Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communciations and Video Accessibility Act of 2010	)	CG Docket No. 10-213
	)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996	)	WT Docket No. 96-198
	)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Telecommunications Industry Association
Danielle Coffey
Vice President, Government Affairs
10 G Street, N.E.
Suite 550
Washington, DC 20001
(202) 346-3240

April 25, 2011

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 2

II. THE COMMISSION SHOULD INTERPRET THE SCOPE OF THE CVAA CONSISTENT WITH CONGRESS'S INTENT. 6

A. Section 2(a) Intentionally Limits the Scope of Manufacturers' Liability. 6

B. The Commission Should Interpret the Scope of Products and Services Covered by the CVAA as Congress Intended, not More Broadly. 8

C. The Commission Should Use Its 716(h) Waiver Authority Consistent with the Intent of the CVAA to Afford Manufacturers the Flexibility to Innovate. 13

III. THE "ACHIEVABLE" STANDARD SHOULD BE INTERPRETED CONSISTENT WITH CONGRESSIONAL INTENT TO AFFORD INDUSTRY FLEXIBILITY. 15

IV. THE COMMISSION'S RULES SHOULD REFLECT CONGRESS'S INTENT TO ALLOW FLEXIBILITY WITH RESPECT TO THIRD PARTY ACCESSIBILITY SOLUTIONS 19

V. THE COMMISSION SHOULD FACILITATE EFFICIENT RECORDKEEPING AND INFORMAL RESOLUTION OF COMPLAINTS 22

A. The Commission's Recordkeeping Requirements Should be Efficient, Flexible and Limited to Essential Information 23

B. The Commission Should Promulgate Clear, Streamlined Enforcement Procedures that Facilitate Efficient Resolution of Complaints 25

VI. AS THE COMMISSION IMPLEMENTS SECTION 716 INTO ITS RULES, IT SHOULD MAINTAIN THE FLEXIBLE APPROACH CONGRESS INTENDED 29

A. The Commission Should Establish Reasonable, Outcome-Oriented Performance Objectives 30

B. The Commission Should Adopt Safe Harbor Rules Based on Industry-Developed Technical Standards. 32

C. The Commission Should Defer Developing Prospective Guidelines Until a Future Proceeding. 32

VII. THE FCC SHOULD INTERPRET THE DEFINITIONS OF "ACCESSIBLE TO AND USABLE BY" AND "COMPATIBLE" FLEXIBLY AND DEFER CONSIDERATION OF WHETHER TO INCORPORATE THE ACCESS BOARD GUIDELINES UNTIL AFTER COMPLETION OF THAT PROCEEDING. 33

VIII. MOBILE INTERNET BROWSER ACCESSIBILITY OBLIGATIONS UNDER SECTION 718 SHOULD BE INTERPRETED CONSISTENT WITH THE SECTION 716 FLEXIBILITY REQUIREMENTS 34

TABLE OF CONTENTS
(continued)

Page

IX. CONCLUSION 36

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communciations and Video Accessibility Act of 2010	)	CG Docket No. 10-213
	)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996	)	WT Docket No. 96-198
	)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Industry Association ("TIA")[1] hereby submits comments in response to the Federal Communications Commission's ("FCC" or the "Commission") Notice of Proposed Rulemaking,[2] which seeks comment on proposed rules that implement provisions in Section 104 of the Twenty-First Century Communications and Video Accessibility Act of 2010

---

[1] TIA is the leading trade association for the information and communications technology ("ICT") industry, representing companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of policy issues affecting the ICT industry and forges consensus on industry standards. Among their numerous lines of business, TIA member companies design, produce, and deploy a wide variety of devices with the goal of making technology accessible to all Americans.

[2] *Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communciations and Video Accessibility Act of 2010, Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, Notice of Proposed Rulemaking, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, FCC 11-37 (rel. Mar. 3, 2011) ("*NPRM*").

(the "CVAA" or the "Act").[3] TIA supported the passage of the CVAA and commends the Commission for initiating this proceeding to help ensure that all Americans have access to advanced communications services ("ACS") products.

I. INTRODUCTION AND SUMMARY

As the Commission implements the CVAA, its rules should reflect the industry flexibility that Congress intended. Achieving accessibility for ACS products is a complicated process and manufacturers are just one part of a complex ecosystem that includes service providers, software developers, the assistive technology industry, and consumers. As such, the Commission must interpret the terms of CVAA in a manner that supports the intent of the Act, particularly regarding: (i) the scope of manufacturers' liability; (ii) the products and services covered; and (iii) the need for flexibility.

First, the Commission's proposal to treat the act of a manufacturer's making software available for download as a form of distribution as within the meaning of "offers for sale or otherwise distributes in interstate commerce" directly contradicts Section 2(a)'s liability limitations.[4] Instead, the Commission should clarify that manufacturers are only liable for hardware and ACS applications installed on the device before sale.

Second, as the Commission interprets the scope of products and services covered by the ACS definitions in Section 716(a),[5] it should be mindful of the limiting language in these definitions and not interpret them more broadly than Congress intended. In particular, the Commission should exclude products with a purely incidental non-interconnected VoIP

---

[3] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) ("CVAA").

[4] *See* CVAA, Pub. L. No. 111-260, § 2(a).

[5] *See* 47 U.S.C. §§ 153(19), (25), (27), (36).

component that are otherwise not designed primarily as ACS devices from the definition of non-interconnected VoIP. And the Commission's proposed interpretation of "interoperable video conferencing service" should be narrowed to include only video conferencing services that are truly "interoperable," which is uniformly understood in FCC rules and precedent to entail inter-platform, inter-network and inter-provider communications.

Third, if the Commission declines to explicitly exclude services and equipment that are designed for purposes other than using ACS from its interpretation of the ACS definitions in Section 716(a), as a second-best solution, the Commission should use its Section 716(h)[6] authority to grant prospective categorical waivers for these services and equipment to ensure needed industry flexibility. And, although the Commission has the authority to address waiver requests on an individualized basis, the Commission should not consider individual waivers to be a substitute for prospective categorical waivers. But if the FCC does grant individual waivers, it should impose a 60-day time limit on the consideration of waiver requests made pursuant to Section 716(h) to ensure that uncertainty created in an individualized waiver process does not chill innovation.

Moreover, consistent with the Act, flexibility should extend beyond the scope of the products and services covered to how manufacturers meet the requirements of the CVAA. TIA agrees that if the inclusion of a feature in a product or service results in a fundamental alteration of that service, it is *per se* not achievable to include that function. TIA also agrees with the Commission's proposal to weigh only the four factors enumerated in the statute to make a determination of achievability. In applying the four factors, however, the FCC should focus on the specific covered entity and product at issue, not competing entities or products. And where a

---

[6] 47 U.S.C. § 617(h).

company offers a range of accessible products that perform different functions at varied price points, the company should not need to consider what is achievable in every product. Furthermore, the Commission should ensure that its rules support manufacturers' and service providers' choice to rely on third party accessibility solutions by supporting the use of third party solutions and evaluating such solutions on a case-by-case basis.

The Commission should also focus on flexibility and efficiency as it implements Section 717's requirements to establish new recordkeeping and enforcement procedures.[7] As a general rule, the Commission should consider the extent to which the Section 717's recordkeeping requirements are already satisfied by existing reporting and disclosure activities. If the Commission believes that additional information is necessary, it should provide voluntary, flexible recordkeeping requirements that account for differences in size and scope of various manufacturers and service providers. Additionally, in implementing the complaint processes required by the Act, the Commission should facilitate the informal resolution of legitimate, clear complaints without placing unnecessary burdens on covered entities.

The flexible approach intended by the CVAA should also drive the Commission's establishment of performance objectives to implement Section 716. The FCC should implement reasonable outcome-oriented performance objectives and adopt safe harbor rules based on industry-developed technical standards. And, although TIA supports the adoption of outcome-oriented performance objectives similar to those in Part 6 of the Commission's rules, the Part 6 performance objectives must be revised to address the flexible nature of the CVAA. Further, while the Access Board Draft Guidelines[8] may eventually be helpful in developing prospective

---

[7] 47 U.S.C. § 618(a).

[8] *See* United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (Mar. 17. 2010) ("Access Board Draft Guidelines).

guidelines or definitions of the terms "accessible to and usable by" and "compatible," the Commission should defer consideration of these issues to a further notice of proposed rulemaking after the Access Board proceeding is published.

In the meantime, to interpret the term "accessible to and usable by" people with disabilities under Section 716(a) and (b) of the Act, the Commission should apply the parallel definitions of "accessible" and "usable" currently used in Part 6 of its rules,[9] so long as such definitions are not interpreted to require "every feature and function of every device or service" to be "accessible for every disability."[10] And, as the Commission develops a framework to address Section 716(c)'s requirement that 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,[11] the Commission should be mindful that the assistive technology industry—while critical to compatibility between communications and peripheral devices—is not subject to the CVAA.

Lastly, the requirements of Section 718, which impose accessibility requirements on handsets with internet browsers should be also interpreted consistent with the Act's flexibility provisions. Section 718 is generally subject to the same "achievable" and industry flexibility standard as products and services subject to Section 716. As such, the requirements of Section 718 should be interpreted and implemented in the same manner as Section 716: on a case-by-case basis and subject to the various factors that apply to Section 716. TIA also agrees with the

---

9 *See* 47 C.F.R. §§ 6.3(a) & 6.3(1).

10 47 U.S.C. § 617(j).

11 *Id*. § 617(c).

Commission that application programming interfaces ("APIs"), which are already being developed, are potentially useful tools to foster the incorporation of screen readers into mobile platforms across different phones, which would render the web browser and other mobile phone functions accessible to individuals who are blind or visually impaired. Finally, TIA notes that, consistent with third party liability requirements, manufacturers are responsible only for the "on-ramp" to content, not for the accessibility of content or services that are made available to the user by the inclusion of a browser on a manufacturer's product.

II. THE COMMISSION SHOULD INTERPRET THE SCOPE OF THE CVAA CONSISTENT WITH CONGRESS'S INTENT.

TIA appreciates the Commission's recognition that achieving accessibility for ACS products is a complicated process, and manufacturers are just one part of a complex ecosystem that includes service providers, software developers, the assistive technology industry, and consumers.[12] The five-layer framework (*i.e.*, hardware, operating system, user interface, application, and network services) set out by the Commission accurately depicts the multidimensional nature of ACS products.[13] ACS products and services are indeed a complicated ecosystem. For this reason, the Commission must interpret the terms of CVAA in a manner that supports the intent of the Act, particularly regarding: (i) the scope of manufacturers' liability; (ii) the products and services covered; and (iii) the need for flexibility.

A. Section 2(a) Intentionally Limits the Scope of Manufacturers' Liability.

The Commission's proposal "to treat generally the act of a manufacturer's making software available for download as a form of distribution"[14] as within the meaning of "offers for

---

12 *NPRM* ¶¶ 14-15.

13 *Id.* ¶ 15.

14 *Id.* ¶ 23.

sale or otherwise distributes in interstate commerce" directly contradicts Section 2(a)'s liability limitations.[15] Section 2(a) of the CVAA generally precludes manufacturers from being liable for third party applications that are installed or downloaded by a consumer unless the manufacturer relies on that application to meet its accessibility obligations.[16] Section 2(a) provides that the CVAA does not apply to any person who "transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of [ACS] by a third party" or who "provides an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such video programming, online content, applications, services, [ACS], or equipment used to provide or access [ACS]."[17] These limitations do not apply "to any person who relies on third party applications, services, software, hardware, or equipment to comply with the requirements of the [CVAA]."[18] Accordingly, to the extent a manufacturer is not relying on an application supplied by a third party to meet its obligations under the CVAA, it is not responsible for the accessibility of that application, even if it is an ACS application.

Under the Commission's formulation, a manufacturer of a device, such as a smart phone, would be liable to meet accessibility obligations for any ACS application or software that could be downloaded to that device. Such a result would make manufacturers inappropriately responsible for software applications over which they have no control. Not only would this interpretation place manufacturers in an untenable situation in which they could not know how

---

15 47 U.S.C. § 617(a)(1).

16 *See* CVAA, Pub. L. No. 111-260, § 2(a).

17 *Id.*

18 *Id.* § 2(b).

their products might be used, it would create incentives for manufacturers to restrict the types of software available on a device, potentially chilling innovation and distribution of ACS applications—even some that may be beneficial to certain disability communities. Instead, consistent with Congressional intent and the statutory language, the Commission should clarify that equipment manufacturers are responsible only for meeting the CVAA's accessibility requirements with respect to the product's hardware and ACS applications that the manufacturer intentionally installs on the device before sale.[19]

B. The Commission Should Interpret the Scope of Products and Services Covered by the CVAA as Congress Intended, not More Broadly.

TIA agrees that manufacturers and service providers are subject to Section 716 if they offer products or services that fall within the scope of the ACS definitions.[20] The Commission should be mindful, however, of the limiting language in these definitions and not interpret them more broadly than Congress intended. TIA provides comment below on specific ACS products covered by the CVAA.

Interconnected VoIP. TIA supports the Commission's proposal to define the term "interconnected VoIP" in the way that it is defined in Section 9.3 of the Commission's rules, as required by the terms of the CVAA.[21]

---

[19] TIA recognizes that if the manufacturer relies on a third party solution or device in order to meet its accessibility requirements the manufacturer is responsible for the accessibility of that solution or device whether or not that solution is installed on the device before sale. *See* CVAA, Pub. L. No. 111-260, § 2(b).

[20] *See* 47 U.S.C. §§ 153(19), (25), (27), (36).

[21] *See NPRM* ¶ 29; 47 C.F.R. § 9.3.

Non-interconnected VoIP.[22] The Commission should reconsider its proposal to "treat any offering that meets the criteria of the statutory definition" of non-interconnected VoIP as a covered non-interconnected VoIP product, whether or not it is offered incidentally as part of a product designed to serve non-communications purposes.[23] A purely incidental non-interconnected VoIP component included in a product with a primary purpose to function as something other than a communications device should not render that product subject to the CVAA.[24] Instead, the Commission should use its authority under the waiver provision in Section 716(h) to exclude products from the non-interconnected VoIP definition[25] that may include an incidental VoIP component but are "designed primarily for purposes other than using advanced communications service."[26] Requiring manufacturers of products with an incidental VoIP component, such as gaming systems or websites that integrate voice as part of the "help desk" feature or for other purposes, to seek waivers after-the-fact instead of granting flexibility upfront will stifle innovation and potentially be disruptive to commerce in this area. This approach creates a situation in which, from the design stage, manufacturers must assume that every product with an incidental VoIP component must be accessible. In other words, this approach

---

[22] The elevation of non-interconnected VOIP has ramifications that extend beyond the disability access realm. To the extent a non-interconnected VoIP provider is required to report telecommunications relay service ("TRS") revenue, the FCC should require that these revenues are reported in block 5 rather than 4 of the FCC Form 499 because non-interconnected VoIP is not a telecommunications service, and Congress did not classify it as such in the CVAA. In addition, the FCC should add a new category of provider for non-interconnected VoIP in block 105 to avoid confusion.

[23] *See NPRM* ¶ 32.

[24] *See* Comments of The Telecommunications Industry Association, CG Docket No. 10-213, at 24 (filed Nov. 22, 2010) ("TIA Comments").

[25] The term "non-interconnected VoIP service" means that a service "(i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment" and that "does not include any service that is interconnected VoIP service." 47 U.S.C. § 152(36).

[26] 47 U.S.C. § 617(h).

creates a *de facto* accessibility requirement for every such device. Such a result is inconsistent with the Act's intent to cover ACS, its flexibility provisions,[27] and inclusion of waiver authority in Section 716(h).

Electronic Messaging Service. TIA supports the Commission's proposal to adopt the CVAA's definition of electronic message service.[28] TIA also agrees that "blog posts, online publishing, or messages posted on a social networking websites" should be excluded from the definition of electronic messaging service.[29] And services and applications that provide access to electronic messaging services, like a broadband platform that provides access to an HTML-based email service, are also not covered by the Act.[30] TIA further reiterates that the phrase "between individuals" in the definition excludes communications in which no human is involved, like automatic software updates or other device-to-device or machine-to-machine communications.[31]

Interoperable Video Conferencing Service. The Commission's proposed interpretation of "interoperable video conferencing service" should be narrowed.[32] Interoperable video conferencing service is defined in the statute as "a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing …."[33] A service that enables "users to share information" necessarily implies that it is a two-way

---

27 *See id.* § 617(a)(2) & (b)(2) (providing "industry flexibility" to allow manufacturers and service providers to satisfy the Act's requirements by multiple means).

28 *NPRM* ¶ 33.

29 *Id.*

30 *Id.* ¶ 34.

31 *Id.*

32 *See NPRM* ¶ 35.

33 47 U.S.C. § 153(27).

service, not a "webinar" or "webcast" type video, which is broadcast by one user to multiple participants and typically does not allow a two-way video exchange of information. Although the *NPRM* implies that the term "interoperable" does not change the meaning of the definition,[34] the Commission cannot ignore the term's existence and its significance, which is uniformly understood in FCC rules and precedent to entail inter-platform, inter-network and inter-provider communications.[35] The Commission should assume that Congress did not intend for it to adopt an entirely different and more expansive definition for purposes of the CVAA. Thus, as part of the definition, the term "interoperable" is not meant to require interoperability, but instead, to narrow the scope of services covered by the definition.

Today, standards for interoperable video conferencing services do not yet exist. As the Consumer Electronics Association noted, all consumers, regardless of disability, using two-way video applications and chat services that are not interoperable must face this barrier and agree to use the same service to engage in two-way sessions.[36] The term "interoperable" therefore implies that Congress intended future video conference services to be covered, not nascent two-way video applications and chat services, which are not interoperable today.[37] Although TIA

---

[34] *See NPRM* ¶ 45.

[35] *See* 47 C.F.R. § 90.7 (defining "interoperable" in the public safety wireless context as "An essential communication link within public safety and public service wireless communications systems which permits units from two or more different entities to interact with one another and to exchange information according to a prescribed method in order to achieve predictable results."); *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442 (May 9, 2006) (imposing an interoperability obligation such that "All VRS consumers should be able to place a VRS call through any of the VRS providers' service, and all VRS providers should be able to receive calls from, and make calls to, any VRS consumer."); *see also* 47 C.F.R. § 51.325(b) (defining "interoperability" as "the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.").

[36] Comments of the Consumer Electronics Association, CG Docket No. 10-213, at 8 (filed Nov. 22, 2010).

[37] TIA submits that the definition of "interoperable video conferencing service" may include more mature products such as Video Relay Service ("VRS") equipment, which is already subject to an express interoperability mandate.

agrees that achieving interoperability of video conferencing services may be a worthy goal, if the FCC wants to encourage interoperability, it should do so by working with open, industry-driven standards development efforts. The CVAA by its terms does not demand interoperability or provide the Commission with authority to require it.[38] Moreover, for the same reasons that products with an incidental VoIP component should be excluded from the definition of "non-interconnected VoIP," TIA reiterates that products that offer a video connection that is incidental to a product designed for a purpose other than ACS also fall outside the scope of video conferencing services covered by the Act.[39] The CVAA flexibility provisions and waiver authority counsel the Commission to interpret the scope of the ACS definitions to exclude products "designed primarily for purposes other than using advanced communications service."[40]

Customized Equipment or Services. TIA agrees that public safety communications devices are "equipment and services that are not offered directly to the public" under Section 716(a)[41] and are thus exempt from the CVAA.[42] And TIA agrees that the Section 716(a) exemption applies to "customized equipment and services offered to business and enterprise customers,"[43] such as equipment and services used by Federal Express and other shipping companies, oil companies, civil defense companies, transportation services like airlines and railroads, hotels, sports arenas and manufacturing plants.

---

38 *See NPRM* ¶ 108. This interpretation is consistent with the general flexibility endorsed by the CVAA and by Section 716(e)(1)(D)'s prohibition on the mandate of technical standards. 47 U.S.C. § 617(e)(1)(D).

39 *See NPRM* ¶ 43.

40 47 U.S.C. § 617(h).

41 47 U.S.C. § 617(i).

42 *NPRM* ¶ 51.

43 *Id.* ¶ 50.

C. The Commission Should Use Its 716(h) Waiver Authority Consistent with the Intent of the CVAA to Afford Manufacturers the Flexibility to Innovate.

As discussed above, TIA believes that the Commission should explicitly exclude services and equipment that are designed for purposes other than using ACS from its interpretation of the ACS definitions in Section 716(a). This approach will reduce the need for the Commission to engage in any waiver process. But, should the Commission instead decide to rely on a waiver process, TIA strongly urges the Commission to use its Section 716(h) authority to grant prospective categorical waivers for these services and equipment, such as products that have a purely incidental VoIP or video conferencing component that might, standing alone, be subject to the CVAA. Congress gave the Commission authority under Section 716(h) to grant prospective industry-wide waivers to exempt from the CVAA's requirements "any feature or function of equipment used to provide or access [ACS], or for any class of such equipment, for any provider of [ACS], or for any class of such services that—(A) is capable of access an [ACS]; and (B) is designed for multiple purposes but is designed primarily for purposes other than using [ACS]."[44] While TIA agrees with the Commission's observation that technology is ever-changing,[45] the Commission is capable of distinguishing between products with incidental ACS components and other ACS products. As Microsoft noted, the Commission can consider the "core features of the product or services as designed and marketed."[46] Granting such categorical waivers would provide manufacturers and industry participants with added certainty that will spur innovation in new devices that may have incidental ACS components, such as TVs with

---

44 47 U.S.C. § 617(h)(1).

45 *NPRM* ¶ 58.

46 Comments of Microsoft Corp., CG Docket 10-213, at 5 (filed Nov. 22, 2010).

Internet capability or gaming systems with VoIP or video capability that allow gamers to interact with one another.

Additionally, although the Commission has the authority to address waiver requests on an individualized basis, such waivers would only address the individual circumstances of a manufacturer or services provider. And, as such, the Commission should not consider individual waivers to be a substitute for prospective categorical waivers. Individualized waivers create risk for the petitioner, who may not know the outcome in advance of planned production.[47] Additionally, because confidentiality cannot be guaranteed when seeking an individualized waiver, the individualized waiver process would create barriers for manufacturers seeking to develop a new product. For these reasons, manufacturers and services providers may determine instead to stop production on a particular product rather than pursue the waiver process. So, if the Commission does not grant categorical waivers and instead grants only individualized waivers, it should address some of the problems inherent in such waivers by ensuring that waiver requests are addressed in a timely manner.[48] To this end, the Commission should impose a time limit of 60 days on the consideration of Section 716(h) waivers to ensure that uncertainty created in an individualized waiver process does not chill innovation. The Commission should also not set any arbitrary length of time period for the duration of waivers and specifically reject the American Council of the Blind's ("ACB") proposal to limit the duration of waivers to twelve

---

[47] An individualized waiver process could be either "retroactive" or "prospective," depending on the point in the product development process at which a petitioner seeks a waiver. In many cases, at least initially, an individual waiver will be retroactive because a product already is being manufactured and sold. In other cases, a waiver will be prospective because a product or service is still in the design process. Neither type of individual waiver would offer manufacturers the same benefit as a prospective blanket waiver, which would advise manufacturers from the outset as to the extent of their obligations under the CVAA.

[48] *NPRM* ¶ 52.

months.[49] Rather, the Commission should allow waivers to be in effect so long as the conditions under which they were granted have been met.

III. THE "ACHIEVABLE" STANDARD SHOULD BE INTERPRETED CONSISTENT WITH CONGRESSIONAL INTENT TO AFFORD INDUSTRY FLEXIBILITY.

The FCC should afford manufacturers maximum flexibility in meeting the requirements of the CVAA consistent with congressional intent.[50] TIA strongly supports the Commission's conclusion to follow Congress's directive 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."[51] TIA also agrees with the Commission's proposal to weigh only the four factors enumerated in the statute to make a determination of achievability.[52] The four factors are already tailored to create incentives for manufacturers to incorporate accessibility, while providing needed flexibility to allow the Commission to make determinations on a case-by-case basis, in keeping with the intent of the law. TIA provides additional considerations relevant to each of the four factors below.

Nature and Cost. Section 716(g)(1) instructs the Commission to focus on "the specific equipment or service in question" when evaluating "[t]he nature and costs of the steps needed to meet the requirements" of the CVAA.[53] In doing so, the Commission should recognize that the circumstances for each manufacturer and service provider vary. For example, depending on the

---

49 *See id.* ¶ 60.

50 *See, e.g.,* H.R. Rep. No. 111-563 at 24 (2010) ("House Report") (noting that in implementing Section 716, the FCC should "afford manufacturers and service providers as much flexibility as possible").

51 *NPRM* ¶ 69.

52 *Id.* ¶ 70.

53 47 U.S.C. § 617(g)(1).

product, either the manufacturer or the service provider may have more influence on the ultimate determination of which features are included in the product. Thus, contrary to the proposals of certain consumer groups, the Commission should do as the CVAA instructs and evaluate the "specific equipment or service in question," and not consider the accessibility of a competing product.[54]

Technical and Economic Impact on Operations. In applying this factor, the Commission should consider the effect of requiring accessibility on the "operation of the *specific* equipment or service in question," and also "on the development and deployment of new communications technologies."[55] Thus, the Commission should disregard the impact of accessibility features on different or competing products when assessing this factor.[56] The statute's explicit direction to consider the impact on new communications technologies underscores Congress's understanding that new entrants, often introduce new technologies, yet may not initially have resources to incorporate particular accessibility features into their products immediately. The CVAA contemplates this possibility and makes clear the intent of Congress to avoid delaying the introduction of new technologies to the market.

Type of Operations. In considering this factor, the Commission should follow the legislative history, which explains that the Commission should take into account whether the entity offering the product or service in question "has a history of offering [ACS] or equipment or whether the entity has just begun to do so."[57] Aside from considering whether or not an entity is a new entrant, the Commission should not presume that a company's size alone is an indicator

---

54 *See NPRM* ¶ 71.

55 47 U.S.C. § 617(g)(2) (emphasis added).

56 *See NPRM* ¶ 72.

57 House Report at 25-26.

of market success or make a company's size a proxy for determining whether or not accessibility can be achieved.[58]

Extent to which Offering Has Varied Functions, Features and Prices. The fourth factor, the extent to which a company "offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points," reflects Congress's intent that the Commission's regulations should seek to give individuals with disabilities meaningful choices in accessible products and reward companies who provide such choices.[59] As such, TIA strongly supports the Commission's interpretation that "[w]here 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" and in those instances, assuming that the other achievability factors have been met, "a company charged with having an inaccessible product might not have to make that specific product accessible."[60] Furthermore, in the design phase of a product, covered entities should not need to consider what is achievable in 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 different price points.[61]

This interpretation is consistent with the legislative history of Section 716(g)(4) in which the Senate and House Reports state that the Commission should interpret this factor similar to how it has implemented its hearing aid compatibility ("HAC") rules, which allow manufacturers and service providers to ensure that a minimum number of the total handsets offered, rather than

---

58 *See NPRM* ¶ 73.

59 47 U.S.C. § 617(g)(4).

60 *NPRM* ¶ 75.

61 *See id*. ¶ 76.

all handsets, are HAC-compliant.[62] Here, "[w]hile Section 716's case-by-case, product-specific approach is not amenable to the fixed number or percentage approach the Commission has employed in the hearing aid compatibility context, Section 716(g)(4) requires that a company's good faith efforts to incorporate an accessibility feature in different products within multiple product lines count favorably in an achievability analysis for the product in question."[63] This approach appropriately rewards companies that make substantial investments in accessible products for broad classes of consumers with broad classes of disabilities, while allowing flexibility to account for marketplace realities. By contrast, the ACB's assertion that covered entities should divide devices into specific classes that fit various price ranges and meet certain accessibility requirements is too rigid and would be unworkable in today's marketplace.[64]

Lastly, Section 716(j), which provides that Section 716 should not be construed to require a manufacturer or service provider to make "every feature and function of every device or service accessible for every disability"[65] coupled with the Act's industry flexibility provisions[66] preclude the Commission from identifying "specific accessibility features that are currently available, to provide clarity on what accessibility features should be universally deployed, if achievable."[67] But should the Commission pursue this route, it should do so only through the

---

62 *See* House Report at 26; S. Rep. No. 111-386 at 8 (2010).

63 *NPRM* ¶ 75.

64 *See id.* ¶ 76.

65 47 U.S.C. § 617(j).

66 *See id.* § 617(a)(2) & (b)(2).

67 *See NPRM* ¶ 76.

forthcoming clearinghouse,[68] and not by codifying a list of accessibility features, given the ever-changing technology market and the need for information gathering from all stakeholders. The clearinghouse, which will be created by coalition of government agencies, including the FCC, industry participants and organizations representing persons with disabilities, will contain comprehensive information on accessible products and services and accessibility solutions. Through this process, manufacturers and service providers will be able to identify accessibility features that can be widely deployed without a rigid technology mandate that could prevent the development and inclusion of updated and advanced accessibility features down the road.

IV. THE COMMISSION'S RULES SHOULD REFLECT CONGRESS'S INTENT TO ALLOW FLEXIBILITY WITH RESPECT TO THIRD PARTY ACCESSIBILITY SOLUTIONS.

The Commission should ensure that its rules support manufacturers' and service providers' choices to rely on third party accessibility solutions. The "industry flexibility" provisions permit manufacturers and service providers to comply with the CVAA's requirements through either built-in features or "third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to the consumer at nominal cost and that can be accessed by people with disabilities."[69] The benefits of allowing flexibility are already evident in the range of mobile phones on the market that can meet the needs of consumers with various disabilities.[70] As such, TIA supports the Commission's conclusion that

---

[68] 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).

[69] *See NPRM* ¶ 77. Peripheral devices may include mass market consumer devices such as headphones and Bluetooth™ ear pieces.

[70] TIA members have added many accessibility features for blind and low-vision users. *See* Comments of the Telecommunications Industry Association, CG Docket No. 10-145, Appendix A, (filed Sep. 19, 2010).

this statutory language and legislative history preclude it "from preferring built-in accessibility over third party accessibility solutions."[71] The Commission should thus support the use of third party solutions according to the following recommendations.

First, to evaluate whether a third party solution has been made available at a "nominal cost," the Commission should evaluate products on a case-by-case basis.[72] This approach is consistent with the overall intent of the CVAA to achieve accessibility through a flexible approach. And the legislative history clarifies that Congress did not prescribe a percentage or amount to define what constitutes a nominal fee, but instead believed that the fee "should 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."[73] Therefore, TIA urges the Commission to reject the RERC-IT's proposal to limit nominal cost to one percent of the total cost of device or service.[74] Such a definition limits both the flexibility of industry and the Commission to determine what constitutes "nominal cost." For example, regardless of what a consumer ultimately pays for third party accessibility software, calculation of "one percent" of the cost of the device will depend on a number of factors, including whether the device was bought with a subscription contract, in which case the cost of the device may be rolled into the monthly cost of the contract. As such, a rigid one-percent approach is too simplistic to capture the various factors at play in a consumer's perception of the cost of a solution. For this reasons, the Commission should maintain flexibility to evaluate whether or not a third party solution is provided at nominal cost on a case-by-case basis.

---

71 *NPRM* ¶ 77.

72 *See id.* ¶ 78.

73 House Report at 24; *see also NPRM* ¶ 78.

74 *See NPRM* ¶ 78.

And *second*, the Commission should ensure that manufacturers and services providers may rely on a wide variety of third party solutions by determining whether those solutions meet the accessibility requirement on a case-by-case basis. TIA appreciates the Commission's recognition that "manufacturers and service providers can rely on a range of third party solutions."[75] But, the Commission should reject ACB's proposal to restrict third party solutions from being an "after-market sale for which the user must perform additional steps to obtain." This would eviscerate the purpose of the industry flexibility provisions.[76] And the rest of ACB's proposal—which would require that third party solutions (i) must be fully operable by a person with a disability without having to turn to people without disabilities to perform setup or maintenance and (ii) must be fully documented and support—is unnecessary as the overarching statutory requirement to make products "accessible to and usable by" people with disabilities, unless not achievable, already covers the obligations of manufacturers and service providers regarding either built-in or third party solutions.[77] Similarly, the Commission's proposal to apply a "not more burdensome" standard to third party accessibility solutions would be unworkable and potentially inconsistent with the CVAA's directive to allow industry flexibility to choose between built-in and third party solutions.[78] Likewise, the Commission should time-limit any requirement that a manufacturer support a solution over the life of the product to a reasonable time period, such as two years after the manufacturer or service provider discontinues use of the solution.[79] Typically, when manufacturers determine to discontinue a product, the

---

75 *Id.* ¶ 79.

76 *Id.* ¶ 80.

77 *See id.*; 47 U.S.C. §§ 617 (a) & (b).

78 *NPRM* ¶ 80.

79 *Id.*

remaining inventory is sold to resellers, and thus manufacturers would lose access to the product and the ability to support it. As a result, if manufacturers and service providers are required to support a solution indefinitely, this would hinder their ability to replace one solution with a better solution in their current products. A two-year limit on supporting a solution past the discontinuation date would allow manufacturers necessary flexibility while still providing end-users support for a reasonable period of time. Lastly, the Commission should not require that covered entities "bundle" third party solutions with their products—such a requirement would effectively require covered entities to provide built-in solutions in contradiction to the statute.[80]

V. THE COMMISSION SHOULD FACILITATE EFFICIENT RECORDKEEPING AND INFORMAL RESOLUTION OF COMPLAINTS.

As the Commission implements Section 717's requirements the Commission to establish new recordkeeping and enforcement procedures, it should facilitate efficient recordkeeping and the resolution of informal complaints.[81] As a general rule, the Commission should consider the extent to which the Section 717's recordkeeping requirements are already satisfied by existing reporting and disclosure activities. To the extent that the Commission believes that additional information is necessary, it should provide voluntary, flexible recordkeeping requirements that account for differences in size and scope of various manufacturers and service providers. Additionally, in implementing the complaint processes required by the Act, the Commission should facilitate the informal resolution of legitimate, clear complaints without placing unnecessary burdens on covered entities.

---

[80] *Id.*

[81] 47 U.S.C. § 618(a); *see NPRM* ¶ 116.

A. The Commission's Recordkeeping Requirements Should be Efficient, Flexible and Limited to Essential Information.

The Commission should allow for industry flexibility in its Section 717 recordkeeping requirements and avoid unnecessarily burdensome rules. Section 717 of the CVAA requires manufacturers, service providers, and other entities the Commission may subject to Section 716 to maintain records of efforts taken to implement Sections 255, 716, and 718.[82] Specifically, Section 717 requires covered entities to maintain: (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.

As an initial matter, TIA submits that there is no need to greatly modify current recordkeeping provisions under Section 255 for the advanced communications services contemplated under the new rules. Indeed, manufacturers and service providers maintain information about efforts to consult with individuals with disabilities pursuant to Section 20.19 of the Commission's rules, which requires manufacturers and service providers to include details of their outreach efforts in annual hearing aid compatibility reports.[83] Moreover, many

---

[82] The Commission proposes 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. The Commission also proposes 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. *NPRM* ¶ 116.

[83] *See* 47 C.F.R. §§ 20.19(i)(2)(ix), 20.19(i)(3)(ix). *See also* Reply Comments of the Alliance for Telecommunications Industry Solutions, CG Docket No. 10-213, at 3 (filed Dec. 7, 2010). ATIS agrees with other commenters that suggest that "given the existing reporting and disclosure obligations required under Section 20.19, the Commission should carefully evaluate what, if any, additional information would be needed to satisfy the statutory requirement." *Id.*

manufacturers and service providers publicly disclose information about accessibility features and compatibility with third party peripherals for their devices and services on corporate websites.[84] Rather than creating new and unnecessarily burdensome requirements for ACS, the Commission should rely on current Section 255 recordkeeping provisions as a model to fulfill Section 717 requirements.

Additionally, the Commission should offer only voluntary guidance as to recordkeeping requirements. Recordkeeping requirements impose added costs on covered entities and occupy time, resource, and space. As such, the Commission should mandate that covered entities maintain only those records which are explicitly required by Section 717(a)(5). Otherwise, the Commission risks exceeding the scope of the statute and inflicting unnecessary costs on providers and manufacturers.

Additionally, a flexible approach to recordkeeping avoids excessive burdens on covered entities and multiple submissions of the same records. As previously explained, and recognized by the Commission,[85] manufacturers, service providers, and other entities subject to Section 716 will come in numerous sizes with different business models and resources.[86] A one-size-fits-all approach to recordkeeping will burden covered entities with excessive and unnecessary administrative costs, potentially discouraging market entry.[87] Instead, the Commission should provide guidance concerning the type of information that would satisfy Section 717 and allow covered entities to keep all records in the manner in which they are already kept in the ordinary

---

84 *See* Comments of Motorola, Inc., CG Docket 10-213, at 10 (filed Nov. 22, 2010). These public disclosures seem to satisfy the second two recordkeeping requirements of Section 716(a)(5).

85 The Commission recognizes that "Section 717 applies to a broad range of entities that have widely ranging business models and modes of operation." *NPRM* ¶ 123.

86 *See* TIA Comments at 24.

87 *Id.*

course of business. A flexible approach promises to be less burdensome on manufacturers and service providers, reduce confusion, and ensure more robust and accurate reporting. Of course, for those entities that desire additional guidance, the Commission could work with industry to offer an optional standardized recordkeeping form as a safe harbor.

Finally, given the costs and burdens associated with recordkeeping requirements, the Commission should not require covered entities to maintain records for a longer period of time than reasonably necessary. A manufacturer, for example, that no longer offers a specific product, should not be required to maintain records associated with that product after its discontinuation. A contrary requirement would impose unnecessary burdens on covered entities without any concomitant benefits. With respect to the effective date by which covered entities must begin maintaining records, TIA reminds the Commission that Congress intended the recordkeeping provisions of Section 717 to begin one year after a reasonable effective date for new regulations—not one year after the October 8, 2011 deadline for promulgation of recordkeeping regulations.[88]

B. The Commission Should Promulgate Clear, Streamlined Enforcement Procedures that Facilitate Efficient Resolution of Complaints.

The Commission's enforcement procedures under Section 717 should be clear, reasonable, and provide for flexible remedies based on the particular facts and circumstances in question. The Commission should seek to ensure that individuals with disabilities are able to pursue meaningful choices in accessible products while deterring superfluous complaints that only serve to detract from the legitimate goals of the CVAA. Moreover, enforcement procedures should create an environment that facilitates greater communication between the parties involved and encourages resolution of disputes through streamlined, informal mechanisms.

---

[88] *See* 47 U.S.C. § 618(a)(5).

The Commission must ensure that complaints filed under Sections 255, 716, or 718 are sufficiently complete and clear to ensure that meritorious complaints are addressed and that resources are not diverted to responding to incomplete and ill-founded complaints. Indeed, the Commission already recognizes that minimum content requirements will be necessary to effectively deter frivolous filings in light of the fact that there is no requirement to establish standing to file a complaint.[89] Moreover, given the relatively short period allotted to a party that is the subject of a complaint to file an answer, it is even more critical that complaints are sufficiently clear and grounded at the outset. Otherwise, frivolous filings will unnecessarily cost both covered entities and the Commission in time, money, and resources. The Commission should, therefore, establish a process by which it will evaluate complaints to ensure that they meet minimum content requirements before the time period to respond to such complaints begins to run.

Due process considerations further require that the Commission ensure that covered entities have a reasonable and adequate amount of time to respond to complaints that do meet the minimum content requirements—at least 45 days from service of a complaint. The filing of a complaint places a covered entity at risk for significant sanctions and monetary forfeitures.[90] The Commission's proposed burdensome recordkeeping requirements and the international nature of the ICT industry require more time than the 30 day response time provided under

---

[89] The Commission notes that it declines to propose a standing requirement and believes that the minimum content requirements proposed in the NPRM will effectively deter frivolous complaint filings. *NPRM* ¶ 130.

[90] 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. Section 718(c) further envisions that the Commission will continue to use its existing enforcement authority under Section 503 of the Act, but specifically adds that 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.

Section 255. For example, manufacturers or software developers based outside the U.S. would require additional time for foreign language translation of documents into English. In addition, the Commission must ensure that covered entities are afforded a fair opportunity to investigate and respond to complaints. Accordingly, TIA proposes that the Commission allow parties 45 days from service of a complaint to file an answer with the Commission. In the case of complaints that do not meet minimum content requirements and therefore are not sufficiently clear at the outset, TIA requests that manufacturers and providers be allowed an extended period of time in which to answer.

The Commission should also afford covered entities an opportunity to demonstrate that a product or service subject to a complaint is, in fact, "accessible" under Section 716.[91] The proposed rules seem to presume that any allegation made is *per se* meritorious. TIA suggests that the Commission clarify that covered entities may submit evidence with their answer that would rebut a complaint that a certain product or service is not "accessible and usable."[92] Indeed, under the Commission's proposed rules, achievability standards need not even be considered for every product a company offers.[93]

In addition, the Commission should streamline its informal complaint procedure to facilitate the efficient resolution of complaints. As it currently stands, the Commission's

---

91 *See NPRM* ¶ 138.

92 The Commission could accomplish this by rewording clause (7) of paragraph 138 of the *NPRM*. Currently, clause (7) states only that a party that is the subject of a complaint must "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." *NPRM* ¶ 138.

93 *See NPRM* ¶ 75. The Commission recognizes that "[w]here 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." *Id.*

proposed informal procedure contains a number of requirements that create a proceeding that is almost as burdensome as the formal complaint procedure. Among other requirements, the informal complaint procedure requires that parties set forth the names, titles, and responsibilities of each decisionmaker in the evaluation process of a given product or service; perform discovery to identify and produce all documents concerning a manufacturer's or service provider's conclusion that it was not achievable to make a product or service accessible and usable; and include a certification by an officer of the company that it was not achievable to make a product or service accessible and usable.[94] These requirements are unnecessary and overbroad.

First, requirements that parties provide the names, titles and responsibilities of each "decisionmaker" involved in the evaluation process of a product or service is not only immaterial as to whether or not accessibility was achievable, it is also redundant to the requirement that an officer of the company certify that it was not achievable to make the product or service accessible and usable. And product development is a complex process that involves a number of personnel from a variety of fields and backgrounds. Requiring that covered entities pinpoint a specific person that is responsible for an accessibility decision is unrealistic and fails to take into consideration the realities of product development. If the Commission does choose to place this kind of burden on companies, it will only deter individual employees from working on accessibility issues, as they would otherwise face potentially being named in a complaint and being drawn into formal and informal complaint proceedings.

Second, the Commission's requirement that covered entities produce "all documents" supporting a conclusion that it was not achievable to make a product or service accessible and usable is overbroad. To illustrate, many companies that could potentially be made the subject of

---

94 *NPRM* ¶ 138.

a complaint are international companies that do not keep their documents in English. A broad rule simply requiring that "all documents" be provided to the Commission is unhelpful and would place significant burdens on the Commission's resources. Moreover, massive production of documents by these companies would overburden complainants, who would be unable to use the information in a helpful or meaningful way. The Commission would benefit from narrowing the scope of its rules and focusing on those documents that would be helpful toward resolving a complaint.

Finally, TIA emphasizes the need for flexible remedies under Section 717. 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, device, or service into compliance within a reasonable period of time.[95] To be sure, a covered entity's ability to bring a product or service into compliance with the Commission's accessibility rules, and how best to judge compliance, will vary according to the nature of the product, its lifecycle, and the size and resources of the company, among other factors. Accordingly, the Commission should provide for flexible remedies that will ensure the appropriate resolution of complaints.

VI. AS THE COMMISSION IMPLEMENTS SECTION 716 INTO ITS RULES, IT SHOULD MAINTAIN THE FLEXIBLE APPROACH CONGRESS INTENDED.

As the Commission implements Section 716 into its rules, it should maintain the flexible approach intended by the CVAA to establish reasonable outcome-oriented performance objectives and adopt safe harbor rules based on industry-developed technical standards. And, although TIA supports the adoption of outcome-oriented performance objectives similar to those in Part 6 of the Commission's rules,[96] the Part 6 performance objections should not be adopted to

---

95 *Id.* ¶ 132.

96 *See NPRM* ¶ 104.

implement the CVAA without some revisions to address the flexible nature of the Act. In addition, the Commission should adopt safe harbor rules based on open, industry-developed technical standards, but not mandate the use of any such standards. And, while the Access Board Draft Guidelines[97] may eventually be helpful in developing prospective guidelines, the Commission should consider this issue in a further notice of proposed rulemaking.

A. The Commission Should Establish Reasonable, Outcome-Oriented Performance Objectives.

The Commission should adopt reasonable, outcome-oriented performance objectives to implement Section 716. Outcome-oriented performance objectives facilitate multiple practical means of implementation and compliance and would help to define the outcome needed to be achieved without defining how it must be accomplished. TIA generally supports using Part 6 of the Commission's rules, as opposed to the Access Board Draft Guidelines, as a basis for outcome-oriented performance objectives, but because Part 6 was not adopted to implement the CVAA, the Commission should make three clarifications to its proposed performance objectives.

First, the Commission's draft proposed rule 8.6(b), which is based on Section 6.3 of the Commission's rules[98] and defines the term "accessible," is unclear as currently drafted. Proposed rule 8.6(b) states that the term accessible "*shall* mean that" and then goes on to list a number of different performance objectives.[99] As drafted, the proposed rule implies that to be "accessible," a product must meet *all* of the performance objectives listed in 8.6(b). This would be in direct contradiction to the statute: Section 716(j) of the CVAA specifically prohibits construing the CVAA in a manner that would "require a manufacturer of equipment used for

---

97 *See* United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (Mar. 17. 2010) ("Access Board Draft Guidelines).

98 47 C.F.R. § 6.3.

99 *See NPRM* ¶ 65.

[ACS] or a provider of [ACS] to make every feature and function of every device or service accessible for every disability."[100] Furthermore, requiring one product to meet a host of performance objectives for various types of disabilities would preclude the provision of basic products in some instances, such as a mobile phone without text display, which could be a useful and inexpensive solution to people with vision disabilities. As such, the Commission should clarify that the performance objectives listed under 8.6(b) need not all be met on the same device to meet the definition of the term "accessible."

Second, the Commission should clarify generally that its performance objectives are limited by Section 2(a) of the CVAA to the same extent that the Act's obligations are limited by that provision. That is, accessibility obligations and performance objectives should apply to the entity offering the application, not the underlying manufacturer or facilities-based service provider, unless the manufacturer or service provider is relying on the application to meet its accessibility obligations.

Third, TIA believes that the performance objectives proposed by the Commission need not mirror the *draft* Section 508 guidelines set forth by the Access Board. Section 508 is a government procurement regulation that applies to Federal agencies. The CVAA was not anticipated by the Access Board, and Congress does not provide a role for the Access Board in the CVAA. Therefore, the Commission may attempt, if not contrary to statutory obligations, to *harmonize* its CVAA performance objectives with those of the Access Board, but the Commission has full discretion to depart from the Access Board Guidelines when merited.[101]

---

[100] 47 U.S.C. § 617(j).

[101] The Commission found similar discretion in Section 255. *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, ¶ 15 (1999). There, the Commission specifically chose not "to adopt Section 1193.43(e) of the Access Board rules, which would require that volume control telephones provide a

Specifically, unlike the Access Board's draft guidelines, which require "access to all functionality," the Commission should clarify that all performance objectives apply only to those features and functions necessary to "operate" the ACS functions and do not extend to functions like turning on electrical power, changing consumables, configuration, set-up or maintenance.

B. The Commission Should Adopt Safe Harbor Rules Based on Industry-Developed Technical Standards.

TIA reiterates its support for the use of industry-developed technical standards as a safe harbor for compliance where necessary and not as a substitute for more general performance objectives.[102] Such safe harbor technical standards can be an effective tool to ensure consistency and transparency. TIA encourages the use of voluntary, consensus-based and open industry standards, such as TIA-1083-A—a standard that defines measurement procedures and performance requirements for the handset generated audio band electromagnetic noise of wireline telephones (including digital cordless phones and VoIP)—to be used as safe harbors to guarantee compliance.[103] Thus, the Commission should continue to encourage industry to propose additional standards, but such standards should not be mandated or classified as an "accessibility" standard.

C. The Commission Should Defer Developing Prospective Guidelines Until a Future Proceeding.

TIA believes that a revised version of the Access Board Draft Guidelines may eventually be helpful to the Commission as it develops prospective guidelines in the future.[104] But, the

---

minimum of 20 dB adjustable volume gain. We decline to adopt this 20 dB volume control standard under our rules because it conflicts with rules that we have previously adopted pursuant to the Hearing Compatibility Act." *Id*. ¶ 25.

[102] *See NPRM* ¶¶ 112-13; *See also* TIA Comments at 18.

[103] More information on TIA-1083-A can be found here: http://engineers.ihs.com/document/abstract/VYHXYBAAAAAAAAAA.

[104] S*ee NPRM* ¶ 115.

current Access Board Draft Guidelines are more standards-driven than necessary for the purpose of developing prospective guidelines. Instead, industry needs practical, real-world guidance that provides manufacturers and service providers with as much flexibility as possible. To address these issues, the Commission should release a further notice of proposed rulemaking when the Access Board proceeding is published.

VII. THE FCC SHOULD INTERPRET THE DEFINITIONS OF "ACCESSIBLE TO AND USABLE BY" AND "COMPATIBLE" FLEXIBLY AND DEFER CONSIDERATION OF WHETHER TO INCORPORATE THE ACCESS BOARD GUIDELINES UNTIL AFTER COMPLETION OF THAT PROCEEDING.

Whether the Commission should incorporate the Access Board guidelines into the definitions of the terms "accessible to and usable by" and "compatible" is a question that should be deferred until after the Access Board rulemaking proceeding is complete, and the guidelines are finalized.[105] In the meantime, to interpret the term "accessible to and usable by" people with disabilities under Section 716(a) and (b) of the Act, the Commission should apply the parallel definitions of "accessible" and "usable" currently used in Part 6 of its rules,[106] so long as such definitions are not interpreted to require "every feature and function of every device or service" to be "accessible for every disability."[107]

And, as the Commission develops a framework to address Section 716(c)'s requirement that 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,[108] the Commission

---

105 *See id.* ¶ 83.

106 *See* 47 C.F.R. §§ 6.3(a) & 6.3(1).

107 47 U.S.C. § 617(j).

108 *Id*. § 617(c).

should be mindful that the assistive technology industry—while critical to compatibility between communications and peripheral devices—is not subject to the CVAA.[109] As a result, although manufacturers can develop compatible hardware, this requirement should not be read to require covered entities to test compatibility with every assistive technology device in the market. Further, covered entities should not be considered responsible under the terms of the CVAA if the assistive technology is the cause of the lack of compatibility.

VIII. MOBILE INTERNET BROWSER ACCESSIBILITY OBLIGATIONS UNDER SECTION 718 SHOULD BE INTERPRETED CONSISTENT WITH THE SECTION 716 FLEXIBILITY REQUIREMENTS.

The requirements of Section 718 should be interpreted consistent with the flexibility requirements of Section 716. Section 718 of the Act imposes accessibility requirements on handsets with internet browsers. As TIA previously explained, Section 718, by its terms, is generally subject to the same "achievable" and industry flexibility standard as products and services that are subject to Section 716.[110] As such, the requirements of Section 718 should be interpreted and implemented in the same manner as Section 716: on a case-by-case basis and subject to the various factors and parameters discussed above in reference to Section 716.

Furthermore, TIA agrees with the Commission that application programming interfaces ("APIs") are potentially useful tools to foster the incorporation of screen readers or other assistive technologies into mobile platforms for different phones, which would render the web browser and other mobile phone functions accessible to individuals who are blind or visually impaired.[111] An API would act as a layer between the device user interface and the screen reader

---

109 *See NPRM* ¶ 86.

110 TIA Comments at 25.

111 *NPRM* ¶ 144.

and could be used to pull information that must be spoken to the user, thereby allowing a screen reader to work within a specific platform.[112] Indeed, the market is already driving the development of APIs, and there are existing APIs that could improve the accessibility of mobile internet browsers. ISO 13066 is one such API, however, generally, every platform requires the development of its own platform-specific API.[113] Thus, there is a need for additional APIs to be created for new and some existing mobile platforms before third party screen readers can be incorporated into mobile phones in this manner. Additionally, Verizon's proposal to "encourage industry forums and working groups to develop accessibility standards for mobile browsers" would be facilitated by permitting such forums to petition the Commission to accept the use of API standards as a voluntary safe harbor standard.[114]

Finally, TIA notes that, consistent with third party liability requirements, manufacturers are responsible only for the "on-ramp" to content, not for the accessibility of content or services that are made available to the user by the inclusion of a browser on a manufacturer's product. As such, to the extent that a manufacturer arranged for the inclusion of a browser at the time the product was produced, it should only be liable for the accessibility of that browser.

---

112 *See* Reply Comments of Code Factory, CG Docket 10-213, at 1-3 (filed Dec. 7, 2010).

113 More information on ISO 13066 can be found here: www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber =53770.

114 *NPRM* ¶ 144.

IX. CONCLUSION

For the foregoing reasons, as the Commission implements the CVAA to promote accessibility of ACS for persons with disabilities, its rules should also reflect the industry flexibility that Congress intended in order to preserve innovation that will benefit all consumers.

Respectfully submitted,

BY: */s/ Danielle Coffey*

Telecommunications Industry Association
Danielle Coffey
Vice President, Government Affairs
10 G Street, N.E.
Suite 550
Washington, DC 20001
(202) 346-3240

April 25, 2011