumer than a built-in solution. In that vein, should a service provider or manufacturer relying on third party solutions be responsible for finding and installing the solution, and supporting the solution over the life of the product?<sup>237</sup> We seek comment on this analysis, on what a company must do to achieve such parity with built-in solutions, and on whether it is necessary to require that covered entities bundle the third party solutions with its products in order to meet the requirements of the statute.

### 3. Accessible to and Usable by

81. Under Sections 716(a) and (b) of the Act, covered service providers and equipment manufacturers must make their products “accessible to and usable by” people with disabilities, unless it is not achievable.<sup>238</sup> In this section, we seek comment on the extent to which we should continue to define “accessible to and usable by” as we have for our implementation of Section 255, which requires telecommunications service providers and equipment manufacturers to make their products “accessible to and usable by” people with disabilities, if readily achievable.

82. In the *Section 255 Report and Order*, the Commission adopted a definition of “accessible” in section 6.3(a) of the Commission's rules which incorporated the functional definition of this term from the Access Board guidelines and includes various input, control, and mechanical functions, output, display, and control functions.<sup>239</sup> The *Section 255 Report and Order* also adopted a definition of

<sup>236</sup> ACB Reply Comments at 14.

<sup>237</sup> Adaptive communication solutions are often not available with mainstream products and finding these solutions often has been difficult for people with disabilities in the past.

<sup>238</sup> 47 U.S.C. §§ 617(a) and (b).

<sup>239</sup> See 47 C.F.R. § 6.3(a) which provides that “input, control, and mechanical functions shall be locatable, identifiable, and operable” as follows:

- Operable without vision
- Operable with low vision and limited or no hearing
- Operable with little or no color perception
- Operable without hearing
- Operable with limited manual dexterity
- Operable with limited reach or strength
- Operable without time-dependent controls
- Operable without speech
- Operable with limited cognitive skills

The output, display and control functions listed by the Access Board at 36 C.F.R. § 1193.43 are:

- Availability of visual information
- Availability of visual information for low vision users
- Access to moving text
- Availability of auditory information
- Availability of auditory information for people who are hard of hearing
- Prevention of visually-induced seizures
- Availability of auditory cutoff
- Non-interference with hearing technologies
- Hearing aid coupling

“usable” in section 6.3 that incorporated the Access Board’s definition of this term. Specifically, section 6.3(l) provides that “usable” “mean[s] that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities.”<sup>240</sup>

83. We seek comment on whether we should adopt these definitions for purposes of Section 716 or whether we should take this opportunity to make changes to these definitions that would apply to both our Section 255 rules and our Section 716 rules based on the Access Board Draft Guidelines that were released for public comment in March 2010.<sup>241</sup> While we note that there is a great deal of overlap between Section 255’s definition of “accessible” and the Access Board’s proposed updated functional criteria for ICT, there are some differences. To the extent that there are differences between these definitions and criteria, should we work to reconcile those differences? For example, the Section 255 rules address cognitive disabilities whereas the draft ICT guidelines do not, and the draft ICT guidelines address photosensitive seizures, whereas the Section 255 rules do not. In addition, we note that the Access Board Draft Guidelines on “usability” are broader and more detailed than the Section 255 rules. The Access Board Draft Guidelines, for example, cover training<sup>242</sup> and alternate methods of communication.<sup>243</sup>

#### 4. Disability

84. Section 3(18) of the Act states that the term “disability” has the meaning given such term under Section 3 of the ADA.<sup>244</sup> The ADA defines “disability” as with respect to an individual: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . .”<sup>245</sup> Our current rules incorporate this definition of disability, and we propose to use that definition in our Section 716 rules.<sup>246</sup>

#### 5. Compatibility

85. Under Section 716(c) of the Act, whenever accessibility is not achievable either by building in access features or using third party accessibility solutions as set forth in Sections 716(a) and (b), a manufacturer or service provider 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 that is not achievable.<sup>247</sup> Section 255 contains a similar compatibility requirement for telecommunications service providers and manufacturers if it is readily achievable to do so, in cases where built-in accessibility is not readily achievable.

86. Our Section 255 rules define peripheral devices to mean “devices employed in connection with equipment covered by this part to translate, enhance or otherwise transform

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<sup>240</sup> 47 C.F.R. § 6.3(l).

<sup>241</sup> See United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (Mar. 17, 2010) (“Access Board Draft Guidelines”).

<sup>242</sup> Access Board Draft Guidelines at C104.2.

<sup>243</sup> *Id.* at C104.3.

<sup>244</sup> 47 U.S.C. § 153(18).

<sup>245</sup> 42 U.S.C. § 12102(1).

<sup>246</sup> 47 C.F.R. § 6.3(d); see also *Section 255 Report and Order*, 16 FCC Rcd at 6428-6429, ¶¶ 18-20. We note that while Congress amended the ADA in 2008 to clarify the definition of disability, it did not modify the definition that we propose to use here. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat 3553 (2008).

<sup>247</sup> See 47 U.S.C. § 617(c).

telecommunications into a form accessible to individuals with disabilities.”<sup>248</sup> We stated in the *Section 255 Report and Order* that these might include “audio amplifiers, ring signal lights, some TTYs, refreshable Braille translators, [and] text-to-speech synthesizers.”<sup>249</sup> Our Section 255 rules define specialized CPE as customer premises equipment that is commonly used by individuals with disabilities to achieve access.<sup>250</sup>

87. For purposes of Section 716, we propose to define peripheral devices to mean “devices employed in connection with equipment, including software, covered under this part to translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities.” This definition is based on our Section 255 definition, with some refinements to reflect the statutory language in Section 716. We also propose to define specialized CPE, as we do in our Section 255 rules, as “customer premises equipment which is commonly used by individuals with disabilities to achieve access.”<sup>251</sup> We agree with the vast majority of commenters that peripheral devices can include mainstream devices and software,<sup>252</sup> as long as they can be used to “translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities” and the devices and software are “commonly used by individuals with disabilities to achieve access.” As we found in the *Section 255 Report and Order*, we do not believe that it would be feasible for the Commission to maintain a list of peripheral devices and specialized CPE commonly used by individuals with disabilities, given how quickly technology is evolving.<sup>253</sup> For the same reason, we also believe that covered entities do not have a duty to maintain a list of all peripheral devices and specialized CPE used by people with disabilities. We do believe, however, that covered entities have an ongoing duty to consider how to make their products compatible with the software and hardware components and devices that people with disabilities use to achieve access and to include this information in their records required under Section 717(a)(5).<sup>254</sup> We seek comment on these proposed definitions.

88. We also seek additional comment on what should be required to ensure compatibility in the context of advanced communications services. Under our Section 255 rules, we use four criteria for determining compatibility: (i) external access to all information and control mechanisms; (ii) existence of a connection point for external audio processing devices; (iii) TTY connectability; and (iv) TTY signal compatibility.<sup>255</sup> We seek comment on whether the four criteria listed above remain relevant in the context of advanced communications services. For example, we understand that a sizeable majority of consumers who previously relied on TTYs for communication are transitioning to more mainstream forms of text and video communications. If we want to encourage an efficient transition, should we phase out the third and fourth criteria as compatibility components in our Section 716 rules? Should we phase out the criteria from our Section 255 rules as well? If so, should we ensure that these requirements are

<sup>248</sup> 47 C.F.R. §§ 6.3(g) and 7.3(g).

<sup>249</sup> *Section 255 Report and Order*, 16 FCC Rcd at 6433, ¶ 32.

<sup>250</sup> 47 C.F.R. §§ 6.3(i) and 7.3(i).

<sup>251</sup> See 47 C.F.R. §§ 6.3(c) and 7.3(c).

<sup>252</sup> See AAPD Reply Comments at 4; ACB Reply Comments at 18; AT&T Comments at 9; AbleLink Reply Comments at 1; Adaptive Solutions Reply Comments at 1; CEA Comments at 12; CTIA Reply Comments at 14; Compusult Reply Comments at 1; IT and Telecom RERCs Reply Comments at 6; Point-and-Read Comments at 1; RERC-IT Comments at 6; TIA Comments at 15-16; Wireless RERC Reply Comments at 4; and Words+ Comments at 2.

<sup>253</sup> *Section 255 Report and Order*, 16 FCC Rcd at 6435, ¶ 36.

<sup>254</sup> See 47 U.S.C. § 618(a)(5). As noted *infra* para. 117, under Section 717(a)(5)(iii), covered entities are required to maintain “information about the compatibility of [their] products and services with peripheral devices or specialized [CPE] commonly used by individuals with disabilities to achieve access.”

<sup>255</sup> 47 C.F.R. § 6.3.

phased out only after alternative forms of communication, such as real-time text, are in place?<sup>256</sup>

89. While the Access Board Draft Guidelines address compatibility primarily with content providers in mind,<sup>257</sup> they may still be helpful in defining what “compatible” should mean as we update our accessibility rules. The Access Board Draft Guidelines define compatibility to be the “interaction between assistive technology, other applications, content, and the platform,”<sup>258</sup> as well as the preservation of accessibility in alternate formats.<sup>259</sup> We seek further comment on whether and how we should use the Access Board Draft Guidelines to help us define compatibility for purposes of Section 716.

90. We also seek comment on whether we should adopt additional criteria for determining compatibility under Section 716 and Section 255. The Access Board Draft Guidelines note that accessibility programming interfaces (“APIs”) enable interoperability with assistive technology.<sup>260</sup> Code Factory explains, for example, that it is better able to develop a screen reader application if “manufacturers and operating system developers develop an Accessibility API, which is essentially a layer between the device user interface and the screen reader that can be used to pull information that must be spoken to the user.”<sup>261</sup> The Access Board Draft Guidelines direct platforms, applications, and interactive content to comply with World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG) 2.0 Level AA Success Criteria and Conformance Requirements<sup>262</sup> or to comply with specific accessibility criteria in Chapter 4 of the Access Board Draft Guidelines.<sup>263</sup> Are there aspects of the WCAG guidelines or Access Board criteria that we should incorporate into our definition of compatibility? We also seek comment on the status of industry development of APIs and whether incorporating criteria related to APIs into our definition of compatibility could promote the development of APIs.

## 6. Network Features

91. Under Section 716(d) of the Act, “[e]ach provider of advanced communications services has the duty not to install network features, functions, or capabilities that impede accessibility or usability.”<sup>264</sup> In the *October Public Notice*, the Bureaus sought comment on how this provision compares to a similar provision in Section 251(a)(2) of the Act (relating to Section 255) and whether the requirement has a different meaning in the context of advanced communications services networks.<sup>265</sup>

92. We agree with commenters who generally believe that this duty not to impede accessibility is comparable to the duty set forth in Section 251(a)(2) of the Act.<sup>266</sup> We propose that our

<sup>256</sup> We note that elsewhere in the CVAA, the Commission is directed to establish an advisory committee whose task is, in part, to consider “[t]he possible phase out of the use of current-generation TTY technology to the extent that this technology is replaced with more effective and efficient technologies and methods to enable access to emergency services by individuals with disabilities.” Pub. L. No. 111-260, § 106(c)(6).

<sup>257</sup> See Access Board Draft Guidelines at 49-51.

<sup>258</sup> See Access Board Draft Guidelines at 49-51.

<sup>259</sup> See Access Board Draft Guidelines at 33.

<sup>260</sup> See Access Board Draft Guidelines at 11 and 25.

<sup>261</sup> Code Factory Reply Comments at 1.

<sup>262</sup> This document was written by the World Wide Web Consortium’s Web Content Accessibility Initiative to explain how to make web content accessible to people with disabilities. See <http://www.w3.org/TR/WCAG20>.

<sup>263</sup> See Access Board Draft Guidelines at 38.

<sup>264</sup> See 47 U.S.C. § 617(d).

<sup>265</sup> *October Public Notice* at 4.

<sup>266</sup> AAPD Reply Comments at 4; AFB Reply Comments at 5; and Verizon Comments at 5.

rules should include the requirements set forth in Section 716(d), just as our Section 255 rules reflect the language in Section 251(a)(2). We also agree with Verizon and AAPD, who stress that Section 716(d) applies to a much broader range of providers, and seek comment on how we can best reach out to newly covered entities and ensure that they are aware of their new responsibilities.<sup>267</sup>

93. We note that both the Senate and House Reports state that the obligations imposed by Section 716(d) “apply where the accessibility or usability of advanced communications services were incorporated in accordance with recognized industry standards.”<sup>268</sup> CTIA states that until the Commission identifies and requires the use of industry-recognized standards, it should “refrain from enforcing these obligations on network providers.”<sup>269</sup> We seek comment on CTIA's assertion and on what industry standards currently exist that can be used to incorporate accessibility or usability in advanced communications services. We also seek comment on what, if any, industry standards *should* be developed to incorporate accessibility or usability in advanced communications services and how these standards should be developed.

94. In addition, we seek comment on assertions by the RERC-IT that our rules should prohibit “passive inaction or setting of options . . . that impede access.”<sup>270</sup> We also seek comment on AFB's statement that under this provision “digital rights management or network security features or functions must . . . be installed so as not to impede accessibility.”<sup>271</sup> Finally, we seek comment on CTIA's assertion that “any rules seeking to limit the incorporation of any network features or functions recognize the need for covered entities to manage all network traffic, including advanced communications services.”<sup>272</sup>

## 7. Accessibility of Information Content

95. Section 716(e)(1)(B) of the Act states that the Commission's regulations shall “provide that advanced communications services, the equipment used for advanced communications services, and networks used to provide [such services] may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through [such services, equipment or networks].”<sup>273</sup> In the *October Public Notice*, the Bureaus sought comment on how this provision should be implemented and the types and nature of information content that should be addressed.<sup>274</sup> We note that the legislative history of the CVAA makes clear that the requirements apply “where the accessibility of such content has been incorporated in accordance with recognized industry standards.”<sup>275</sup> Echoing comments regarding duties relating to network features, functions, and capabilities, several commenters stress the importance of developing industry-recognized standards to ensure the delivery of information content.<sup>276</sup>

96. We seek further comment on what these standards should be and how they should be developed and reflected in the Commission's rules, subject to the limitation on mandating technical

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<sup>267</sup> AAPD Reply Comments at 5 and Verizon Comments at 5.

<sup>268</sup> Senate Report at 8; House Report at 25.

<sup>269</sup> CTIA Comments at 15.

<sup>270</sup> RERC-IT Comments at 6; *see also* ACB Reply Comments at 18.

<sup>271</sup> AFB Comments at 6.

<sup>272</sup> CTIA Comments at 16; *see also* T-Mobile Comments at 5.

<sup>273</sup> 47 U.S.C. § 617(e)(1)(B).

<sup>274</sup> *October Public Notice* at 4.

<sup>275</sup> Senate Report at 8; House Report at 25.

<sup>276</sup> CTIA Reply Comments at 16; T-Mobile Comments at 5; CEA Comments at 14.

standards in Section 716(1)(D). In particular, we seek comment on the RERC-IT proposal that our regulations need to ensure that (i) “the accessibility information (e.g., captions or descriptions) are not stripped off when information is transitioned from one medium to another;”<sup>277</sup> (ii) “parallel and associated media channels are not disconnected or blocked;”<sup>278</sup> and (iii) “consumers . . . have the ability to combine text, video, and audio streaming from different origins.”<sup>279</sup> We also seek comment on how we can best ensure that encryption and other security measures do not thwart accessibility,<sup>280</sup> while at the same time ensuring that we “promot[e] network security, reliability, and survivability in broadband networks.”<sup>281</sup>

97. We also note that the Access Board Draft Guidelines require content, which includes “information and sensory experience communicated to the user and encoding that defines the structure, presentation, and interactions associated with those elements” to be accessible.<sup>282</sup> The Draft Guidelines provide text, images, sounds, videos, controls, and animations as examples of content and encourage, as a best practice, the maximization of compatibility of content with existing and future technologies, including assistive technology.<sup>283</sup> The Draft Guidelines also require user interfaces and their functions to be accessible.<sup>284</sup> For example, under these Draft Guidelines, advanced communications services, equipment, and networks cannot strip captions that make content accessible to people who are deaf or hard of hearing from content that provides closed captioning. We seek comment on whether all or some of these Draft Guidelines would be appropriate for industry-recognized standards or inclusion in the Commission's rules.

98. Finally, we agree with CEA that, consistent with the legislation's liability limitations,<sup>285</sup> manufacturers and service providers are not liable for content or embedded accessibility content (such as captioning or video description) that they do not create or control.<sup>286</sup> We seek comment on this assessment.

#### IV. IMPLEMENTATION REQUIREMENTS

##### A. Obligations

99. Section 716(e)(1)(C) of the Act requires the Commission to “determine the obligations . . . of manufacturers, service providers, and providers of applications or services accessed over service provider networks.”<sup>287</sup> Below, we seek comment and make proposals relating to the obligations of manufacturers and service providers and ask further questions about the obligations of providers of applications or services accessed over service provider networks.<sup>288</sup>

<sup>277</sup> RERC-IT Comments at 7.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> ACB Reply Comments at 19.

<sup>281</sup> T-Mobile Comments at 5.

<sup>282</sup> See Access Board Draft Guidelines at 49.

<sup>283</sup> See Access Board Draft Guidelines at 49.

<sup>284</sup> Access Board Draft Guidelines at 50-51.

<sup>285</sup> As discussed *supra* para. 21 (and text accompanying note. 62) and para. 27, Section 2 of the CVAA provides a limitation on liability for a violation of the requirements of the CVAA.

<sup>286</sup> CEA Comments at 14.

<sup>287</sup> 47 U.S.C. § 617(e)(1)(C).

<sup>288</sup> 47 U.S.C. § 617(e)(1)(C).

## 1. Manufacturers and Service Providers

100. With respect to equipment manufacturers and service providers of ACS, we propose to adopt general obligations that mirror the language of the statute, similar to the approach taken in sections 6.5 and 7.5 of our Section 255 rules. Specifically, we propose that the Commission's rules set forth the following "General Obligations:"

- With respect to equipment manufactured after the effective date of the regulations, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, must ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless such requirements are not achievable.<sup>289</sup>
- With respect to services provided after the effective date of the regulations, a provider of advanced communications services must ensure that services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless such requirements are not achievable.<sup>290</sup>
- If accessibility is not achievable either by building it in or by using third party accessibility solutions, then a manufacturer or service provider shall 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 such compatibility is not achievable.<sup>291</sup>
- Providers of advanced communications services shall not install network features, functions, or capabilities that impede accessibility or usability.<sup>292</sup>
- Advanced communications services and the equipment and networks used to provide such services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks.<sup>293</sup>

101. In addition, we propose to adopt requirements similar to those in our Section 255 rules regarding product design, development, and evaluation (sections 6.7 and 7.7); information pass through (sections 6.9 and 7.9); and information, documentation and training (sections 6.11 and 7.11), modified to reflect the statutory requirements of Section 716. Consistent with the *Section 255 Report and Order*, we find that adoption of the functional approach reflected in such requirements will provide clear guidance to covered entities regarding their obligation to ensure accessibility and usability.<sup>294</sup> The full text of these proposed rules is found in Appendix B, *infra*, but some key requirements of these proposed rules include the following:

- Manufacturers and service providers must consider performance objectives at the design stage as early and as consistently as possible and must implement such evaluation to the extent that it is achievable.<sup>295</sup>

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<sup>289</sup> See discussion *supra* paras. 19-24.

<sup>290</sup> See discussion *supra* paras. 25-27.

<sup>291</sup> See discussion *supra* paras. 67-76, 85-90.

<sup>292</sup> See discussion *supra* paras. 91-94.

<sup>293</sup> See discussion *supra* paras. 95-98.

<sup>294</sup> See *Section 255 Report and Order*, 16 FCC Rcd at 6429-6432, ¶¶ 21-30.

<sup>295</sup> See discussion *supra* para. 9 and text accompanying note 33.

- Manufacturers and service providers must identify barriers to accessibility and usability as part of such evaluation.<sup>296</sup>
- Equipment used for advanced communications services, including end user equipment, network equipment, and software must pass through cross-manufacturer, nonproprietary, industry-standard codes, translation protocols, formats or other information necessary to provide advanced communications services in an accessible format, if achievable. Signal compression technologies shall not remove information needed for access or shall restore it upon decompression.<sup>297</sup>
- Such information and documentation includes user guides, bills, installation guides for end user devices, and product support communications, in alternate formats, as needed. The requirement to provide access to information also includes ensuring that individuals with disabilities can access, at no extra cost, call centers and customer support regarding both the product generally and the accessibility features of the product.<sup>298</sup>

102. We seek comment on these proposed obligations for equipment manufacturers and service providers of ACS. In particular, we seek comment on whether we should adopt additional obligations or make modifications to our proposals.

## 2. Providers of Applications or Services Accessed over Service Provider Networks

103. We also seek comment on what, if any, obligations we should impose on “providers of applications or services accessed over service provider networks.”<sup>299</sup> Are there any requirements that we should impose on these providers in order to ensure that the statutory mandates of Section 716 are carried out? We also seek comment on the meaning of “accessed over service provider networks.” How does this apply to applications and services that are downloaded and then run as either native or web applications on the device? How does this apply to applications and services accessed through cloud computing?<sup>300</sup>

### B. Performance Objectives

104. Section 716(e)(1)(A) of the Act provides that in prescribing regulations for this section, 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.”<sup>301</sup> In the *October Public Notice*, the Bureau sought comment on how to interpret this provision, including the extent to which these objectives should be specific or general.<sup>302</sup> The *October Public Notice* also sought comment on the usefulness of the Access Board’s March 2010 draft standards and guidelines on Section 508 of the Rehabilitation Act.<sup>303</sup>

105. We agree with the broad range of commenters who stress the importance of having performance objectives that would clearly define the outcome needed to be achieved without specifying

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<sup>296</sup> See discussion *supra* para. 9 and text accompanying note 33.

<sup>297</sup> See discussion *supra* para. 9.

<sup>298</sup> See discussion *supra* para. 9 and text accompanying note 34.

<sup>299</sup> See 47 U.S.C. § 617(e)(1)(C).

<sup>300</sup> See *supra* note 55.

<sup>301</sup> 47 U.S.C. § 716(e)(1)(A).

<sup>302</sup> *October Public Notice* at 4.

<sup>303</sup> *Id.*

how these ends should be accomplished.<sup>304</sup> More specifically, we agree with those commenters who suggest that we incorporate into the performance objectives the outcome-oriented definitions of “accessible,” “compatibility,” and “usable” from Sections 6.3 and 7.3 of the Commission's rules,<sup>305</sup> set forth in Appendix B. We propose to adopt these definitions as performance objectives subject to any changes that we make to these definitions as part of this proceeding.<sup>306</sup> We also agree with the IT and Telecom RERCs that “performance standards must . . . be testable, concrete, and enforceable”<sup>307</sup> and seek further comment about how we can accomplish these objectives. We disagree with ITI's suggestion that performance objectives be merely “aspirational.”<sup>308</sup>

106. We seek additional comment on whether to adopt more specific performance objectives, and on the procedures and timelines that we should use to develop these objectives. While as a general matter it may be desirable to harmonize the Commission's rules with the Access Board Guidelines after the Access Board finalizes its Guidelines,<sup>309</sup> we seek comment on what parts of the Access Board Draft Guidelines may be useful to us if we develop specific performance objectives in the interim.<sup>310</sup> We also seek comment on AT&T's assertion that “the specific functionalities and standards mandated by Section 508 [for government purchases of technology] . . . may not be appropriate in all circumstances for industry wide, mass market application contemplated by Section 716.”<sup>311</sup> In which instances would the Access Board standards not be appropriate for mass market application? In which areas might they be particularly instructive?

107. We also propose to update our performance objectives, as appropriate, after the Emergency Access Advisory Committee (“EAAC”), which was established pursuant to Section 106 of the CVAA,<sup>312</sup> provides its recommendations to the Commission in December 2011.<sup>313</sup> The EAAC, among other things, is considering “what actions are necessary as part of the migration to a national Internet protocol-enabled network to achieve reliable, interoperable communication transmitted over such network that will ensure access to emergency services by individuals with disabilities.”<sup>314</sup> We express our general belief that achieving reliable, interoperable communication over IP-enabled networks will have applicability outside the emergency access context and may be relevant to developing performance objectives under Section 716 for advanced communications services and equipment used for these services.<sup>315</sup> We note as well that the Access Board Draft Guidelines contain a proposal for real time text

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<sup>304</sup> See, e.g., ITI Comments at 9; RERC-IT Comments at 7; Google Reply Comments at 6; CTIA Reply Comments at 8; and ACB Reply Comments at 5.

<sup>305</sup> See, e.g., TIA Comments at 17; CEA Comments at 13; and T-Mobile Comments at 6; see also 47 C.F.R. §§ 6.3 and 7.3.

<sup>306</sup> See Section III.B, *supra*, where we seek comment on how we should update the definitions of accessible, compatibility, and usable in our Part 6 and Part 7 rules.

<sup>307</sup> IT and Telecom RERCs Reply Comments at 7.

<sup>308</sup> ITI Comments at 9.

<sup>309</sup> See TIA Comments at 17; CEA Comments at 13.

<sup>310</sup> See discussion *infra* Section III.A.4.d on interoperable video conferencing services; see also ACB Reply Comments at 6-7.

<sup>311</sup> AT&T Comments at 6; see also CEA Comments at 13 and CTIA Comments at 12.

<sup>312</sup> Pub. L. No. 111-260, § 106. The Emergency Access Advisory Committee held its first meeting on January 14, 2011.

<sup>313</sup> See Pub. L. No. 111-260, § 106(c)(1).

<sup>314</sup> Pub. L. No. 111-260, § 106(c)(1).

<sup>315</sup> See also National Broadband Plan, Chapter 9, Adoption and Utilization, Recommendation 9.10 (recommending, among other things, that the FCC open a proceeding to implement a standard for reliable and interoperable real-time (continued....))

requirements for hardware and software whenever real-time voice is supported,<sup>316</sup> further supporting the need to move forward with the recommendation in our National Broadband Plan to consider a standard for reliable and interoperable real-time text any time that VoIP is available and supported.<sup>317</sup>

108. With respect to interoperable video conferencing services,<sup>318</sup> we seek input on what performance objectives or rules need to be established to ensure that, where achievable, interoperable video conferencing services and equipment are accessible to and usable by individuals with disabilities (such as individuals who are blind, have a visual impairment, have limited manual dexterity, or who are deaf, hard of hearing, or deaf-blind). We also seek comment on whether and to what extent we have the authority to adopt industry-wide performance objectives that would set objectives for covered entities collectively. We recognize, for example, that no single entity working alone can ensure that video conferencing services (or other advanced communications services) are interoperable. If we were to interpret Section 716 to require interoperability among all video conferencing services, what industry-wide performance objectives are needed to achieve and ensure such interoperability so that consumers are able to make point-to-point calls using different video conferencing services and equipment? We also seek comments on what performance objectives are needed to address concerns expressed by consumers about the general inability of current video conferencing services to connect to VRS in a manner that achieves functional equivalency with conventional voice telephone services.<sup>319</sup> In this regard, Consumer Groups urge that mainstream video conferencing equipment and services be required to “comply with standards, such as requisite resolution and frame-rate, to support real-time video conferencing used for VRS, remote video interpreting, and point-to-point communication.”<sup>320</sup> We note that the Access Board Draft Guidelines on Section 508 propose that products used to transmit video conversations provide sufficient quality and fluidity for real-time video conversation in which at least one party is using a visual method of communication, such as sign language.<sup>321</sup>

109. It appears that video conferencing equipment now available off-the-shelf to the general public does not match the capabilities of proprietary equipment offered by VRS providers in other ways as well. First, although our VRS rules require ten-digit numbering capability on VRS-provided video equipment – to enable the owners of such equipment to make point-to-point calls to one another – this capability does not presently exist in video conferencing equipment such as off-the-shelf videophones.<sup>322</sup> Consumer Groups urge that the North American Numbering Plan (“NANP”) ten-digit telephone number system be “adopted and/or adapted by [mainstream] video conferencing equipment and service providers to make their systems interoperable with other systems and users, including VRS users.”<sup>323</sup> Finally, we note that, while not yet universal, Consumer Groups envision multipoint control unit (MCU) capability in video conferencing services when VRS is provided so that all parties to the call can see the VRS

(Continued from previous page) \_\_\_\_\_

text any time that Voice over Internet Protocol is available and supported) and Access Board Draft Guidelines at 80-81 (providing for real-time text requirements for hardware and software whenever real-time voice is supported.)

<sup>316</sup> Access Board Draft Guidelines at 80-81.

<sup>317</sup> See National Broadband Plan, Chapter 9, Adoption and Utilization, Recommendation 9.10.

<sup>318</sup> See *supra* Section III.A.4.d.

<sup>319</sup> See also Consumer Groups Comments at 4-5, noting the desirability of enabling the delivery of captioned telephone and captioned conference relay services to make the audible voice communication component of a video conferencing service accessible. See also Convo Comments at 7; RERC-IT Comments at 4; and CSD Reply Comments at 2.

<sup>320</sup> Consumer Groups Reply Comments at 8.

<sup>321</sup> Draft Access Board Draft Guidelines at 86 (Advisory 905.3 on Video Communication Quality).

<sup>322</sup> 47 C.F.R. § 64.611(e).

<sup>323</sup> Consumer Groups Reply Comments at 3.

communications assistant and each other simultaneously.<sup>324</sup> We therefore seek comment on performance objectives for mainstream interoperable video conferencing services and equipment to address multiple video conferencing needs by people with disabilities, including the need for point-to-point calls where at least one party is using a visual method of communication, such as sign language; for functionally equivalent VRS; for multi-party conferencing via MCUs; for ten-digit numbering (or an alternative means of identifying and contacting one another); for effective emergency access; and for the delivery of video remote interpreting services.

110. We also seek comment on whether industry or the Commission should establish a working group of diverse stakeholders to address the interoperability issues relating to video conferencing services and equipment.<sup>325</sup> If so, should the goals be focused on ensuring interoperability among the largest service providers and equipment manufacturers? How can we ensure that new entrants and software application developers would be fully represented in such a process? We ask commenters to set forth in detail the goals of such a group, which stakeholders should be included, the specific issues that such a working group should consider, and a timeline for completion of its work. We further ask whether such group should be part of the Commission's Consumer Advisory Committee, or be a standalone entity. Finally, we seek comment on what industry efforts are ongoing to address interoperability challenges and the degree to which such efforts have been effective.<sup>326</sup>

111. Finally, we note that the comments to the *October Public Notice* contain relatively little discussion of "electronic messaging services" and "non-interconnected VoIP services." We seek further comment about the specific accessibility concerns relating to these services and whether we should adopt specific performance objectives to address these concerns. We also seek comment on whether it would be appropriate to establish a working group of diverse stakeholders to provide recommendations related to such performance objectives.

## V. INDUSTRY GUIDANCE

### A. Safe Harbors

112. Section 716(e)(1)(D) of the Act provides that the Commission "shall . . . not mandate technical standards, except that the Commission may adopt technical standards as a safe harbor for such compliance if necessary to facilitate the manufacturers' and service providers' compliance" with the accessibility and compatibility requirements in Section 716.<sup>327</sup> In the *October Public Notice*, we sought comment on whether we should adopt safe harbor technical standards.<sup>328</sup>

113. The vast majority of commenters oppose establishing technical standards as safe harbors.<sup>329</sup> CTIA and AT&T assert that safe harbors will result in *de facto* standards being imposed that will limit the flexibility of covered entities seeking to provide accessibility.<sup>330</sup> The IT and Telecom

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<sup>324</sup> See Consumer Groups Comments at 3-4; Consumer Groups Reply Comments at 2.

<sup>325</sup> See Convo Comments at 8; Consumer Groups Reply Comments at 8; and Google Reply Comments at 7.

<sup>326</sup> See, e.g., the Unified Communication Interoperability Forum, <http://www.ucif.org/>. The Unified Communications Interoperability Forum (UCIF) is an alliance dedicated to enabling standards-based, inter-vendor unified communications (UC) interoperability. The founding members are HP, Juniper Networks, Microsoft, Logitech/LifeSize Communications, and Polycom.

<sup>327</sup> 47 C.F.R. § 617(e)(1)(D).

<sup>328</sup> *October Public Notice* at 4-5.

<sup>329</sup> CTIA Comments at 11-12; CTIA Reply Comments at 5; AT&T Comments at 7; CEA Comments at ii and 15; RERC-IT Comments at 8; IT and Telecom RERCs Reply Comments at 7; ACB Reply Comments at 22; AFB Reply Comment at 7.

<sup>330</sup> CTIA Comments at 11; AT&T Comments at 7.

RERCs state that the Commission's rules should not include safe harbors because “technology, including accessibility technology, will develop faster than law can keep up.”<sup>331</sup> AFB asserts that it is too early in the CVAA’s implementation “to make informed judgments . . . about whether and which safe harbors should be available.”<sup>332</sup> While ITI supports safe harbors, noting they provide clarity and predictability, it warns against using safe harbors “to establish implicit mandates [that] . . . lock in particular solutions.”<sup>333</sup> In light of the concerns raised in the record, we agree with AFB that it is too early in the implementation of the CVAA to make informed judgments about whether safe harbor technical standards should be established.<sup>334</sup> Therefore, we propose not to adopt any technical standards as safe harbors at this time.<sup>335</sup> We seek comment on this proposal.

## B. Prospective Guidelines

114. Section 716(e)(2) of the Act requires the Commission to issue prospective guidelines concerning the new accessibility requirements.<sup>336</sup> While the Senate Report did not discuss this provision, the House Report notes that such guidance “makes it easier for industry to gauge what is necessary to fulfill the requirements” by providing industry with “as much certainty as possible regarding how the Commission will determine compliance with any new obligations.”<sup>337</sup>

115. We agree with CTIA that the prospective guidelines that we adopt must be clear and understandable and provide service providers and manufacturers as much flexibility as possible, so long as achievable accessibility requirements are satisfied.<sup>338</sup> We seek comment on a proposal by the RERC-IT, endorsed by ACB, that we use “an approach to the guidelines similar to that used by the World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG),<sup>339</sup> which provide mandatory performance-based standards and non-mandatory technology-specific techniques for meeting them.”<sup>340</sup> We also seek comment on whether any parts of the Access Board’s Draft Guidelines on Section 508 should be adopted as prospective guidelines.<sup>341</sup> In addition, we seek comment on the process that should be used to develop prospective guidelines and to ensure that a diverse and broadly-based group of stakeholders participate in such an effort. Should the Commission, for example, establish a consumer-industry advisory group to prepare these?

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<sup>331</sup> IT and Telecom RERCs Reply Comments at 7.

<sup>332</sup> AFB Reply Comments at 7. ACB urges that if the Commission establishes safe harbors, it provide a framework for assessing these standards. ACB Reply Comments at 21-22.

<sup>333</sup> ITI Comments at 10.

<sup>334</sup> AFB Reply Comment at 7.

<sup>335</sup> *See, e.g.*, CEA Comments at 15 and Microsoft Comments at 3.

<sup>336</sup> 47 U.S.C. § 617(e)(2).

<sup>337</sup> *See* House Report at 25.

<sup>338</sup> CTIA Comments at 8-11. Both the RERC-IT and IT and Telecom RERCs suggest that prospective guidelines should be based on outcomes that must be achieved while permitting flexible approaches to that outcome. RERC-IT Comments at 7; IT and Telecom RERCs Reply Comments at 7.

<sup>339</sup> *See supra* note 262.

<sup>340</sup> RERC-IT Comments at 8; ACB Reply Comments at 22.

<sup>341</sup> We note that some in industry have expressed concern about incorporating parts of the Access Board Draft Guidelines as prospective guidelines. *See, e.g.*, CTIA Comments at 12, finding that the Access Board Draft Guidelines were “insufficiently clear to provide useful guidance” and “did not offer manufacturers and providers sufficient technological flexibility to enable a seamless transition from traditional devices to IP-based technologies.”

## VI. SECTION 717 RECORDKEEPING AND ENFORCEMENT

### A. Overview

116. Section 717(a) requires the Commission to establish new recordkeeping and enforcement procedures for “manufacturers and providers subject to [Sections 255, 716, and 718.]”<sup>342</sup> In the *October Public Notice*, the Bureaus sought comment on these requirements, including the types of records that should be maintained and the possible enforcement procedures that should be imposed.<sup>343</sup> We will discuss the recordkeeping and enforcement requirements in further detail below, including a proposal to amend the existing Section 255 rules and to add a new rule subpart to implement the requirements of Section 717. For purposes of our discussion below, we propose to apply the Section 717 requirements to manufacturers of equipment used for telecommunications services, interconnected VoIP, voicemail and interactive menu services subject to Section 255 of the Act; manufacturers of equipment used for ACS subject to Section 716; and manufacturers of telephones used with public mobile services which include an Internet browser, subject to Section 718. We also propose to apply the Section 717 requirements to providers of telecommunications services, interconnected VoIP services, voicemail or interactive menu services subject to Section 255 of the Act; providers of ACS subject to Section 716; and providers of mobile services who arrange for the inclusion of a browser in telephones, subject to Section 718.<sup>344</sup> Finally, we reiterate our proposal to subject providers of applications and services that can be used for ACS and that can be accessed (*i.e.*, downloaded or run) by users over other service provider networks to the requirements of Section 716 and thus by extension cover them under Section 717.<sup>345</sup> We seek comment on these proposals.

### B. Recordkeeping

117. Beginning one year after the effective date of regulations promulgated pursuant to Section 716(e), each manufacturer and provider subject to Sections 255, 716, and 718 must maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such manufacturer or provider to implement Sections 255, 716, and 718, including: (1) information about the manufacturer's or provider's efforts to consult with individuals with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) 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.<sup>346</sup> Section 717 also requires an officer of a manufacturer or provider to submit to the Commission an annual certification that records are being kept in accordance with this provision.<sup>347</sup> Section 717 also states that “[a]fter 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 [this Section] that are directly relevant to the equipment or service that is the subject of such complaint.”<sup>348</sup> We seek comment on how to implement these statutory requirements and solicit specific input below.

118. Some commenters urge the Commission to refrain from making the recordkeeping requirements overly burdensome, unnecessarily expensive, or repetitive of the information required by

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<sup>342</sup> 47 U.S.C. § 618(a).

<sup>343</sup> See *October Public Notice* at 6.

<sup>344</sup> As noted *infra* at Section VII., Section 718 does not go into effect until October 2013.

<sup>345</sup> See discussion *supra* at Section III.A.3.

<sup>346</sup> 47 U.S.C. § 618(a)(5)(A).

<sup>347</sup> 47 U.S.C. § 618(a)(5)(B).

<sup>348</sup> 47 U.S.C. § 618(a)(5)(C).

existing reports.<sup>349</sup> Motorola notes that it and some covered entities already publicly provide some of the information required by Section 717, including information regarding accessibility features, consultations with individuals with disabilities, and compatibility with third party peripherals submitted in existing Commission reports, such as those required for compliance with our HAC rules.<sup>350</sup> CEA also states that “outreach to individuals with disabilities either directly or indirectly through standards development organizations”<sup>351</sup> should be sufficient to demonstrate a company’s compliance with Section 717’s requirement to document efforts to consult with individuals with disabilities. Additionally, CEA points out that some of the required information may be reflected in information provided to the clearinghouse that will be established under the CVAA.<sup>352</sup>

119. We note, however, that Section 717 requires the Commission to establish uniform recordkeeping and enforcement procedures for entities subject to Sections 255, 716, and 718.<sup>353</sup> While some of these records that Section 717 requires to be kept and, potentially, produced may be available publicly (in other reports or submissions made to the Commission or Bureau or in information submitted to a clearinghouse), most of the information required by this section is not required in existing Commission reports and it is not clear to what extent this will be available in public information.<sup>354</sup>

120. While we agree that we should avoid imposing excessive burdens or requiring the same information multiple times, we also seek to ensure that specific and relevant records required by the statute are appropriately maintained by manufacturers and providers. In light of the range of potential complaints that may be filed against covered entities under the CVAA and Section 255, we seek comment on how the Commission should effectively implement Section 717’s recordkeeping requirements without imposing excessive burden or expense on covered entities or requiring multiple submissions of the same records to the Commission.

121. Section 717 appears to give the Commission the discretion to expand the recordkeeping requirements beyond the three categories specifically set forth in subsection (a)(5)(A) to “records of the efforts taken by such manufacturer or provider to implement” these Sections.<sup>355</sup> We seek comment on whether the Commission should require covered entities to maintain and, potentially, produce records to demonstrate their compliance with the provisions of Section 255 and similarly structured requirements in Section 716.<sup>356</sup> We also seek comment on what constitutes a “reasonable time period” during which

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<sup>349</sup> See ATIS, on behalf of AISP.4-HAC, Reply Comments at 3-4; TIA Comments at 24.

<sup>350</sup> See Motorola Comments at 9-10 and 47 C.F.R. § 20.19. See also ATIS Reply Comments at 3.

<sup>351</sup> CEA Comments at 21.

<sup>352</sup> See CEA Comments at 21-22. The CVAA requires the Commission, in consultation with the Architectural and Transportation Barriers Compliance Board, the National Telecommunications and Information Administration, trade associations, and organizations representing individuals with disabilities, to establish a clearinghouse of information on the availability of accessible products and services and accessibility solutions required under Sections 255, 716, and 718 within one year of the CVAA’s enactment. Pub. L. No. 111-260 § 717(d).

<sup>353</sup> See 47 U.S.C. § 617(a)(5). Section 718 is required to be implemented three (3) years after the enactment of the CVAA, which is two (2) years after the date on which the rules we seek comment on here must be implemented. We therefore postpone our consideration of whether covered entities should be required to keep records of their compliance with Section 718 of the Act, which covers Internet browsers built into telephones used with public mobile services, and what types of records those might be until we seek comment more broadly on the implementation of Section 718 in the Commission’s rules. See 47 U.S.C. § 618 and 47 U.S.C. § 619 Note.

<sup>354</sup> The only other reporting obligation relevant to the obligations under this Section is contained in our HAC rules, which require information about only one of the many access features required by the CVAA. See 47 C.F.R. § 20.19.

<sup>355</sup> 47 U.S.C. § 618(a)(5).

<sup>356</sup> See *supra* Section IV. and paras. 117, 119.

covered entities will be required to maintain these records. Should we require covered entities to create and maintain records showing their compliance with the general obligation requirements as well as the requirements of product design, development, and evaluation, information pass through, and information, documentation, and training?<sup>357</sup> For example, should we require covered entities to create and maintain records demonstrating the process they have used to assess whether it is achievable to make particular products and services accessible and usable by persons with disabilities? What kinds of records would be sufficient to demonstrate such compliance? We also seek comment on whether the Commission should require these or any other types of records to demonstrate covered entities' compliance with Section 255.

122. Many comments on the recordkeeping requirement request that the Commission adopt a flexible approach to Section 717's recordkeeping requirement that recognizes the differences in size and scope of covered entities and their communications services or manufacturing operations, instead of requiring a specific form of documentation.<sup>358</sup> Verizon recommends that the Alliance for Telecommunications Industry Solutions (ATIS) or a similar organization develop a standard recordkeeping form that could be used to satisfy this requirement.<sup>359</sup> While ATIS, on behalf of AISP.4-HAC, expresses a preference for flexible recordkeeping requirements, ATIS also supports Verizon's suggestion that industry and consumers should work together to develop a mutually agreeable form in the event the Commission decides to adopt a standardized approach.<sup>360</sup> CTIA specifically requests that the Commission allow records to be kept electronically.<sup>361</sup> TIA suggests that the Commission should "provide some non-exclusive guidance concerning the type of information that would be responsive to the statutory recordkeeping criteria" without precluding flexibility in the form in which those records may be kept.<sup>362</sup> We seek comment on these recommendations.

123. We recognize that Section 717 applies to a broad range of entities that have widely ranging business models and modes of operation. Therefore, consistent with some commenters' suggestions, we propose that we should not mandate any one form in which records must be kept in order to comply with Section 717. We also propose that if a record (that the Commission requires be produced after receipt of a complaint) is not readily available, the covered entity must provide it no later than the date of its response to the complaint.<sup>363</sup> We seek comment on these proposals and on whether there is any reason for the Commission to mandate a standard form of recordkeeping to comply with Section 717(a)(5) or to require covered entities to submit publicly available records or those the Commission already has in another report or submission. While we cannot predict what the nature of consumers' complaints will be or provide specific guidance as to what information will be responsive to those complaints, we propose, as discussed more fully below, to require each response to a filed complaint to sufficiently describe how each record submitted is relevant to the complaint and the alleged violation, and how the provided record establishes the covered entity's compliance with the Act. Finally, given that the statute provides that recordkeeping requirements do not take effect until one year after the effective date of regulations promulgated pursuant to Section 716(e), we seek comment regarding whether, and if so, in what fashion, the Commission should address this transition period, particularly for the purposes of

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<sup>357</sup> See 47 C.F.R. §§ 6.5, 6.7, 6.9, and 6.11. See also *supra* Section IV. and paras. 117, 119.

<sup>358</sup> See ATIS, on behalf of AISP.4-HAC Reply Comments at 4; CEA Comments at iii and 21; T-Mobile Comments at 8; CTIA Comments at 18.

<sup>359</sup> Verizon Comments at 6-7.

<sup>360</sup> ATIS, on behalf of AISP.4-HAC Reply Comments at 4; Verizon Comments at 6-7.

<sup>361</sup> See CTIA Comments at 18.

<sup>362</sup> TIA Comments at 24.

<sup>363</sup> 47 U.S.C. § 618(a)(5)(C).

enforcement.<sup>364</sup>

## C. Enforcement

### 1. Background

124. Section 717 requires the Commission to adopt rules that facilitate the filing of formal and informal complaints that allege a violation of Section 255, 716, or 718 and to establish procedures for enforcement actions by the Commission with respect to such violations, within one year of enactment of the law.<sup>365</sup> In this section, we seek comment on specific procedures to implement these requirements and propose rules to consolidate the existing enforcement provisions for Section 255 with the newly proposed enforcement rules for alleged violations of Sections 716 and 718.

#### a. Enforcement of Section 255

125. In the rules adopted in the *Section 255 Report and Order*, the Commission provided form and content requirements for informal and formal complaints alleging a violation of Section 255, as well as review and disposition procedures.<sup>366</sup> In particular, the Commission established specific elements to be included in any informal complaint alleging a violation of Section 255 of the Act as well as the form and content for answers to such complaints.<sup>367</sup> These rules provide that if the Commission determines that an informal complaint has been satisfied based on the defendant's answer, or from other communications with the parties, the Commission may, at its discretion, consider the informal complaint closed, without providing a response to the complainant or defendant.<sup>368</sup> Additionally, the Commission may close the informal complaint if it determines that no further action is necessary based on the complaint and answer, and will then duly inform the complainant and the defendant of the reasons therefor.<sup>369</sup> If, however, the Commission, based on the pleadings, determines that a material and substantial question remains as to a defendant's compliance with the Section 255 requirements and the Commission's implementing rules, the Commission may conduct further investigation or proceedings as necessary to determine whether the defendant has violated any legal requirements, as well as whether any remedial actions and/or sanctions

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<sup>364</sup> In particular, the failure to create and maintain some type of compliance documentation could have implications in enforcement proceedings wherein covered entities may be called upon to refute claims of noncompliance. See Enforcement Section *infra* Section VI.C.

<sup>365</sup> 47 U.S.C. § 618(a).

<sup>366</sup> See 47 C.F.R. §§ 6.15 to 6.23. Formal complaints may be filed in the form and manner prescribed under Sections 1.720 – 1.736 of the Commission's rules. 47 C.F.R. § 6.21.

<sup>367</sup> 47 C.F.R. § 6.17(a), (b)(1)-(7). An informal complaint must include (1) the name and address of the complainant; (2) the name and address of the manufacturer or provider against whom the complaint is made; (3) a full description of the telecommunications equipment, CPE or telecommunications service about which the complaint is made; (4) the date(s) on which the complainant purchased or used the telecommunications equipment or service that is the subject of the complaint; (5) a complete statement of facts, including supporting documentation, demonstrating why the telecommunications service or equipment is not accessible or useable by a person with disabilities; (6) the relief sought; and (7) the preferred method of response to the complaint. Section 7.19 provides that answers to informal complaints must (1) be prepared in the format requested by the complainant; (2) describe any actions that the defendant has taken or proposes to take to satisfy the complaint; (3) advise the complainant and the Commission of the nature of the defense(s) claimed; (4) respond specifically to all material allegations of the complainant; and (5) provide any other information or materials specified by the Commission as relevant to its consideration of the complaint. 47 C.F.R. § 7.19.

<sup>368</sup> 47 C.F.R. § 6.20(a). In all other cases, the Commission must inform the parties of its review and disposition of a complaint filed.

<sup>369</sup> 47 C.F.R. § 6.20(b). If unsatisfied with the defendant's response and Commission staff decision to terminate the complaint, the complainant can file a formal complaint. 47 C.F.R. §§ 6.20(b), 6.22.

are warranted.<sup>370</sup> If the Commission determines that a defendant has failed to comply with Section 255 and its implementing rules, the Commission can order such remedial action or sanctions as are authorized by the Act and the rules, as it deems appropriate.<sup>371</sup> Aside from its complaint procedures, the Commission may, on its own motion, conduct inquiries and initiate proceedings as necessary to enforce the relevant requirements.<sup>372</sup>

#### b. Section 717 Enforcement Requirements

126. As discussed above, Section 717 requires the Commission within one year after the date of enactment of the CVAA to establish regulations that facilitate the filing of formal and informal complaints that allege a violation of Section 255, 716, or 718, and to establish procedures for enforcement actions.

127. Specifically, the CVAA requires the Commission to establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of complaints filed under Section 255, 716, or 718<sup>373</sup> as well as establish a process for filing and receiving formal or informal complaints.<sup>374</sup> Further, the CVAA requires the Commission to investigate the allegations in an informal complaint and, within 180 days after the date on which such complaint was filed with the Commission, issue an order concluding the investigation and provide an explanation for its conclusion, unless such complaint is resolved before such time.<sup>375</sup> If the Commission determines that a violation has occurred, the Commission may, in the order or in a subsequent order, 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.<sup>376</sup> If a determination is made that a violation has not occurred, the Commission must provide the basis for such determination.<sup>377</sup> The statute also provides that before the Commission makes a determination, the party that is the subject of the complaint shall have a reasonable opportunity to respond to such complaint, and may include in its response any factors that are relevant to such determination.<sup>378</sup> Before issuing a final order, the Commission is required to provide the responding party a reasonable opportunity to comment on any proposed remedial action.<sup>379</sup>

### 2. General Requirements

128. *Pre-Filing Notice.* We seek comment on whether the Commission should require potential complainants to first notify the defendant manufacturer or provider that it intends to file a complaint based on an alleged violation of one or more provisions of Section 255, 716, or 718. We note that some parties have suggested that such a pre-filing notice can potentially foster greater communication

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<sup>370</sup> 47 C.F.R. § 6.20(c).

<sup>371</sup> 47 C.F.R. § 6.20(d).

<sup>372</sup> 47 C.F.R. § 6.23.

<sup>373</sup> 47 U.S.C. § 618(a)(2).

<sup>374</sup> 47 U.S.C. § 618(a)(1). The statute also provides that the Commission may not charge a fee to an individual who files such a complaint.

<sup>375</sup> 47 U.S.C. § 618(a)(3)(B). Any such order must also include a determination whether any violation occurred. *Id.*

<sup>376</sup> 47 U.S.C. § 618(a)(3)(B)(i).

<sup>377</sup> 47 U.S.C. § 618(a)(3)(B)(ii). The Commission may also consolidate for investigation and resolution complaints alleging substantially the same violation. 47 U.S.C. § 618(a)(3)(C).

<sup>378</sup> 47 U.S.C. § 618(a)(4).

<sup>379</sup> *Id.*

among parties.<sup>380</sup> While we agree that such a requirement could lead to a more efficient resolution in advance of a complaint in some instances, we are also concerned that in other cases, such a requirement could prove burdensome to consumers and delay resolution of complaints. In the *Section 255 Report and Order*, consistent with an Access Board recommendation, we encouraged consumers to express their concerns informally to the manufacturer or service provider before filing a complaint with the Commission.<sup>381</sup> We declined, however, to adopt a rule requiring consumers to contact manufacturers and service providers before they could file a complaint with the Commission, finding that our informal complaint process is “geared toward cooperative efforts.”<sup>382</sup> We seek comment on whether such an approach is sufficient or whether a specific requirement is necessary. To the extent that commenters advocate that we require that consumers notify manufacturers or providers before they file a complaint, we seek comment on specific safeguards that we should adopt to ensure that this requirement does not prove onerous to the consumers.

129. *Receipt and Filing of Complaints.* We seek comment on how the Commission should establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of complaints, both formal and informal. We note that the Commission’s Disability Rights Office has already established a new phone number [202-418-2517(V) / 202-418-2922 (TTY)] and email address (dro@fcc.gov) for this purpose. We also note that currently, informal complaints alleging a violation of Section 255 may be transmitted to the Commission via any reasonable means, e.g., letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille. We propose to retain these vehicles as means for transmission and receipt of informal complaints by the Commission under Sections 255, 716, and 718 and ask commenters to consider whether additional methods are necessary to meet this statutory requirement. Similarly, as discussed more fully below, we seek comment on the extent to which we should retain or revise our current requirements under Section 255 governing formal complaints that are filed for alleged violations by manufacturers and providers under Sections 255, as well as Sections 716 and 718, in the future. At present, these procedures are consistent with sections 1.720–1.736 of the Commission’s rules. If we make changes to facilitate the filing of informal complaints, but continue to apply our procedures for formal complaints largely in their current form to the new ACS sections (as well as maintain these procedures for Section 255), will this be enough to fulfill Congress’s intent to facilitate the filing of complaints under these sections? We note that since our Section 255 rules went into effect in 1999, the Commission has received only three formal complaints alleging violations of that Section.<sup>383</sup>

130. *Standing to File.* We received comments requesting that the Commission establish “reasonable” standing requirements.<sup>384</sup> We note that the CVAA allows “any person alleging a violation” of the CVAA or the implementing rules to file a formal or informal complaint under Section 255, 716, or 718.<sup>385</sup> Given that there is no standing requirement under these Sections, and there is no standing requirement under either Section 208 of the Act and our existing complaint rules,<sup>386</sup> we decline to propose

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<sup>380</sup> CTIA Comments at 17.

<sup>381</sup> *Section 255 Report and Order*, 16 FCC Rcd at 6466, ¶ 119.

<sup>382</sup> *Id.*

<sup>383</sup> See *Dr. Bonnie O'Day v. Cellco Partnership d/b/a Verizon Wireless, Motion To Dismiss With Prejudice*, EB-03-TC-F-001, *Order*, 19 FCC Rcd 17477 (2004); *Frank Winsor Burbank and Barbara Gail Burbank v. OnStar Corporation*, EB-03-TC-F-001, *Order*, 19 FCC Rcd 16652 (2004); and *Dr. Bonnie O'Day v. Audiovox Communications Corporation*, EB-03-TC-F-004, *Order*, 19 FCC Rcd 14 (2004).

<sup>384</sup> Verizon Comments at 6.

<sup>385</sup> 47 U.S.C. § 618(a)(3)(A).

<sup>386</sup> See 47 U.S.C. § 208(a). This Section, applicable to complaints against common carriers, specifically states that “no complaint shall at any time be dismissed because of the absence of direct damage to the complainant” and (continued....)

a standing requirement and believe the minimum content requirements we propose *infra* in Sections VI.C.3 and VI.C.4 will effectively deter frivolous complaint filings.

131. *Sua sponte actions by the Commission.* As noted above, the Commission's implementing rules for Section 255 explicitly state that the agency may, on its own motion, conduct inquiries and proceedings as necessary to enforce the requirements of its implementing rules and that Section of the Act.<sup>387</sup> We intend for the Commission and its staff to continue to investigate and take action on our own motion when compliance issues or problems involving Sections 255, 716, and 718 come to our attention through an accessibility-related complaint or otherwise. Rather than establishing specific guidelines for initiating investigations and other enforcement actions on the Commission's own motion, we propose to continue to follow existing protocols, and use procedures that in the opinion of the Commission best serve the purposes of Commission- and staff-initiated inquiries and proceedings.<sup>388</sup> We seek comment on this approach.

132. *Remedies and Sanctions.* We seek comment on what remedies and other sanctions the Commission should consider for violations found to have occurred under Section 255, 716, or 718. As a preliminary matter, as noted above, we observe that Section 717(a)(3)(B) specifically authorizes the Commission to impose as a remedy for any violation an order directing a manufacturer to bring the next generation of its equipment or device, and a service provider to bring its service, into compliance within a reasonable period of time. We also observe that Section 718(c) envisions that we will continue to use our existing enforcement authority under Section 503 of the Act, but specifically adds that (subject to Section 503(b)(5)) manufacturers and service providers subject to the requirements of Sections 255, 716, and 718 are liable for forfeitures of up to \$100,000 per violation or each day of a continuing violation, with the maximum amount for a continuing violation set at \$1 million.<sup>389</sup> We intend to use these statutorily directed remedies and sanctions as well as other remedies and sanctions authorized in the Act. We propose a change to section 1.80 of the Commission's rules in Appendix B *infra* to reflect the modifications of section 718(c) to the Act.<sup>390</sup>

133. We seek comment on whether there are additional remedies that the Commission should consider when a violation is determined to have occurred. The Senate and House Reports make clear that we should not consider remedies that require retrofitting of equipment,<sup>391</sup> and accordingly, we agree with CEA that we should not employ those remedies for violations of these provisions.<sup>392</sup> We also note that AFB suggests that when a complaint is filed and a given product is not accessible, but the company nevertheless offers an array of accessible options, "the Commission should require the company to demonstrate that it can offer the complainant at least one other of its products that satisfies the [CVAA's] requirements and that would provide the complainant at least the same features and level of functionality as the product that is the subject of the complaint" and at a comparable cost to the inaccessible product.<sup>393</sup> While we agree that this may be a potential defense, we clarify that the issue of whether a subject entity satisfies its accessibility obligations is a fact-specific determination that will be decided in the context of a

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generally authorizes the filing of a complaint by "any person" claiming that a carrier has violated a provision of the Act or the Commission's rules. *See also* 47 U.S.C. § 153(39) ("[t]he term 'person' includes 'an individual, partnership, association, joint-stock company, trust, or corporation'").

<sup>387</sup> 47 C.F.R. § 6.23; *see supra* para. 125.

<sup>388</sup> *See* 47 C.F.R. § 6.23.

<sup>389</sup> *See* 47 U.S.C. § 619(c).

<sup>390</sup> *See* 47 C.F.R. § 1.80; *see also* 47 U.S.C. § 503(b) and 47 U.S.C. § 618(c).

<sup>391</sup> Senate Report at 9; House Report at 26.

<sup>392</sup> CEA Comments at iii, 22.

<sup>393</sup> AFB Reply Comments at 4.

complaint proceeding based on the record. More specifically, we believe our determination about what is achievable must take into account all four factors enumerated under Section 716(g), not just the fourth factor that considers “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.”<sup>394</sup>

### 3. Informal Complaints

134. As described above, within one year after the date of enactment of the CVAA, the Commission is required to establish regulations that facilitate the filing of an informal complaint that alleges a violation of Section 255, 716, or 718, as well as establish procedures for enforcement actions by the Commission for any violations.

135. We note that commenters suggest that any enforcement procedures should provide clarity regarding culpability, given that a product or service may potentially involve several different entities such as a device manufacturer, a broadband provider, or an application developer.<sup>395</sup> We acknowledge that it may be difficult for a consumer to determine where the responsibility of one covered entity ends and another begins. We seek comment on what additional procedures the Commission might adopt to clarify which entity is “culpable” for noncompliance and further ask to what extent the Commission should be available to assist consumers in determining which entities are appropriately targeted by specific complaints? We also seek comment on what additional elements should be included in complaints that are filed under these sections, beyond what is proposed below.

136. We propose the following minimum requirements that complainants should include in their informal complaints, which are consistent with Section 255 requirements as well as existing enforcement rules that have been adopted in other contexts.<sup>396</sup> Specifically, we propose to include the following in any informal complaint: (1) the name, address, email address and telephone number of the complainant, and the manufacturer or service provider defendant against whom the complaint is made; (2) a complete statement of facts explaining why the complainant contends that the defendant manufacturer or provider is in violation of Section 255, 716, or 718, including details regarding the service or equipment and the relief requested, and all documentation that supports the complainant’s contention; (3) the date or dates on which the complainant or person on whose behalf the complaint is being filed either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service about which the complaint is being made; (4) the complainant’s preferred format or method of response to the complaint by the Commission and defendant (e.g., letter, facsimile transmission, telephone (voice/TRS/TTY), Internet email, audio-cassette recording, Braille; or some other method that will best accommodate the complainant’s disability); and (5) any other information that is required by the Commission’s accessibility complaint form. We seek comment on this proposal and request parties to consider what additional or modified requirements are necessary. Complaints that do not satisfy the pleading requirements will be dismissed without prejudice to refile.<sup>397</sup>

137. We also recognize that the CVAA’s recordkeeping requirements will allow the Commission to obtain records of the efforts taken by manufacturers or providers to implement Sections 255, 716, and 718 and the Commission may use these records as necessary to determine whether a covered entity has complied with its legal obligations. Additionally, consistent with our Section 255 rules, we propose to maintain our current rule that the Commission will promptly forward any informal

<sup>394</sup> See 47 U.S.C. § 617(g)(4).

<sup>395</sup> VON Coalition Comments at 9.

<sup>396</sup> See, e.g., 47 C.F.R. § 76.1302.

<sup>397</sup> The CVAA requirement for the Commission to issue an order (within 180 days of the filing of the complaint) concluding an investigation that is triggered by informal complaint, will be tied to the Commission’s receipt of a complaint that satisfies its pleading requirements.

complaint meeting the appropriate filing requirements to each defendant named or determined to be implicated by the complaint.<sup>398</sup> Also consistent with our approach taken in our Section 255 rules, we propose to require manufacturers and service providers to establish points of contact for complaints and inquiries under Section 255, 716, or 718.<sup>399</sup> We continue to believe that this requirement will facilitate the ability of consumers to contact manufacturers and service providers directly about accessibility issues or concerns and ensure prompt and effective service of complaints on defendant manufacturers and service providers by Commission staff. We seek comment on this proposal.

138. As discussed above, the CVAA provides a party that is the subject of a complaint a reasonable opportunity to respond to such a complaint.<sup>400</sup> Consistent with this requirement, we propose that answers to informal complaints must: (1) be filed with the Commission and served on the complainant within twenty 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 decisionmaker in the evaluation process; (6) 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 the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable; (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) set forth any claimed defenses; (10) set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised; (11) provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and (12) be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.<sup>401</sup> We seek comment on this proposal. We further propose that within ten (10) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply, which shall be responsive to matters contained in the answer and shall not contain new matters. We seek comment on this proposal as well. Given the statutory requirement for the Commission to issue an order concluding an investigation of an informal complaint within 180 days of the filing of the complaint, are there other pleading requirements we should impose, and, if so, what should these be?

139. As noted above, the CVAA requires the Commission to issue an order that finds whether a violation has occurred within the time limits required by the Act, and to provide an explanation for its conclusion. Also, as we have noted, the statute provides that 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.<sup>402</sup> In addition, as also previously mentioned, before issuing a final order, the Commission is required to provide the responding party a reasonable opportunity to comment on any proposed remedial action.<sup>403</sup> We would further note that the CVAA authorizes the Commission to direct manufacturers and service providers of ACS to bring their equipment and services into compliance either in the order

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<sup>398</sup> 47 C.F.R. § 6.18(a).

<sup>399</sup> 47 C.F.R. § 6.18(b).

<sup>400</sup> 47 U.S.C. § 618(a)(4).

<sup>401</sup> See *supra* para. 129 (*Receipt and Filing of Complaints*).

<sup>402</sup> 47 U.S.C. § 618(a)(3)(B)(i).

<sup>403</sup> *Id.*