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Telecommunications Industry Association

Proposal for FCC Guidelines  
for  
Implementing Section 255 of the Communications Act

Explanation and Supporting Rationale

Discussion Draft

December 12, 1997

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Introduction

The purpose of these guidelines is to provide guidance to manufacturers of telecommunications equipment and customer premises equipment (CPE) in discharging their responsibilities under Section 255 of the Communications Act of 1934 and to establish the commission's policy with respect to complaints about the accessibility, usability or compatibility of telecommunications equipment or CPE.

The Telecommunications Act of 1996 (1996 Act)<sup>1</sup> added Section 255 to the Communications Act of 1934. Section 255(b) requires manufacturers of telecommunications equipment and CPE to “ensure that the equipment is designed, developed and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.” If accessibility is not readily achievable, manufacturers must ensure that the telecommunications equipment and CPE are compatible with “existing peripheral

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<sup>1</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996).

devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.”

Section 255(a)(2) states that the term “readily achievable” has the meaning given to it by Section 301(9) of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12181(9). Section 255(e) requires the Architectural and Transportation Barriers Compliance Board (the Access Board), in conjunction with the commission, to develop guidelines for equipment accessibility (Accessibility Guidelines) within 18 months of enactment. Section 255(f) vests with the commission “exclusive jurisdiction” over complaints brought pursuant to Section 255 and provides that there shall be no private right of action to enforce the provisions of Section 255 or any regulations thereunder.

#### 1. General -- Definitions.

The following working definitions are established for the purposes of these guidelines.

Accessible. As applied in the context of telecommunications, the word “accessible” is used to mean that the telecommunications equipment and CPE can be used by individuals with disabilities in its standard manufactured and shipped form without having to modify the product or purchase other equipment.

This definition reflects the use of the term “accessible to and usable by” in the context of the ADA. For example, with respect to new construction or alterations of an existing facility, “accessible to and usable by” means that patrons and employees of

commercial facilities, including individuals with disabilities, “are able to get to, enter and use the facility.” 56 Fed. Reg. 35544, 35574.

Compatible. Telecommunications equipment and CPE will be considered compatible if they conform with a compatibility interface standard for the interconnection of such equipment with peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities that is adopted by an accredited voluntary consensus standards body.

Without defined interface standards to govern the connection of telecommunications equipment and CPE with peripheral devices and specialized CPE, manufacturers of telecommunications equipment and CPE will be unable, as a practical matter, to achieve compatibility with peripheral devices and specialized CPE. Where there is no interface standard governing the connection of telecommunications equipment or CPE with a particular peripheral device or specialized CPE, achieving compatibility between telecommunications equipment and CPE and peripheral devices and specialized CPE frequently may be not readily achievable.

Manufacturer. The term “manufacturer” is defined as the division, business unit, subsidiary or other business entity that is responsible for introducing directly, or through distribution arrangements, related telecommunications equipment or CPE (often described as product lines) into the United States marketplace in their final form or has direct control over the design, development, fabrication and costs and expenses associated with such equipment.

This definition of “manufacturer” is most consistent with both the complexity of modern corporate organizations as well as the ADA precedent for

determinations of financial responsibility for the readily achievable removal of architectural and communication barriers. Under the ADA, when evaluating whether a specific barrier removal action is “readily achievable,” courts are instructed to consider “whether the local store was threatened with closure by the parent or is faced with job loss. . . .” House Committee on the Judiciary, H. Rep. No. 485, Part 3, 101st Cong., 2d Sess. (1990), at p. 55. The readily achievable barrier removal obligations in the ADA are not intended to result in corporate decisions to close neighborhood stores or eliminate jobs. Congress recognized that, regardless of the financial resources of a corporate entity, decisions related to local operations would inevitably reflect the financial performance of those local operations. cf. In the matter of Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, paragraph 204; Appendix B, (f)(3) (released August 22, 1997).

Similarly, the commission, in assessing the relationship between the financial resources of a corporate entity and decisions related to equipment designs, must bear in mind that decisions to introduce new products or to continue existing ones inevitably reflect the financial performance of those individual products. For manufacturers, individual products or product lines are “units of decision,” analogous to the local store operations Congress considered when enacting the ADA. Regardless of the size or financial resources of a corporate parent, individual product management teams, business units or divisions are provided limited financial resources. In evaluating whether it is readily achievable to make a product accessible or compatible, product teams, business units or divisions must consider whether, in light of these limited financial resources and the costs of incorporating additional accessibility features, a

financially prudent decision would be not to introduce a product. Such an action would be analogous to a decision to close a local retail store that does not meet financial targets because of the added burdens of the ADA, an effect that Congress did not intend the ADA to have. Moreover, because small manufacturers and product teams typically established by larger manufacturers typically have similar -- and limited -- resources, the definition of manufacturer does not establish disproportionate responsibilities based on the size of the manufacturer.

The entity which introduces equipment into the marketplace in its final form should be responsible for assuring compliance with Section 255. In the case of CPE, this generally would be the firm under whose brand name the equipment is marketed. Where a manufacturer designs, develops and fabricates equipment and introduces it into the marketplace under its own brand name, the responsibility for compliance with Section 255 is clear. In other cases, such as contract manufacturing (where a firm fabricates equipment designed, developed and marketed by another firm), private label arrangements (where a firm sets specifications for and markets under its own name, equipment designed, developed and fabricated by another firm), or license agreements (where a firm manufactures and markets equipment designed and developed by another firm), holding the firm that introduces the product in its final form into the marketplace responsible for compliance with Section 255 will provide all interested parties with a useful degree of certainty about the entity responsible for compliance with Section 255. Of course, the parties to arrangements such as those described above are free to apportion, by contract among themselves, liability for the consequences of equipment found not to be in compliance with the obligations of Section 255.

The definition of a manufacturer subject to these guidelines does not differentiate among firms based on their location or national affiliation. Like other technical or operational requirements for telecommunications equipment sold in the United States, these guidelines will apply to all manufacturers of telecommunications equipment or CPE sold in the United States, regardless of the location or national affiliation of the manufacturer. In accordance with long-standing commission policy, the definition of a manufacturer does not affect telecommunications equipment or CPE manufactured within the United States for export to other countries. *See, e.g.,* 47 C.F.R. 68.4 (providing an exemption for non-hearing aid compatible telephones manufactured for export).

Disability. The term “disability” means a current limitation affecting hearing, vision, movement, manipulation, speech or interpretation of information which substantially limits the use of telecommunications equipment, customer premises equipment or telecommunications services.

Section 255(a) of the Communications Act of 1934, as amended, incorporates by reference the definition of “disability” from the ADA. The ADA uses a three-pronged definition:

The term “disability” means, with respect to an individual --

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. 12102(2)(A)-(C). Although Section 255 of the Communications Act incorporates the ADA definition of disability, the definition is used in a different way than it is used in the ADA. The ADA uses this definition of disability to identify those

individuals who are entitled to the protections of the statute. The second and third prongs of the definition -- a record of an impairment or being regarded as having an impairment - - were included in the ADA to extend its provisions to individuals who, although they do not have an impairment which limits a major life activity, are, nevertheless, potential victims of discrimination on the basis of at one time having had an impairment or being regarded as having an impairment. House Committee on the Judiciary, H. Rep. No. 485, Part 3, 101st Cong., 2d Sess. (1990), at pp. 29-30.

Section 255 of the Communications Act uses the term “disability” to describe the types of impairments that manufacturers must consider when undertaking to make their telecommunications equipment and CPE accessible. In this context, the second and third prongs of the ADA definition of disability are not germane. Unless an individual has an active, current disability that “substantially limits” his or her ability to use telecommunications equipment or CPE, that individual does not need to make use of accessibility features. Inasmuch as the obligations of Section 255 apply to equipment that is marketed generally to all -- those with and without disabilities -- the guidelines apply only the first prong of the ADA definition and those disabilities Congress intended to be included – the functional limitations of hearing, vision, movement, manipulation, speech or interpretation of information. *See* Senate Committee on Commerce, Science and Transportation, S. Rep. No. 23, 104th Cong., 1st Sess. (1995), p 74; House Committee on the Judiciary, *supra*, at p. 29.

Readily achievable. An action by a manufacturer to make telecommunications equipment or CPE accessible, usable or compatible is “readily achievable” if it:

- a) is technically feasible at the time design or development activities for the telecommunications equipment or CPE commences;
- b) does not add much to the expense of designing or developing the telecommunications equipment or CPE or to the cost or expense of manufacturing or marketing its telecommunications equipment or CPE;
- c) does not add much to the time required to design or develop its telecommunications equipment or CPE;
- d) does not involve altering a fundamental or essential characteristic of the telecommunications equipment or CPE;
- e) would not significantly limit the usefulness, marketability or volume of sales of the telecommunications or CPE; and
- f) is not inconsistent with an existing FCC regulation, FCC technical specification or requirement, or stated FCC policy goal and does not conflict with other applicable interface standards.

The obligation of manufacturers to design, develop and fabricate telecommunications equipment or CPE to be accessible, usable or compatible is not unlimited. Rather, the legal obligation is expressly limited to that which is readily achievable. Section 255(a) (2) incorporates by reference the term “readily achievable” from the ADA where it is defined as “easily accomplishable and able to be carried out without much difficulty or expense.” The ADA further provides that “in determining whether an action is readily achievable, factors to be considered include --

- (A) the nature and cost of the action needed under this act;
- (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses



and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities; and

(D) the type of operations of the covered entity, including the composition, structure and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.”

42 U.S.C. 12181(9). In view of its origins, it is appropriate to look for guidance about the meaning of the term “readily achievable” in the context in which it is used in the ADA.

There, the term “readily achievable” is used to describe the limits on the obligation of operators of public accommodations to remove architectural and communications barriers that are structural in nature. Barrier removal is limited to those circumstances where it can be accomplished “easily and without much difficulty or expense.” The term addresses “the degree of ease or difficulty that the business operator would experience in removing a barrier. . . .” House Committee on Energy and Commerce, H. Rep. No. 485, Part 4, 101st Cong., 2d Sess. (1990), at pp. 56-57 (“Commerce Report”). Examples of the types of actions that would be considered readily achievable include “the addition of grab bars, the simple ramping of a few steps, the lowering of telephones, the addition of raised letter and Braille markings on elevator control lights, and similar modest adjustments.” House Committee on Education and Labor, H. Rep. No. 485, Part 2, 101st Cong., 2d Sess. (1990), at p. 110. Congress intended that the ADA require an operator of a public accommodation only to take such modest actions to increase the accessibility of the public accommodation, even if the end result is something short of full accessibility.

The Department of Justice (DOJ) regulations implementing the provisions of Title III of the ADA that require the removal of architectural barriers in existing facilities, where readily achievable, provide numerous examples of steps to remove barriers. 28 C.F.R. 36.304(a) and (b). None of these examples are steps which would constitute more than a small fraction of the operating expenses of the public accommodation. The DOJ recommended priorities for operators of public accommodations for barrier removal, clearly recognizing that all barriers may not be removed at once. 28 C.F.R. 36.304(c).

Based on the foregoing, the term readily achievable requires manufacturers to make telecommunications equipment and CPE accessible or compatible only to the extent that modest features that increase the accessibility of the equipment to individuals with disabilities can be implemented. It would be inconsistent with the ADA definition and DOJ interpretations to require manufacturers of telecommunications equipment or CPE to incorporate accessibility features if doing so would add much expense to the cost of designing, developing or fabricating a product. Examples of accessibility features that generally would be readily achievable include the use of highly contrasting colors for numbers or letters and their background, making buttons as large as practical in view of the size of the equipment, and making wireline handsets that can be used by individuals with hearing aids equipped with telecoils. Other technically feasible features -- voice recognition, for example -- should not be required on simple, low-cost products because the degree of difficulty or expense of providing them currently would exceed the readily achievable threshold.

Similarly, the addition of accessibility features which add much time to manufacturers' product design and development processes for telecommunications equipment and CPE would not be readily achievable. Nor would the addition of accessibility features which are not technically and commercially feasible at the commencement of design and development activities. Because of the competitive environment in the telecommunications industry, telecommunications equipment and CPE products have relatively short lives in the marketplace. For this reason, manufacturers are under intense pressure to design and develop new products quickly. In such an environment, the addition of some accessibility features, especially those features which require the investment of time and resources to develop new technology, can extend a manufacturer's normal product design and development time and, as a consequence, can cause a manufacturer to miss a window of opportunity in the marketplace, inevitably resulting in a significant loss of sales. Actions with this result are clearly not readily achievable. ADA precedent confirms this conclusion. DOJ clearly has indicated that actions to remove barriers to accessibility are not readily achievable if they materially degrade a public accommodation's operations or revenue. 28. C.F.R. 36.304 (f) (rearrangement of store shelves, display racks, and restaurant tables to be wheelchair accessible) "is not readily achievable to the extent that it would result in a significant loss of selling or serving space."

In applying the definition of readily achievable to a particular piece of telecommunications equipment or CPE, the commission should not consider the incorporation of multiple accessibility features in isolation one from another. If a manufacturer incorporates features that resolve one identified barrier to accessibility, and

the incorporation of features resolving additional barriers would involve efforts that, in total, would exceed the readily achievable standard -- by, for example, adding much expense to the cost of production -- incorporation of the additional accessibility features on that particular piece of equipment would not be required. The DOJ requirements for the ADA are consistent with this approach. In addressing the obligations of operators of public accommodations to remove barriers to accessibility to the extent that it is “readily achievable,” DOJ determined that, under the ADA, it is “appropriate to consider the cost of other barrier removal actions as one factor in determining whether a measure is readily achievable.” DOJ, Final Rule, 56 Fed. Reg. 35544, at 35554.

Likewise, it is consistent with Section 255 and the ADA to conclude that the readily achievable accessibility of telecommunications equipment and CPE may be achieved without modifying each and every product or model within a product line. Several examples from the ADA context support the proposition that accessibility should be assessed across a product line, rather than on a product-by-product basis. The regulations implementing the ADA do not require hotels to make every hotel room accessible to individuals with disabilities who use wheelchairs. Rather the ADA requires hotels to make some rooms of each type (suites, regular rooms, etc.) accessible “in order to provide persons with disabilities a range of options equivalent to those available to other persons. . . . Factors to be considered include room size, cost, amenities provided and the number of beds provided.” ADA Guidelines for Buildings and Facilities, 28 C. F. R. Part 36, App. A at 63. Likewise, the ADA Guidelines do not require theaters to make every seat accessible to persons using wheelchairs. Rather, the guidelines require theaters and other assembly areas to provide wheelchair seating “so as to provide

people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public,” including the option to sit beside the companion of one’s choice. *Id.* at 56.

Under the definition of readily achievable, telecommunications equipment and CPE manufacturers are not required to add accessibility features if doing so would alter fundamentally the nature of the equipment. The DOJ regulations implementing the ADA do not require operators of public accommodations to modify their policies, practices or procedures where “the modification would fundamentally alter the nature of the [public accommodation’s] goods, services, facilities. . . .” 28 C.F.R. 36.302. For example, a manufacturer of a very small communications device intended to meet a market need for such small devices is not required to incorporate accessibility features -- for example, large control buttons or a large visual display on a wrist-watch sized paging device -- that would require enlarging the size of the device, thereby altering its fundamental characteristic of “smallness.” Similarly, manufacturers are not required to incorporate accessibility features that would materially limit the mass market appeal -- and hence the volume of sales -- of a product in the general marketplace. Incorporating accessibility features that would so limit the appeal of a product would have the effect of changing a mass market product into an assistive device of limited application -- thus altering a fundamental characteristic of the product.

Finally, the addition of a feature or modification to a product is not readily achievable if it is inconsistent with an existing FCC regulation, technical specification or requirement, or stated policy goal, or if it conflicts with an other applicable interface

standard. For example, although it might be feasible to make a product more accessible by modifying the parameters of the product's transmitter, the modification would not be required if it is inconsistent with the Commission's rules.

2. Accessibility and compatibility of telecommunications equipment and CPE.

General. Section 255(e) requires the Architectural and Transportation Barriers Compliance Board ("Access Board"), in conjunction with the Commission, to develop accessibility guidelines for the accessibility of telecommunications equipment and CPE. In discharging its portion of this conjoint responsibility, the Access Board convened the Telecommunications Access Advisory Committee ("TAAC") to assist in developing these accessibility guidelines. Specifically, the TAAC was charged with making recommendations on the following issues: (1) types of equipment to be covered by the guidelines; (2) barriers to the use of such equipment by persons with disabilities; (3) solutions to such barriers, if known, categorized by disability; and (4) the contents of the guidelines. *See* Notice, 61 Fed. Reg. 13813. Following the publication of the TAAC's report, the Access Board proposed and sought public comment on its proposed Telecommunications Act Accessibility Guidelines. *See* Notice, 62 Fed. Reg. 19178.

By adopting the substantive provisions of this Proposal for FCC Guidelines Implementing Section 255 of the Communications Act, the Commission would discharge its portion of the conjoint responsibility imposed on the Commission and Access Board by Section 255.

Ongoing obligation: The obligation to evaluate the accessibility of telecommunications equipment and CPE is an ongoing obligation that must be accomplished at the beginning of the design and development process for new equipment and upgrades of existing equipment that materially affect the functionality of the equipment. Early consideration of accessibility in the design and development for telecommunications equipment and CPE will have the effect of enhancing accessibility. Given the speed of technological advances which quickly render existing equipment obsolete, retrofitting equipment already in the marketplace would result in a serious misallocation of resources and would stifle innovation.

Manufacturer's discretion. The solutions to accessibility barriers incorporated by a manufacturer in a given product are not appropriately considered in isolation from the solutions incorporated in its other products. These Guidelines recognize that there will be cases where a manufacturer may not be able to achieve the creation of a single product that addresses accessibility for all, or some, combinations or degrees of disabilities. In fact, products which attempt to address all disabilities, even through selectable modes of operation, may become difficult for everyone to use and can introduce problems for those with cognitive disabilities. Therefore, a manufacturer shall have reasonable discretion in choosing among those accessibility features to be incorporated into telecommunications equipment and CPE. Notwithstanding this discretion, a manufacturer should consider incorporating into another comparable product, an access feature or features not addressed elsewhere. Manufacturers shall make

good faith efforts to address the limitations which affect the use of telecommunications equipment and CPE by persons with disabilities.

The manufacturer's discretion will be exercised in an environment in which two conditions exist. First, the design of individual items of equipment to incorporate solutions to a wide variety of barriers is impractical. For example, individuals with some types of impaired mobility may benefit from a keypad that is larger than the one normally used with telephones, while others may benefit from a keypad that is smaller than the keypad normally used. The impracticality of designing a single product with both "solutions" to impaired mobility is obvious. And, second, consumers, including individuals with disabilities, have the ability to choose among manufacturers' offerings in a competitive marketplace. In the case of buildings and facilities there is little, if any, ability to choose to enter a building on the basis that meets one's unique accessibility needs; therefore all buildings and facilities must be equally accessible. In contrast, CPE generally is used by an individual or a small known group of individuals, is selected to meet the unique needs of those specific individuals or small groups of known individuals, including individuals with disabilities, and is obtained from among a variety of products available from a manufacturer. In many cases the needs of an individual with disabilities can be satisfied by selecting specific equipment from among that generally available in the marketplace. Examples include vibrating pagers (useful both for individuals with impaired hearing and those who wish a "silent alert"), volume controls (useful for both those with impaired hearing as well as those working in a noisy environment), and speakerphones (useful for both those with certain musculatory or



skeletal impairments which prevent holding a telephone receiver to the ear as well as those who participate in lengthy conference calls).

If manufacturers of telecommunications equipment and CPE were not afforded this reasonable degree of manufacturers' discretion in choosing among a wide range of accessibility features, the cost of complying with the requirements of Section 255 would be excessive and counter-productive to achieving the goals of Section 255. For example, if manufacturers were required to demonstrate either that each product that they sell is accessible or that accessibility is not readily achievable, the result could be large, costly, compliance bureaucracies employed by the Commission and by manufacturers, and a diversion of resources from product design and development with the inevitable long-term result of reduced accessibility – both an unintended and undesired consequence.

### 3. General guidelines for manufacturers.

#### Adoption of a disciplined process to ensure accessibility and compatibility.

Recognizing that accessibility is most effectively addressed at the beginning of the product introduction process, Section 255 requires manufacturers to ensure that equipment is “designed, developed, and fabricated to be accessible to and usable by individuals with disabilities. . . .” In addition, these Guidelines establish an expectation that, no later than twelve months following the effective date of these Guidelines, each manufacturer of telecommunications equipment or CPE will adopt a disciplined process

for evaluating the means for accomplishing the goal of enhancing the accessibility and usability of its equipment.

Generally, design activities commence approximately 24 months prior to the first introduction of new CPE into the marketplace, and, in the case of telecommunications equipment, even earlier. It would be unrealistic to expect that manufacturers would be able to consider the Access Board and Commission Guidelines in their equipment designs prior to, or even immediately following, the effective date of these Guidelines. Thus, a twelve month period is established for the purpose of enabling manufacturers to: (i) develop a process for evaluating the accessibility of its product designs; (ii) identify barriers to accessibility; (iii) incorporate solutions to those barriers to the extent that they are readily achievable; (iv) communicate that process to its equipment designers and developers; and (v) train its designers and developers in the use of the process.

Each manufacturer may adopt that disciplined process which is most consistent with its unique organizational and management structure, provided that the process, at a minimum, will: (a) identify barriers to the accessibility of the manufacturer's telecommunications equipment or CPE resulting from the limitations constituting a disability; (b) disseminate information about accessibility needs and barriers to employees and others involved in the equipment design and development processes; (c) consider accessibility early in the design and development processes; and

(d) evaluate designs to remove barriers to accessibility or to enhance the accessibility of telecommunications equipment or CPE.

Because of the wide variety of manufacturers' organizational structures, the absence of generally agreed-upon approaches to identifying the accessibility barriers and solutions, and the very immature state of what could be called "accessibility engineering" principles, third-party auditing or certification of manufacturers' processes for identifying and resolving barriers to accessibility is not required.

The Access Board, at the time it promulgated its ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG"), had the benefit of a decade or more of experience in discharging similar responsibilities required by the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355. Moreover, in the case of the construction of accessible buildings and facilities, the affected industries had a similar period in which to gain experience in constructing facilities to meet the requirements of the predecessors to the ADAAG. By contrast, no similar base of experience exists related to the accessible design, development, or fabrication of telecommunications equipment and CPE.<sup>2</sup> In view of the uncertainty that necessarily results from this lack of experience, requiring third-party audit or certification programs is unnecessary and of little or no value.

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<sup>2</sup> For example, the Access Board's Notice announcing the establishment of its Advisory Committee states that the Committee will be charged with identifying the barriers to the use of telecommunications and customer premises equipment by persons with various types of disabilities and the solutions to such barriers, if known, categorized by type of disability. . . . (Emphasis added.)

Manufacturers shall incorporate into their equipment those designs to increase accessibility identified by their processes to the extent that it is readily achievable to do so. Paragraphs 9. and 10. describe those aspects of accessibility and compatibility which manufacturers are expected to consider when evaluating whether it is readily achievable to make telecommunications equipment and CPE accessible or compatible. They contain the substantive portions of Subparts C and D of the Architectural and Transportation Barriers Compliance Board's ("Access Board") proposed Telecommunications Act Accessibility Guidelines. Notice, 62 Fed. Reg. 19178.

When designs to remove barriers to accessibility are not readily achievable, manufacturers shall: (a) identify applicable interface standards, adopted by accredited standards bodies governing the connection of telecommunications equipment or CPE with existing peripheral devices or specialized customer premises equipment, and (b) ensure compatibility with such standards, to the extent that it is readily achievable to do so.

Adoption of measures to ensure usability. Not later than twelve months following the effective date of these Guidelines, manufacturers are required to adopt measures to ensure that individuals with disabilities are provided with usable information and documentation about their telecommunications equipment or CPE, to the extent that it is readily achievable to do so.

Because marketing and product communications are not a part of the equipment design, development, and fabrication process, they are not covered by Section 255. Nevertheless, because marketing and product communications, including user guides or instructions, installation instructions for end-user installable devices, and other product support communications like customer call centers, are an important aspect of making equipment accessible to and usable by individuals with disabilities, manufacturers have voluntarily agreed to provide such information, including information about accessibility and compatibility features, in alternate formats.

#### 4. Complaints

General. Section 255(f) gives the Commission "exclusive jurisdiction" over Section 255 complaints. Section 255 does not permit private lawsuits to enforce Section 255 requirements.

Informal Resolution of Inquiries or Complaints. The Commission should establish a policy in favor of voluntary resolution of Section 255 complaints. In many instances, manufacturers and persons with disabilities will be able to resolve voluntarily complaints about the accessibility or compatibility of telecommunications equipment and CPE. A policy that favors voluntary resolution of complaints will conserve the limited Commission resources available for enforcement. Moreover, a cooperative approach between manufacturers and persons with disabilities is most likely to promote the goals of accessibility and compatibility established by Section 255.

Each manufacturer subject to Section 255 should be required to establish one or more points of contact to answer inquiries, to provide information, and to address complaints about the accessibility of its telecommunications equipment or customer premises equipment. Each manufacturer should provide its points of contact information to the Commission and, upon request, to individuals with disabilities or to their representatives. This will ensure that there is at least one person from each manufacturer who is responsible for receiving and coordinating inquiries and complaints from persons with disabilities or the Commission.

To implement this policy in favor of voluntary resolution of Section 255 complaints, the Commission should require that all complaints be submitted to the manufacturer's point of contact in the first instance, before they are submitted to the Commission. In order to ensure that complainants receive a prompt response from manufacturers, a manufacturer must respond to a written complaint (which may be in electronic form including electronic mail, facsimile transmission, or audio cassette) within 60 days after receipt thereof, unless the complainant agrees to an extension.

The Commission should only consider those complaints that cannot be resolved informally between a complainant and a manufacturer. At a minimum, this mandatory attempt at informal resolution will require a complainant to submit a complaint to the manufacturer and allow the manufacturer 60 days in which to resolve the complaint or formulate a response. If a person with a disability submits a complaint to

the Commission without exhausting these requirements for informal complaint resolution, the Commission should either return the complaint to the complainant with instructions about how to contact the manufacturer, including the manufacturer's point(s) of contact information, and how to utilize the informal complaint process or forward the complaint to the manufacturer's point of contact for informal resolution.

#### Formal Commission Resolution of Complaints.

Pleading requirements. A complaint must demonstrate on its face that the complainant is entitled to formal consideration on the merits. First, and most important, a complainant must demonstrate that he or she has attempted to achieve an informal resolution of the complaint as described in the above discussion of the informal resolution of inquiries or complaints. As a result, the complaint must either: (1) include copies of the informal complaint submitted to the manufacturer and the manufacturer's response; or (2) demonstrate that the manufacturer failed to respond or provide a satisfactory resolution of a complaint within 60 days.

Second, in order to state a claim that Section 255 has been violated, a complaint should state with particularity the barrier to accessibility or compatibility associated with the equipment subject to the complaint. Particularity is necessary to allow both manufacturers and the Commission to respond effectively to complaints. Accordingly, a complainant should be required, at a minimum, to identify the specific feature of the equipment that is not accessible or compatible. For example, a complaint indicating that "this phone is inaccessible to me as a person with a hearing impairment"

does not demonstrate sufficient particularity. In contrast, a complaint indicating that "the volume control on this phone cannot be adjusted loud enough so that I can hear" is sufficiently particular.

Additionally, a complainant should, whenever possible: (a) identify a specific known solution to the barrier complained of; and (b) demonstrate that incorporating that feature would have been readily achievable. Complainants bear the burden of proving that Section 255 has been violated. As a result, those complaints that identify specific, known, readily achievable solutions to accessibility or compatibility barriers will be the most compelling. By including such information, if known, a complainant can focus the Commission's scrutiny upon the specific alleged area of non-compliance.

Where the Commission determines that a complaint appears on its face to qualify for formal resolution, the Commission shall notify the manufacturer's point of contact and the complainant of this determination. The manufacturer then has 60 days in which to provide a written answer to the Commission.

##### 5. Complaint answers.

Manufacturer's answer. A manufacturer shall have 60 days from receipt of the notice from the Commission indicating that a complaint appears to qualify for formal



resolution in which to file an answer. In the answer, a manufacturer may raise several defenses.

A manufacturer may argue that the complainant has failed to exhaust the mandatory voluntary complaint resolution process with the manufacturer. If a manufacturer's response to a complaint demonstrates that either: (1) the complainant has not submitted the complaint to the manufacturer; or (2) the manufacturer's 60 days to respond to an informal complaint have not yet expired, then the Commission should return the complaint.

A manufacturer may argue that it is entitled to a presumption of compliance because it has adopted a disciplined process for evaluating and incorporating accessibility and compatibility issues as part of the product design process. Accessibility and compatibility can be addressed most easily and economically if considered early in the design process, with the result that accessibility or compatibility features are more likely to be readily achievable. By establishing this presumption, manufacturers have an incentive to adopt such a disciplined process. A manufacturer may invoke this presumption if it has: (1) adopted such a process; (2) described that process either to the Commission or to the complainant; and (3) used that process consistently.

A manufacturer may assert any of three defenses on the merits. These defenses identify those circumstances where a manufacturer has complied with its obligation under Section 255 by providing equipment that is accessible or compatible, to

the extent readily achievable. First, a manufacturer should be permitted to demonstrate that the product complained of is, in fact, accessible or compatible for the complainant. Situations may arise, for example, where a product is in fact accessible or compatible if used correctly, but has not been used correctly by the complainant.

Second, a manufacturer may demonstrate that one or more of its existing products, or products in the design and development stage, with reasonably comparable features and price provide, or will provide, the accessibility or compatibility required by the complainant. By permitting this defense, the Commission recognizes that the readily achievable standard does not require every piece of telecommunications equipment to be accessible to every person with a disability. Instead, Section 255 requires each manufacturer to provide a range of functionally equivalent, comparably priced products that are accessible to individuals with disabilities. The ADA, the source of the "readily achievable" standard that defines the scope of manufacturers' obligations, provides guidance here. The ADA has been implemented with a recognition that the readily achievable definition will, in some circumstances, result in persons with disabilities having accessibility but fewer choices than the general public. *See e.g.*, Department of Justice Standards for Accessible Design, 28 C.F.R. § 36.308 (regulations governing fixed seating in public theaters and stadiums); 28 C.F.R. Part 36, App. A, § 9.1.2 (wheelchair accessibility of hotel rooms); *Id.* at § 9.1.3 (requirements related to hotel rooms and accessibility for individuals with hearing impairments). The common thread in these regulations implementing the ADA is that persons with disabilities will have a more

limited number, but comparable range, of choices in comparison to individuals without disabilities.

A product family approach to compliance with Section 255 is warranted because of the varying and occasionally conflicting accessibility needs of persons with different disabilities. This approach to compliance will permit manufacturers to incorporate a range of accessibility and compatibility features to accommodate different disabilities, to the extent readily achievable, across the manufacturer's product families. This approach will maximize the types of equipment that are accessible and compatible for persons with different disabilities.

Third, a manufacturer may demonstrate that the requested accessibility or compatibility feature was not readily achievable and therefore not required by Section 255. Readily achievable is defined to mean "without much difficulty or expense." In addition, the amount of difficulty required cannot easily be quantified. As a result, what is readily achievable and therefore required must necessarily be resolved on a case-by-case basis utilizing the criteria set forth in the discussion of the meaning of the term "readily achievable."

Where the Commission has entered a consent order and the time for the manufacturer to comply with that order has not yet expired, the manufacturer shall be shielded from complaints raising the same or substantially the same areas of noncompliance. The goals of accessibility and compatibility established by Section 255

will best be served by a policy which favors proactive over retroactive relief. For this reason, the Commission should attempt to negotiate consent orders with manufacturers that have either: (1) been found to have violated Section 255; or (2) voluntarily agree to enter into such consent orders. Such consent orders shall require the manufacturer to undertake specific measures to remedy the identified or alleged area of noncompliance within a specified time period.

The Commission shall dismiss any complaints that raise the same or substantially the same identified or alleged areas on noncompliance as an existing consent order. In dismissing a complaint under this section, the Commission shall notify the complainant of the subject matter of the consent order and the deadline for compliance. The Commission also shall notify the complainant that subsequent complaints, except complaints alleging failure to comply with the consent order, are precluded and will be dismissed.

6. Replies to complaint answers.

Complainant's reply. A complainant shall be provided 60 days in which to reply to the manufacturer's answer. In order to rebut a presumption of compliance, a complainant should be required to present specific factual information demonstrating that the manufacturer in fact: (1) has not adopted a disciplined process; (2) has not described that process either to the Commission or to the complainant; or (3) has not used that process consistently.

Because a manufacturer's defenses on the merits are fact-based, a complainant, to overcome these defenses, shall be required to provide specific evidence that the manufacturer's claimed defense is not factually accurate in one of the following respects: (1) the substitute product identified by the manufacturer does not possess reasonably comparable features and price as the product complained of; (2) the substitute product is not accessible to the complainant; or (3) the required accessibility or compatibility was readily achievable at the outset of the design and development activities related to the equipment subject to the complaint.

If a complainant fails either to respond or to provide specific evidence refuting the manufacturer's claimed defenses, the complaint shall be dismissed.

#### 7. Remedies.

The Section 255 goals of accessibility and compatibility are best achieved with a policy that favors proactive relief over monetary penalties for violations of Section 255. In imposing a penalty for a violation, the Commission should prefer requiring that the manufacturer undertake additional obligations to achieve accessibility or compatibility in the future, rather than requiring payment of a fine.

Therefore, the Commission should, when appropriate, negotiate consent orders with manufacturers that have been found to have violated Section 255. Such

consent orders would obligate a manufacturer to undertake specific measures to remedy an identified area of noncompliance within a specified time period. In addition, in exchange for dismissal of a complaint, manufacturers may voluntarily agree to a consent order and undertake similar obligations for future remedial measures. These consent orders would be consensual in that they permit a manufacturer voluntarily to undertake a program that has been approved by the Commission as an appropriate method for remedying an alleged area of noncompliance with Section 255. In both instances, by agreeing to enter into a consent order and adhering to its terms, a manufacturer would avoid monetary penalties for noncompliance.

Consent orders should establish a specific time period or deadline for the manufacturer to fulfill its agreed upon obligations. Moreover, the manufacturer's obligations under the consent order must be sufficiently specific so that the manufacturer's compliance with the order, and therefore Section 255, can be accurately assessed at the end of the specified period.

Where a manufacturer fails to comply with a consent order, the manufacturer should be subject to any and all penalties that could have been imposed in the underlying complaint proceeding if all issues had been resolved against the manufacturer. The Commission would bear the burden of proving that the consent order has been violated in some material respect. A manufacturer's failure to comply with a consent order is only material if it has caused significant delay or resulted in a failure to accomplish the accessibility or compatibility contemplated in the consent order. Further,

proceedings to determine whether a consent order has been violated shall be limited exclusively to this issue, and shall not address any additional issues related to compliance with Section 255.

#### 8. Standards.

Section 255 of the Communications Act requires that, when it is not readily achievable for telecommunications equipment or CPE to be accessible, it must be compatible with existing peripheral devices or specialized CPE commonly used by individuals with disabilities to achieve access, if readily achievable.

Telecommunications equipment and CPE will be deemed to be compatible with existing peripheral devices or specialized customer premises equipment if it conforms with an applicable compatibility interface developed by a voluntary consensus-based standards development process. The purpose of this provision is to ensure that all manufacturers, including manufacturers of telecommunications equipment and CPE and manufacturers of peripheral devices and specialized CPE, have a reasonable degree of certainty regarding the technical means of achieving the interconnection of their equipment and an opportunity to participate in the development of standard means of interconnection. Without the certainty afforded by defined interface standards, manufacturers of telecommunications equipment and CPE will be unable, as a practical matter, to achieve a significant and predictable degree of compatibility with peripheral devices and specialized CPE.

Consistent with the National Technology Transfer and Advancement Act of 1995, 15 U.S.C. 3701, any technical specifications and practices, comprising compatibility interface standards for the interconnection of telecommunications equipment or CPE with peripheral devices or specialized CPE used to achieve access, should be developed by private, voluntary standards-setting bodies. The telecommunications industry (comprising manufacturers of telecommunications equipment and CPE and service providers) has a long history of developing standards to ensure the interoperability of the many distinct elements of a modern telecommunications system using voluntary, accredited, consensus standards organizations such as the Telecommunications Industry Association (TIA) and American National Standards Institute (ANSI) Committee T1. The ANSI program for accrediting voluntary standards development organizations is well-developed and widely recognized. ANSI provides an opportunity for public review and comment on all applications for ANSI accreditation and limits its accreditation to those standards-setting organizations that are open to participation by all affected parties, foster the development of a consensus position among those affected parties, and operate in accordance with generally accepted principles of openness and “due process.”

In addition, the ANSI accreditation program includes two mechanisms to ensure that, once accredited by ANSI, voluntary standards development organizations continue to operate in a manner consistent with their ANSI accreditation: ANSI has an appeals mechanism that can be used by any materially affected party with a complaint



about an accredited organization's standards development process and has implemented a program for auditing accredited organizations on a regular basis to ensure that their activities conform with both their own accredited procedures and with the current ANSI requirements.