

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Accessibility of User Interfaces, and Video	)	MB Docket No. 12-108
Programming Guides and Menus	)	
	)	
Accessible Emergency Information, and Apparatus	)	MB Docket No. 12-107
Requirements for Emergency Information and	)	
Video Description: Implementation of the Twenty-	)	
First Century Communications and Video	)	
Accessibility Act of 2010	)	

**REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

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By the Commission: Acting Chairwoman Clyburn and Commissioner Rosenworcel issuing separate statements; Commissioner Pai approving in part, concurring in part, and issuing a statement.

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## I. INTRODUCTION

1. Pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),<sup>1</sup> this *Report and Order and Further Notice of Proposed Rulemaking* adopts rules requiring the accessibility of user interfaces on digital apparatus and navigation devices used to view video programming. The rules we adopt here will effectuate Congress’s goals in enacting Sections 204 and 205 of the CVAA by: 1) enabling individuals who are blind or visually impaired to more easily access video programming on a range of video devices; and 2) enabling consumers who are deaf or hard of hearing to more easily activate closed captioning on video devices.

2. As discussed in Section III below, we delineate the types of devices that are covered under Sections 204 and 205 and discuss the responsible entities under each section. Specifically, we:

- Conclude that Section 205 of the CVAA applies to “navigation devices” as defined by Section 76.1200 of the Commission’s rules – that is, devices and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.
- Find that under current marketplace and technological conditions, consumers generally only access multichannel video programming and other services offered over multichannel video programming systems through the use of devices that have built-in capability to use a conditional access mechanism, and therefore, Section 205 only applies to devices manufactured with a CableCARD slot or other conditional access technology; this includes devices such as set-top boxes, digital cable ready televisions, devices with pre-installed MVPD applications, and cable modems.
- Conclude that Section 204 of the CVAA applies to all other “digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound.”

<sup>1</sup> Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA). The foregoing are collectively referred to herein as the CVAA. The CVAA was enacted on October 8, 2010.

Interpret this phrase the same as a comparable phrase in Section 203 was interpreted in the *IP Closed Captioning Order*, but excluding navigation devices. Thus, this class of devices includes televisions and computers without conditional access capability, mobile devices (such as tablets and smartphones) that do not have pre-installed MVPD applications, and removable media players.

- Conclude, consistent with the Commission’s approach in implementing Section 203 in the *IP Closed Captioning Order*, that Section 204 applies to the video players and user interfaces of video applications, such as Netflix, Hulu, and Amazon, when such applications are pre-installed on digital apparatus by the manufacturer.
- Find that professional and commercial equipment and public safety and enterprise equipment are outside the scope of Sections 204 and 205.
- Defer the compliance deadline by an additional five years for display-only monitors and video projectors and devices, such as digital cameras, that are subject to the waiver granted in the *IP Closed Captioning Reconsideration Order*.
- Determine that under Section 204, the entities responsible for compliance are digital apparatus manufacturers.
- Determine that under Section 205, the entities responsible for compliance are MVPDs leasing or selling navigation devices, equipment manufacturers of navigation devices that place devices into the chain of commerce for sale to consumers, and other manufacturers of navigation device hardware and software.
- Find that MVPDs and other manufacturers of software installed on devices by a device manufacturer that provides on-screen text menus and guides for the display or selection of multichannel video programming, such as applications offered by MVPDs to view multichannel video programming, are responsible for compliance with Section 205, including both audible guide and menu accessibility and ensuring the software’s closed captioning capability can be activated through a mechanism reasonably comparable to a button, key, or icon.

3. As discussed in Section IV below, we specify the accessibility obligations of devices covered under Sections 204 and 205. Specifically, we:

- Under Section 204, require apparatus designed to receive or play back video programming transmitted simultaneously with sound to make “appropriate” built-in functions (*i.e.*, those used for the reception, play back, or display of video programming) accessible to individuals who are blind or visually impaired.
  - Conclude that, at this time, the 11 essential functions identified by the VPAAC are the “appropriate” built-in functions under Section 204.
  - Conclude that, if the “appropriate” built-in functions are accessed through on-screen text menus or other visual indicators built in to the apparatus, such functions must be accompanied by audio output.
- Under Section 205, require navigation devices to make on-screen text menus and guides for the display or selection of multichannel video programming audibly accessible.
  - Conclude that nine of the 11 essential functions identified by the VPAAC are used for the display or selection of video programming and must be made audibly accessible on navigation devices under Section 205 to the extent they are accessed through on-screen text menus and guides.

- Conclude that the remaining two VPAAC functions – power on/off and volume adjust/mute – must be made accessible (but not necessarily *audibly* accessible) to individuals who are blind or visually impaired on navigation devices under Section 205 because they are controls necessary to access covered functions.
- Recognize that a covered apparatus or navigation device may not include all of the functions required to be accessible and is not required to add any of these functions, but to the extent the apparatus or navigation device *does include* any of these functions, they must be made accessible in accordance with our rules.
- Do not adopt technical standards or other technical requirements for compliance with the accessibility mandates in Sections 204 and 205, but apply the definition of “accessible” in Section 6.3(a) of the Commission’s rules for guidance on how to make functions generally accessible.
- Implement the same rules as in other CVAA contexts for determining whether compliance with Section 204 and 205 accessibility requirements is “achievable.”
- Require apparatus covered by Section 204 to provide access to closed captioning and video description through a mechanism for each that is reasonably comparable to a button, key, or icon.
- Require navigation devices covered by Section 205 to provide access to closed captioning (but not, at this time, video description) through a mechanism reasonably comparable to a button, key, or icon.

4. As discussed in Section V below, we set forth the compliance obligations of entities subject to Section 205 of the CVAA (“covered entities”) to provide accessibility “upon request.” Specifically, we:

- Require a covered entity to provide accessible navigation devices to requesting blind or visually impaired individuals “within a reasonable time,” defined as a time period comparable to the time that it takes such entity to provide navigation devices generally to other consumers;
- Conclude that a covered entity must permit blind or visually impaired consumers to request compliant devices through any means that it generally makes available to other consumers that request navigation devices;
- Conclude that a manufacturer that provides navigation devices at retail to requesting blind or visually impaired consumers must make a good faith effort to have retailers make available compliant navigation devices to the same extent they make available navigation devices to other consumers generally; and
- Conclude that any means that a covered entity employs to accept requests for accessible devices may not be more burdensome to blind or visually impaired individuals than the means the entity employs to provide navigation devices generally to other consumers, *e.g.*, if a covered entity establishes a website through which blind or visually impaired consumers can request accessible devices, such website must be screen-readable.
- With respect to a covered entity that relies on separate equipment or software (“separate solution”) to achieve accessibility under Section 205(b)(4) of the CVAA, we:
  - Conclude that a covered entity that relies on a separate solution to achieve accessibility is responsible for providing such solution to a requesting blind or visually impaired individual;
  - Require that if a non-compliant navigation device has any functions that are required to be made accessible pursuant to the rules we adopt in this *Report and Order*, any separate

solution relied upon to achieve accessibility must make all of those functions accessible or enable the accessibility of those functions;

- Require that a separate solution be provided in a manner that is not more burdensome to requesting blind or visually impaired individuals than the manner in which other consumers generally obtain navigation devices;
  - Require that a covered entity relying on a separate solution must make available such solution “within a reasonable time,” defined as a period of time comparable to the time in which it generally provides navigation devices to consumers who are not blind or visually impaired;
  - Conclude that a covered entity that provides separate equipment or software may not impose on a requesting blind or visually impaired consumer any charges beyond those it has imposed for the non-compliant navigation device. In cases where an entity provides accessibility functionality in only select devices, this constitutes an “other solution” under Section 205(b)(4)(B) for which an entity can impose no additional charge. For example, if a covered entity’s only solution is to provide a sophisticated navigation device (one with enhanced features and functions) to a consumer that requests a less sophisticated device, it cannot charge the consumer more than the price of the less sophisticated device; and
  - Conclude that if a covered entity’s chosen manner of compliance involves a software solution that must be operated on a third-party device (*e.g.*, a laptop, tablet, smart phone) or if additional services are required to make use of the device, this manner of compliance constitutes an “other solution” under Section 205(b)(4)(B); thus, the covered entity must provide that solution – *i.e.*, the software, third-party device, and any service needed to use the accessibility features – to the requesting individual at no additional charge.
- Require a covered entity to ensure that activation mechanisms comparable to a button, key, or icon for built-in closed captioning are provided on all its navigation devices (*i.e.*, such mechanisms are not subject to the statutory “upon request” language in Section 205).

5. As discussed in Section VI below, we address a number of other issues related to our implementation of Sections 204 and 205. Specifically, we:

- Conclude that MVPDs must clearly and conspicuously inform consumers about the availability of accessible navigation devices when providing information about equipment options in response to a consumer inquiry about service, accessibility, or other issues, and also must provide such notice on their official websites.
- Allow covered entities to require verification of eligibility (as an individual who is blind or visually impaired) to the extent the covered entity chooses to rely on an accessibility solution that involves providing the consumer with sophisticated equipment and/or services at a price that is lower than that offered to the general public.
- Permit Section 204 covered entities to comply with the new requirements by alternate means, as provided in the CVAA.
- Adopt procedures for consumer complaints alleging a violation of the new requirements.
- Set a three-year compliance deadline by which covered entities must generally comply with the requirements of Sections 204 and 205.
- Set a five-year compliance deadline by which certain mid-sized and smaller MVPD operators (400,000 or fewer subscribers) and small MVPD systems (20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers) must comply with the requirements of Section 205.

- Decline at this time to adopt a permanent exemption for small cable systems of 20,000 or fewer subscribers, as permitted by Section 205(b)(2).

6. In addition, as discussed in Section VII, we eliminate the analog closed captioning label requirement in our rules and we reorganize Part 79 of our rules to assist readers in browsing and locating our accessibility rules.

7. Finally, as discussed in Section VIII, we adopt a *Further Notice of Proposed Rulemaking* (“*Further Notice*”) in which we:

- Propose to implement the requirement that covered apparatus make appropriate built-in functions “usable by” individuals who are blind or visually impaired, by defining the term “usable” and adopting information, documentation, and training requirements, analogous to rules the Commission has adopted in other CVAA contexts.
- Seek comment on whether the phrase “accessibility features” in Sections 303(aa)(3) and 303(bb)(2) of the Act includes user display settings for closed captioning and whether those sections can be interpreted to require covered entities to ensure that consumers are able to locate and control such settings.
- Seek comment on possible sources of authority for requiring MVPDs to include specific information for public, educational, and government (“PEG”) programming in video programming guides and menus, as well as on the technical issues and costs for MVPDs to comply with such requirements.
- Seek comment on whether Section 203 of the CVAA provides the Commission with authority to require covered apparatus to make the secondary audio stream used for audible emergency information accessible through a mechanism reasonably comparable to a button, key, or icon (MB Docket No. 12-107).
- Seek comment on whether we need to impose additional notification requirements on MVPDs and, if so, what those requirements should be.
- Tentatively conclude that equipment manufacturers subject to Section 205 should be required to inform consumers about the availability of accessible devices and accessibility solutions and propose that equipment manufacturers must prominently display accessibility information on their official website, and seek comment on whether additional notification requirements are necessary and, if so, what those requirements should be.
- Seek comment on whether we need to impose notification requirements on equipment manufacturers subject to Section 204 that will not be making all of their apparatus accessible to ensure consumers with disabilities are informed about which products contain the required accessibility features and which ones lack such features.

## II. BACKGROUND

8. Section 204 of the CVAA, entitled “User Interfaces on Digital Apparatus,” portions of which were codified as Section 303(aa) of the Communications Act of 1934 (“the Act”), directs the Commission to require “if achievable (as defined in section 716) that digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound” be built in a way so that “control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired.”<sup>2</sup> Section 204 states that the Commission “may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement.”<sup>3</sup> Section 204 also specifies that if “on-screen text menus or other visual indicators built in

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<sup>2</sup> 47 U.S.C. § 303(aa)(1).

<sup>3</sup> *Id.*



to the digital apparatus are used to access the functions of the apparatus . . . such functions shall be accompanied by audio output that is either integrated or peripheral to the apparatus” so that they are accessible to and usable by individuals with visual disabilities in real-time.<sup>4</sup> Further, Section 204 directs the Commission to require covered digital apparatus to “buil[d] in access to those closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features.”<sup>5</sup> Section 204 states that “in applying this subsection the term ‘apparatus’ does not include a navigation device, as such term is defined in section 76.1200 of the Commission’s rules.”<sup>6</sup>

9. Section 205 of the CVAA, entitled “Access to Video Programming Guides and Menus Provided on Navigation Devices,” portions of which were codified as Section 303(bb) of the Act, imposes requirements relating to “navigation devices.” It directs the Commission to require, “if achievable (as defined in section 716), that the on-screen text menus and guides<sup>7</sup> provided by navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations) for the display or selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired.”<sup>8</sup> Section 205 states that the Commission “may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement.”<sup>9</sup> Section 205 also directs the Commission to require, “for navigation devices with built-in closed captioning capability, that access to that capability through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features.”<sup>10</sup>

10. The CVAA directed the Chairman of the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee (“VPAAC”), with representatives from the industry and consumer groups.<sup>11</sup> The VPAAC was directed to develop a report recommending standards, protocols, and procedures to enable user interfaces and video programming guides and menus to be accessible to individuals who are blind or visually impaired.<sup>12</sup> The VPAAC submitted its statutorily mandated report addressing user interfaces and video programming guides and menus to the Commission

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<sup>4</sup> *Id.* § 303(aa)(2).

<sup>5</sup> *Id.* § 303(aa)(3).

<sup>6</sup> *Id.* § 303(aa)(4). Section 76.1200 of the Commission’s rules defines “navigation devices” to include “[d]evices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c).

<sup>7</sup> In this context, we interpret the term “guides” to mean “video programming guides,” which is the complete phrase used in the title of Section 205. Pub. L. No. 111-260, § 205.

<sup>8</sup> 47 U.S.C. § 303(bb)(1).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 303(bb)(2).

<sup>11</sup> Pub. L. No. 111-260, § 201(a). Although the CVAA refers to this advisory committee as the “Video Programming and Emergency Access Advisory Committee,” the Commission shortened its working name to the “Video Programming Accessibility Advisory Committee” to avoid confusion with the “Emergency Access Advisory Committee” established under Section 106 of the CVAA.

<sup>12</sup> *Id.* § 201(e)(2). Section 201(e)(2) also required the report to include information related to the provision of emergency information and video description, which is part of a separate Commission rulemaking proceeding that addresses Sections 202 and 203 of the CVAA. See *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket Nos. 12-107, 11-43, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871 (2013) (“*Emergency Information/Video Description Order*”).

on April 9, 2012.<sup>13</sup> The *VPAAC Second Report: User Interfaces* defined the functional requirements needed to implement Sections 204 and 205 of the CVAA, including a list of 11 functions that the VPAAC determined are essential for making digital apparatus and navigation devices accessible to individuals with disabilities.<sup>14</sup> In April 2012, the Media Bureau and the Consumer and Governmental Affairs Bureau issued a Public Notice seeking comment on the *VPAAC Second Report: User Interfaces*, and the comments and reply comments received in response to the Public Notice helped inform the *NPRM*.<sup>15</sup> The Commission released the *NPRM* on May 30, 2013.<sup>16</sup> Sections 204(b) and 205(b) of the CVAA provide that “[w]ithin 18 months after the submission to the Commission of the [*VPAAC Second Report: User Interfaces*], the Commission shall prescribe such regulations as are necessary to implement” Sections 204 and 205.<sup>17</sup>

11. To fulfill these statutory mandates, we adopt the rules discussed below. By imposing new requirements with regard to the accessibility of user interfaces and video programming guides and menus, the regulations adopted herein further the purpose of the CVAA to “update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.”<sup>18</sup>

### III. SCOPE OF SECTIONS 204 AND 205 OF THE CVAA

#### A. Categories of Devices Covered Under Sections 204 and 205

12. We conclude, consistent with the text of Sections 204 and 205, and the definition of “navigation devices” set out in Section 76.1200 of our rules, that “devices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems”<sup>19</sup> are subject to the requirements of Section 205. As we discuss below, based on current marketplace and technological conditions, we interpret the term “navigation devices” to encompass devices that have built-in capability to use a conditional access mechanism in order to access MVPD video programming and other services. All other “digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound” that are not navigation devices as defined by Section 76.1200 of our rules are subject to the requirements of Section 204. We also conclude that an individual device can be subject to the requirements of Section 204 or Section 205 depending on its classification as a digital apparatus or navigation device, but cannot be subject to the requirements of both sections.

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<sup>13</sup> Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: User Interfaces, and Video Programming and Menus, Apr. 9, 2012, available at <http://apps.fcc.gov/ecfs/document/view?id=7021913531> (“*VPAAC Second Report: User Interfaces*”).

<sup>14</sup> *Id.* at 8.

<sup>15</sup> Public Notice, *Media Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Second VPAAC Report: User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, 27 FCC Rcd 4191 (2012).

<sup>16</sup> See *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Notice of Proposed Rulemaking, 28 FCC Rcd 8506 (2013) (“*NPRM*”).

<sup>17</sup> See 47 U.S.C. § 613(g); Pub. L. No. 111-260, § 203(d)(2). As noted, the VPAAC submitted its report to the Commission on April 9, 2012. We note that the deadline set forth by statute for prescribing regulations, October 9, 2013, fell during a shutdown of the Federal government due to a lapse in appropriations, during which time the Commission could not conduct normal business operations.

<sup>18</sup> H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010) (“House Committee Report”); S.Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010) (“Senate Committee Report”).

<sup>19</sup> 47 C.F.R. § 76.1200(c).



13. The *NPRM* set out two general approaches for how the Commission might categorize the devices subject to Sections 204 and 205.<sup>20</sup> Under one approach, the Commission would apply Section 205 only to the navigation devices provided by MVPDs to their subscribers or, in a variation on this approach, to MVPD-provided devices and “to retail set-top boxes such as TiVos,” while applying Section 204 to all other navigation devices and digital apparatus.<sup>21</sup> Under the second approach, the Commission would apply Section 205 to the full range of devices that qualify as “navigation devices” as that term is defined in Section 76.1200 of our rules, and Section 204 only to the digital apparatus that are not navigation devices.<sup>22</sup>

14. Several commenters support the MVPD-provided devices approach. For example, the American Foundation for the Blind (“AFB”), the National Association of the Deaf in conjunction with several consumer groups (“NAD/Consumer Groups”), and dozens of individuals with visual disabilities express the view that Section 205’s provisions should apply only to MVPD-provided equipment.<sup>23</sup> These commenters contend that such an approach would better effectuate Congress’s intent in enacting the CVAA by making more devices subject to Section 204’s requirements, which require accessibility without requiring consumers to request an accessible solution.<sup>24</sup> In contrast, other commenters assert that the statute gives the Commission no discretion to limit the definition of “navigation device” to only those devices provided by MVPDs and requires that any device that meets the definition of navigation device under Section 76.1200 be covered by Section 205.<sup>25</sup>

15. Manufacturers and MVPDs have taken the position that the term “navigation devices” is not as wide-ranging as we presumed in the *NPRM*.<sup>26</sup> According to these commenters, the term “navigation devices” includes all devices that are designed to be used by consumers to access multichannel video programming and other services offered over multichannel video programming systems using conditional access technology; thus, they assert, Section 205 should apply to both MVPD-

<sup>20</sup> See *NPRM*, 28 FCC Rcd at 8509-14, ¶¶ 7-23.

<sup>21</sup> See *id.* at 8509-13, ¶¶ 7-20.

<sup>22</sup> See *id.* at 8513-14, ¶¶ 21-22.

<sup>23</sup> See Comments of the National Association of the Deaf *et al.* at 3-4 (“NAD/Consumer Groups Comments”); Reply Comments of the American Foundation for the Blind at 1-3 (“AFB Reply”). See also, *e.g.*, Reply Comments of Mary Carla Hayes (urging FCC not to apply “upon request” provision of Section 205 beyond MVPDs); Reply Comments of DeAnna Noriega (same); Reply Comments of Ellen P. Grundt (same). See also Comments of Panasonic Corporation of North America at 7-9 (“Panasonic Comments”).

<sup>24</sup> See AFB Reply at 2-3. See also, *e.g.*, Reply Comments of Virginia Laky (arguing that the CVAA requires universal accessibility of products, not accessibility only upon request); Reply Comments of Christopher Millsap (arguing that accessibility for blind and visual impaired users should be built in); Reply Comments of Elizabeth Aldworth (arguing that “TVs and TV-like equipment” need to be “accessible by default” but cable and satellite operators can provide accessible equipment upon request).

<sup>25</sup> Comments of DISH Network L.L.C. & EchoStar Technologies L.L.C. at 2-4 (“DISH/EchoStar Comments”); Comments of AT&T Services, Inc. at 4-5, 7 (“AT&T Comments”); Comments of Rovi Corporation at 3, 7 (“Rovi Comments”).

<sup>26</sup> Compare *NPRM*, 28 FCC Rcd at 8512, ¶ 16 (stating that “any device that has a tuner, an audiovisual input, or IP connectivity could be considered a navigation device”), with Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, at 2-3 (Sept. 16, 2013) (“CEA Sept. 16 *Ex Parte* Letter”) (encouraging the Commission to interpret Section 76.1200 to apply to “devices that are *actually configured* to operate as navigation devices”), and Letter from Rick Chessen, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, at 2-3 (Sept. 12, 2013) (“NCTA Sept. 12 *Ex Parte* Letter”) (stating that “the Commission has consistently and repeatedly applied the definition of ‘navigation device’ to equipment, such as cable set-top boxes, used to access Title VI cable services that are made available by a cable operator.”). In the *NPRM*, we stated that “every device that uses Internet access service could be considered a navigation device.” *NPRM*, 28 FCC Rcd at 8512, n. 41.

provided devices and those retail devices that use conditional access to reach MVPD services, consistent with congressional intent.<sup>27</sup> The Consumer Electronics Association (“CEA”), after initially supporting a broader interpretation of the term “navigation devices” as used in Section 76.1200,<sup>28</sup> now supports a reading of that term to include only “devices that are *actually configured* to operate as navigation devices comparable to MVPD-furnished devices.”<sup>29</sup> Verizon takes a similar position, arguing that Section 205 should be applied only to “traditional” navigation devices, which Verizon defines as “set-top boxes and related equipment used in the home by consumers to access MVPD services” that are either MVPD-provided or purchased at retail.<sup>30</sup> Verizon submits that such an approach is consistent with the language of the *VPAAC Second Report: User Interfaces* and Congressional intent in enacting the CVAA.<sup>31</sup> Panasonic Corporation of North America (“Panasonic”) suggests, along the same lines as CEA and Verizon, that Section 205 should apply only to MVPD-provided or retail equipment employing CableCARDS that “enable a consumer to control the display or selection of multichannel video programming.”<sup>32</sup> Panasonic argues that, without the use of a CableCARD, a device cannot provide the “on screen text menus and guides” which must be made accessible under Section 205.<sup>33</sup> Several other commenters take no position as to whether Section 205 should apply to devices other than set-top boxes, but do argue that Section 205 should apply not just to MVPD-provided equipment but also to comparable equipment sold at retail.<sup>34</sup> The National Cable & Telecommunications Association (“NCTA”) also initially took no position as to the scope of devices subject to Section 205,<sup>35</sup> but later argued that, “[i]nterpreting ‘navigation device’ so broadly as to cover equipment that does not perform the functions of a traditional set-top box but simply contains an Internet connection (by which any mobile device or any other equipment theoretically could access cable broadband service) would stray beyond Congress’ intent in the CVAA.”<sup>36</sup>

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<sup>27</sup> CEA Sept. 16 *Ex Parte* Letter at 2-3; NCTA Sept. 12 *Ex Parte* Letter at 2-3. We note that while AFB and the American Council of the Blind (“ACB”) do not agree that Section 205 should apply to set-top boxes sold at retail that use conditional access mechanisms to allow consumers to access MVPD programming and other services, such as TiVo boxes, the approach that we adopt is otherwise consistent with AFB and ACB’s position in that consumer electronics equipment sold at retail that does not use conditional access mechanisms to access MVPD programming and other services will be subject to Section 204. See Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, and Mark Richert, Director, Public Policy, AFB, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Aug. 16, 2013) (“CEA/AFB Aug. 16 *Ex Parte* Letter”).

<sup>28</sup> See Comments of the Consumer Electronics Association at 6-9 (“CEA Comments”); Reply Comments of the Consumer Electronics Association at 5-6 (“CEA Reply”).

<sup>29</sup> CEA Sept. 16 *Ex Parte* Letter at 2-3. CEA states that this position is consistent with an agreement that it reached with AFB and ACB, in which CEA stated that it “would be agreeable to the Commission proceeding to apply section 205 of the CVAA only to MVPD-provided equipment, as well as to equipment that is similar in kind to MVPD-provided equipment (i.e., set-top boxes) made available to consumers via retail outlets.” CEA/AFB Aug. 16 *Ex Parte* Letter at 2.

<sup>30</sup> Comments of Verizon and Verizon Wireless at 3 (“Verizon Comments”).

<sup>31</sup> *Id.* at 3-4.

<sup>32</sup> Panasonic Comments at 7-9.

<sup>33</sup> *Id.* at 8.

<sup>34</sup> See Comments of the American Cable Association at 3 (“ACA Comments”). See also Reply Comments of the AllVid Tech Company Alliance at 2 (“AllVid Reply”); Reply Comments of CenturyLink, Inc. at 1-2 (“CenturyLink Reply”).

<sup>35</sup> See Comments of the National Cable & Telecommunications Association at 7 (“NCTA Comments”).

<sup>36</sup> See NCTA Sept. 12 *Ex Parte* Letter at 2. See also Letter from Rick Chessen, Senior Vice President, Law & Regulatory Policy, NCTA, Mark Richert, Director, Public Policy, AFB, and Eric Bridges, Director of External Affairs and Policy, ACB, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 12, 2013) (“NCTA/AFB/ACB Sept. 12

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16. Based on our review of the statutory language and the record, we conclude that the soundest approach is to follow one of the paths suggested in the *NPRM* by applying Section 205 to all devices that qualify as “navigation devices” as that term is defined in Section 76.1200 of our rules, and Section 204 only to digital apparatus that are not navigation devices.<sup>37</sup> In Sections 204 and 205, the term “navigation devices” is repeatedly modified by the phrase “as such term is defined in Section 76.1200 of the Commission’s rules.”<sup>38</sup> As the *NPRM* discussed, some elements of Section 205 could be read to suggest that Congress meant for Section 205 to apply only to MVPD-provided equipment, but we find that there is nothing in the statute or legislative history expressly indicating that Section 205 should be applied only to a particular subset of navigation devices. Although the *NPRM* observed that certain statutory phrases “appear to presume a preexisting relationship between the individual requesting or using the device, menu and/or guide and the entity providing it,”<sup>39</sup> as described in more detail below, we conclude that these statutory phrases can also be applied to situations involving no preexisting relationship, such as when an individual purchases an accessible device at retail.<sup>40</sup> Had Congress intended for Section 205 to apply only to MVPD-provided equipment, as some commenters suggest, we believe that Congress would have used different terminology in Sections 204 and 205 than the phrase “navigation device” with a direct citation to Section 76.1200 of our rules. Accordingly, consistent with

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*Ex Parte* Letter”) (expressing NCTA’s support for the CEA/AFB agreement under which “Section 205 would apply to MVPD-supplied navigation devices while Section 204 would apply to non-MVPD devices sold at retail.”). NCTA recognized that AFB and CEA could not come to agreement on whether non-MVPD provided retail set-top boxes should be covered under Section 205, which NCTA presumably still supports. *See id.*

<sup>37</sup> *See NPRM*, 28 FCC Rcd at 8513-14.

<sup>38</sup> *See* 47 U.S.C. §§ 303(aa)(4) (“the term ‘apparatus does not include a navigation device, as such term is defined in section 76.1200 of the Commission’s rule (47 CFR 76.1200)’”); 303(bb)(1) (requiring accessibility of “the on-screen text menus and guides provided by navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations) for the display or selection of multichannel video programming”); Pub. L. No. 111-260, § 206(6) (“The term ‘navigation device’ has the meaning given such term in section 76.1200 of title 47, Code of Federal Regulations”). The legislative history provides no additional insight into Congress’s selection of the term “navigation devices.” *See NPRM*, 28 FCC Rcd at 8513, ¶ 19.

<sup>39</sup> *NPRM*, 28 FCC Rcd at 8509-10, ¶ 8. In addition, as NCTA points out, some devices that are sold at retail, such as a TiVo, include subscriptions and create a relationship between the customer and the device manufacturer. *See* NCTA Comments at 8, n. 26.

<sup>40</sup> The *NPRM* also discussed how the phrase “placing in service” in Section 205(b)(6) might suggest that the provision was directed at MVPD-provided equipment. *See NPRM*, 28 FCC Rcd at 8510, ¶ 10, citing 47 C.F.R. § 76.1204 (MVPDs may not “place in service” devices with integrated security). We agree with NCTA that the Commission’s rules use similar phrasing in other areas “wholly unrelated to MVPD-provided service.” NCTA Comments at 7, n. 26, citing 47 C.F.R. §§ 25.216(a)-(d), (f) (limiting emissions from terrestrial receivers and transmitters “placed in service” in satellite networks); § 32.9000 (defining “times of installation” as the date on which a telecommunications plant is “placed in service”); § 80.953(a) (requiring inspections of maritime radio equipment after the equipment is “placed in service”); § 101.141(a)(2) (requiring fixed microwave facilities for voice transmission to be “placed in service, authorized, or applied for” by a certain date). The *NPRM* also pointed to the fact that Section 205(b)(2) authorizes us to create an exemption for cable systems with fewer than 20,000 subscribers as evidence that Section 205 applied to MVPDs. *See NPRM*, 28 FCC Rcd at 8510, ¶ 11. While such a statement does suggest that Section 205 applies to MVPDs, it does not foreclose the Commission from also applying Section 205 to other covered entities, such as manufacturers of navigation devices placed into the chain of commerce for sale and other navigation device hardware and software manufacturers. *See* NCTA Comments at 7, n. 26.

Congress's repeated citations, in multiple sections of the CVAA,<sup>41</sup> to our definition of navigation device in Section 76.1200, we interpret the term in accordance with the definition contained in our rules.<sup>42</sup>

17. Therefore, consistent with a literal interpretation of the statute and in accordance with the Commission's definition of navigation device, Section 205 will apply to any device that can be "used by consumers to access multichannel video programming and other services offered over multichannel video programming systems."<sup>43</sup> We recognize that this definition uses broad language to describe what constitutes "navigation devices," and that in the *NPRM* we proposed to interpret this phrase to cover a broad array of devices.<sup>44</sup> The *NPRM* also sought comment on the correct reading of the term "navigation devices" as defined under Commission rules.<sup>45</sup>

18. We have closely examined the arguments made in the record of this proceeding<sup>46</sup> and met with representatives of consumer groups and all sectors of the industry, and have been persuaded that our understanding of the term "navigation devices" must be clarified in light of intervening marketplace and technological changes.<sup>47</sup> We do not believe that the Commission intended the term to encompass every device with the ability to access the Internet; nor do we believe that under current marketplace and technological conditions such a broad definition of navigation devices is reasonable. We also believe that Congress, in drafting the CVAA, understood the Commission's definition of navigation devices to be narrower, because otherwise the exemption in Section 204 for "navigation devices" would have largely nullified that section.<sup>48</sup> This is the first time it has been necessary for us to delineate more precisely the

<sup>41</sup> See 47 U.S.C. §§ 303(aa)(4), 303(bb)(1); Pub. L. No. 111-260, § 206(6).

<sup>42</sup> AFB suggests that the Commission could, through the use of a Further Notice of Proposed Rulemaking, revise the definition of navigation device "for the limited purpose of sorting out the application of sections 204 and 205." AFB Reply at 5-6. We find no compelling reason to do so, and therefore decline this request.

<sup>43</sup> 47 C.F.R. § 76.1200(c).

<sup>44</sup> See, e.g., *NPRM*, 28 FCC Rcd at 8511-12, ¶ 15 (internal footnotes omitted) ("The Commission has interpreted this term to encompass a broad array of 'equipment used to access multichannel video programming or services.' For example, televisions, personal computers, cable modems, and VCRs all fall under the Commission's navigation devices definition."); *id.* at 8512, ¶16 (internal footnote omitted) ("any device that has a tuner, an audiovisual input, or IP connectivity could be considered a navigation device").

<sup>45</sup> See, e.g., *id.* at 8513, ¶ 17 (observing that "nearly any device that can display video programming using Internet protocol could use Internet protocol to access MPVD programming or other services, thereby making that device a navigation device under the broad reading of that term" and seeking comment on this interpretation); *id.* at 8514, n. 55 (seeking comment on whether Section 204 would cover digital apparatus other than DVD and Blu-ray players if the "navigation devices" exception contained in that section were broadly applied); *id.* at 8514, n. 56 (seeking comment on (i) whether to interpret "navigation device" to mean a device used by consumers to access *both* multichannel video programming *and* other services offered over multichannel video systems, (ii) whether, under that interpretation, a cable modem or a device that streams Internet video, but cannot be used to access multichannel video programming, would be considered a "navigation device;" (iii) how this interpretation would be reconciled with Commission precedent; and (iv) whether this interpretation would apply only for purposes of the CVAA); and *id.* at 8514, ¶ 23 (seeking comment on "whether the text of the CVAA would permit the Commission to amend its definition of 'navigation devices' so that, for this specific purpose, the definition would cover only MVPD-supplied navigation devices").

<sup>46</sup> See, e.g., CEA/AFB Aug. 16 *Ex Parte* Letter at 1-2 (agreeing that Section 205 should only apply to a narrow class of devices, while Section 204 should apply to a broader class of devices); NCTA/AFB/ACB Sept. 12 *Ex Parte* Letter at 2 (expressing NCTA's agreement with CEA and AFB that Section 205 should apply to a narrow class of devices); NCTA Sept. 12 *Ex Parte* Letter at 2 (arguing that Commission adoption of a broad definition of "navigation device" would be inconsistent with Congress's intent in enacting the CVAA).

<sup>47</sup> See *NPRM*, 28 FCC Rcd at 8512, ¶ 16 (internal footnote omitted) ("any device that has a tuner, an audiovisual input, or IP connectivity could be considered a navigation device").

<sup>48</sup> See *id.* Moreover, as noted in the *NPRM*, interpreting "navigation devices" to apply to "every device with Internet  
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outer boundaries of the term “navigation devices.”<sup>49</sup> After consideration of the record on this issue, we thus clarify the meaning of the term “navigation devices,” taking into consideration current marketplace and technological conditions, and in a manner that will give meaning and effect to each section of the CVAA.

19. As noted, Section 76.1200 defines navigation devices as “devices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.”<sup>50</sup> The Commission derived this definition from the text of Section 629 of the Act, added by the Telecommunications Act of 1996,<sup>51</sup> which directed the Commission to adopt rules “to assure the commercial availability” of such devices “from manufacturers, retailers, and other vendors not affiliated with any” MVPD.<sup>52</sup> When the Commission adopted Section 76.1200 in 1998, consumers used a wide variety of equipment to access multichannel video programming and other services.<sup>53</sup> For example, at that time many consumers could connect analog “plug and play” televisions, video cassette recorders (“VCRs”), and personal computers directly to the cable and access cable programming without the need for a cable set-top box.<sup>54</sup> Thus, at that time, the Commission contemplated that some devices that lack the ability to perform conditional access – such as these analog “plug and play” televisions – were navigation devices.<sup>55</sup> We no longer believe that to be the case, given the current state of technology. Nearly all MVPD services are encrypted today, and devices that do not perform conditional access can access at most a *de minimis* amount of MVPD programming, and that amount is decreasing rapidly, as discussed below. Accordingly, we construe the phrase “used by consumers to access” in the definition of “navigation devices” to refer to the access that MVPDs control when using conditional access technology

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connectivity” would have “render[ed] meaningless Section 204’s statement that digital apparatus include ‘apparatus designed to receive or display video programming transmitted in digital format using Internet protocol’ . . . .” *Id.* at 8514, ¶ 22.

<sup>49</sup> The Commission in 2010 sought comment on the various types of devices covered under the term “navigation devices,” but has not had the occasion to address the issue since then. *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, Notice of Inquiry, 25 FCC Rcd 4275, 4288, ¶ 40 (2010) (“Traditionally, the Commission and interested parties have considered the term navigation devices to include televisions, set-top boxes (including DVRs), and home theater computers. Do these devices comprise the universe of navigation devices, and if not, what other devices could perform navigation device functions? Are there specific minimum functions that a navigation device needs to perform?”).

<sup>50</sup> 47 C.F.R. § 76.1200(c).

<sup>51</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996), § 629, codified at 47 U.S.C. § 549.

<sup>52</sup> 47 U.S.C. § 549.

<sup>53</sup> See *Basic Service Tier Encryption*, MB Docket No. 11-169, PP Docket No. 00-67, Report and Order, 27 FCC Rcd 12786, 12796-97, ¶ 15 (2012) (“*Encryption Order*”) (explaining that since the 1990s, consumers have lost the ability to connect their televisions “directly to a coaxial cable without the need for a set-top box”).

<sup>54</sup> That is, subscribers could simply plug the cable into the back of their TV sets or other devices; conditional access was performed by means of traps installed outside the home. *Encryption Order*, 27 FCC Rcd at 12796-97, 12789, ¶ 15, n. 15. When the cable operator granted access to its programming, through the removal of a trap, both cable operator-provided set-top boxes and retail devices could access the programming. Today, cable operators rely on encryption rather than traps to protect themselves from theft of service, and encryption requires hardware inside the consumer’s home to perform the decryption functions. See *Encryption Order*, 27 FCC Rcd at 12789-90, ¶ 4.

<sup>55</sup> See 47 C.F.R. § 76.1202.



as a prerequisite to receive MVPD-offered multichannel video programming and other services. Indeed, in 2010, the Commission recognized that conditional access is an essential part of “access.”<sup>56</sup>

20. The Commission has recognized that, in the past, most cable signals were transmitted in the clear and that subscribers with analog “plug and play” television sets would not need cable set-top boxes to view subscribed-to programming.<sup>57</sup> Beginning in the mid-1990’s, however, cable operators began to upgrade their systems to offer digital cable service in addition to analog cable service (hybrid cable service).<sup>58</sup> Even more recently, many cable operators have transitioned to more efficient all-digital service, freeing up cable spectrum to offer new or improved products and services.<sup>59</sup> At each stage of the transition from all-analog to all-digital cable service, cable operators have increasingly used conditional access to protect more types and tiers of programming from unauthorized access.<sup>60</sup> Nearly all MVPD services today use some form of conditional access to prevent unauthorized access, and encryption of the program signal has proven to be an indispensable aspect of controlling access to MVPD services as it ensures that no signal can be viewed without digital permissions individually issued by the MVPD. The Commission recognized as much in its recent *Encryption Order*, when it observed that “relaxing the encryption prohibition for all-digital systems will have minimal impact on consumers because most subscribers do not rely on the clear-QAM tuners in their devices to access basic tier signals.”<sup>61</sup> As of October 2012, when the Commission released the *Encryption Order* permitting cable operators to encrypt the basic service tier under certain conditions,<sup>62</sup> few subscribers were accessing cable programming without the use of a set-top box. Further, subscribers to direct broadcast satellite (“DBS”) and Internet protocol television (“IPTV”) operators have never been able to use televisions to access service; rather, they must use a set-top box.<sup>63</sup> The Commission concluded that allowing all-digital cable operators to

<sup>56</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Fourth Further Notice of Proposed Rulemaking, 25 FCC Rcd 4303, 4303, ¶ 2, n. 3 (2010) (“*CableCARD FNPRM*”) (“The term ‘conditional access element’ refers to a piece of equipment that handles the security functions that allow a set-top box or television set to access subscription video services (e.g., decryption of scrambled content).”).

<sup>57</sup> *See Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment*, ET Docket No. 93-7, First Report and Order, 9 FCC Rcd 1981, 1990-92, ¶¶ 49-59 (1994).

<sup>58</sup> *See Encryption Order*, 27 FCC Rcd at 12788, ¶ 3.

<sup>59</sup> *Id.*

<sup>60</sup> *See* “Comcast is Going to Start Encrypting Basic Cable,” <http://Gizmodo.com/5994680/comcast-is-going-to-start-encrypting-basic-cable-data> (last accessed Sept. 17, 2013); “Digital cable” <http://en.wikipedia.org/wiki/Digital-cable> (last accessed Sept. 17, 2013) (“Most digital cable signals are encrypted, which reduced the high incidence of cable theft which occurred in analog systems”); “Television encryption” [http://en.wikipedia.org/wiki/Television\\_encryption](http://en.wikipedia.org/wiki/Television_encryption) (last accessed Sept. 17, 2013) (“The early cable-based Pay TV networks used no security. This led to problems with people connecting to the network without paying. Consequently, some [conditional access] methods were developed to frustrate these self-connectors.”).

<sup>61</sup> *Encryption Order*, 27 FCC Rcd at 12798, ¶ 17. In 2010, the Media Bureau granted Cablevision a waiver to allow it to encrypt its basic service tier on its New York City systems, which at the time was otherwise prohibited. *Cablevision Systems Corporation’s Request for Waiver of Section 76.630(a) of the Commission’s Rules*, MB Docket No. 09-168, Memorandum Opinion and Order, 25 FCC Rcd 134, ¶ 1 (MB 2010). The Media Bureau issued the waiver because it would allow Cablevision to enable and disable cable service remotely, permitting “reduced costs for Cablevision, improved customer service, and reduced fuel consumption and CO2 emissions.” *Id.* at 139, ¶ 12. As a condition of the waiver, Cablevision offered free equipment to every subscriber in New York City that was not using some form of conditional access equipment to access its video programming services. *Id.* at 140, ¶ 15. Only one-tenth of one percent of subscribers sought that equipment. *Encryption Order*, 27 FCC Rcd at 12798, ¶ 17.

<sup>62</sup> *Encryption Order*, 27 FCC Rcd at 12794, 12797-98, ¶¶ 11, 16.

<sup>63</sup> *See id.* at 12788, ¶ 3, n. 11.



encrypt the basic service tier served the public interest because it would have a *de minimis* impact on subscribers to these systems,<sup>64</sup> while having significant additional benefits.<sup>65</sup>

21. Therefore, the phrase “other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems,” in today’s MVPD market, means more than mere passive display made possible through the use of an intermediary device. For a consumer to “use” a device to “access” MVPD services, the device must employ some kind of access control to “unlock” the services and make them available for the consumer’s use. For example, a television set with a CableCARD supports “conditional access” such that an MVPD can control which channels or services a device receives. In contrast, a television without a CableCARD cannot access encrypted cable channels without an intermediary device—*e.g.*, a set-top box—that controls access to the content; the television can merely display the content that the set-top box sends to it. In the latter example, the set-top box is a navigation device but the television is not because the consumer could not use it to “access” cable service. As Panasonic states, “absent the use of a CableCARD, the Commission’s rules do not ensure the availability of the channel information necessary for independent manufacturers to design ‘navigation devices.’”<sup>66</sup>

22. Cable operators also control access to their broadband services through an authentication scheme similar to that used for video services, reinforcing our view that “navigation devices” require the use of conditional access. The navigation device definition includes devices consumers use to access “other services offered over multichannel video programming systems,” which would include broadband data services.<sup>67</sup> Cable modems must be “initialized”—a process involving authentication and registration—before the cable operator grants the modem access to the broadband network.<sup>68</sup> Although an Internet Protocol (“IP”)–enabled device may use Internet services by connecting through a cable modem, consumers do not use the IP-enabled device itself to access the broadband service. Rather, the device uses the cable modem to access the Internet. In this example, the cable modem is a navigation device, but the IP-enabled device is not.

23. Given the widespread and routine practice of cable operators controlling access to all of their programming and other services, and the fact that DBS operators universally use encryption to control access to their programming, we expect that shortly virtually all MVPDs will control access to their programming and services through some sort of conditional access technology.<sup>69</sup> Thus, we interpret

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<sup>64</sup> This is because all-digital cable operators indicate that all of their subscribers have at least one set-top box or retail CableCARD device in their homes. *Encryption Order*, 27 FCC Rcd at 12798, ¶ 4 & n. 20.

<sup>65</sup> We note that since the advent of encryption of the basic tier on all-digital cable systems, the Commission has received only one complaint from an aggrieved consumer. *See* Letter from Lee L. Selwyn, President, Economics and Technology, Inc., to Marlene H. Dortch, Secretary, FCC (July 23, 2013).

<sup>66</sup> Panasonic Comments at 7-8.

<sup>67</sup> 47 C.F.R. § 76.1200(c); *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, CS Docket No. 99-230, Sixth Annual Report, 15 FCC Rcd 978, 1066, ¶ 206 (1999) (“These technologies allow MVPDs to deliver additional video options and other services (*e.g.*, data access, telephony) to their customers.”).

<sup>68</sup> For instance, the DOCSIS specifications define a procedure for initializing a cable modem that involves authentication and registration. *See* Cisco, Cable Modem Initialization Wallchart, [http://www.cisco.com/image/gif/paws/12199/initialization\\_pdf\\_wallchart.pdf](http://www.cisco.com/image/gif/paws/12199/initialization_pdf_wallchart.pdf).

<sup>69</sup> It is conceivable that some cable systems will still exist three years from now, at the time of our compliance deadline, that do not use any encryption; thus, in some cases consumers may still be able to plug televisions directly into the cable to receive service. As explained, however, we expect such systems to be rare, and the subscribers who choose to use such devices without a set-top box to be rarer still. *See supra* ¶ 20. Moreover, these systems are likely to be very small systems subject to the extended Section 205 compliance date that we adopt herein. *See infra* ¶ 114. They are also likely to be analog systems. Because television broadcast receivers will no longer be required to include analog tuners after September 1, 2015 due to the low power television transition to digital television, we

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the term “navigation devices” as encompassing only devices that support conditional access to control consumer access to programming and services. Based on our interpretation, we find that navigation devices subject to Section 205 are those devices manufactured with a CableCARD slot, CableCARD’s successor technology, or other conditional access capabilities.<sup>70</sup> Thus, the following are navigation devices: digital cable ready televisions (*i.e.*, televisions with CableCARD slots), set-top boxes (including those provided by MVPDs as well as consumer-owned CableCARD-ready devices), computers with CableCARD slots, and cable modems. The Commission has consistently recognized that these are navigation devices throughout the past 15 years since adoption of our navigation device rules.<sup>71</sup> Third-party devices with MVPD applications that are installed by the device manufacturer are also navigation devices because the MVPD application performs conditional access functions in a software-based manner

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believe it is likely that many manufacturers will cease including analog reception capability in devices sold after that date. *See* 47 C.F.R. § 74.731(l); *id.* § 15.117(b). Thus, it is unlikely that subscribers to all-analog cable systems will use devices manufactured after the effective date of these rules to access analog cable service. We do not believe it would be reasonable to subject retail devices – which are manufactured for nationwide distribution – to a set of rules designed for these corner cases. Nor would it be appropriate to expect manufacturers to spend their resources designing their products based on a technology that we expect to be essentially outdated by the time of our compliance deadline. *See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Rcd 787, 859, ¶ 122 (2012) (“*IP Closed Captioning Order*”) (recognizing that it generally takes two years to design, develop, test, manufacture, and make available for sale new products). Rather, to give manufacturers certainty as to their compliance obligations we will uniformly subject only devices using conditional access to regulation under Section 205 based on our predictive judgment about how the marketplace is developing.

<sup>70</sup> We note that in *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013) (“*EchoStar*”), the D.C. Circuit vacated the Commission’s *CableCARD Order*, 18 FCC Rcd 20885 (2003), which effectively vacated the rules adopted in the *CableCARD Order*, including the technical standards for CableCARD (47 C.F.R. §§ 76.602 and 76.640). Although the rule requiring reliance on the specific CableCARD standard was vacated in *EchoStar*, given that nearly all cable operators use CableCARDS as their means to comply with the integration ban, we believe that CableCARD use will continue for the foreseeable future. *See Adams Cable Equipment, Inc.; Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Docket No. 97-80, Memorandum Opinion and Order, 28 FCC Rcd 11011, 11014, n. 16 (MB 2013). *But see Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, MB Docket No. 12-328, Memorandum Opinion and Order, 28 FCC Rcd 5212 (MB 2013) (granting Charter a waiver of the Commission’s integration ban rule while it deploys a downloadable conditional access system).

<sup>71</sup> *See, e.g., Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657, 14658, ¶ 1 (2010) (“[W]e remedy shortcomings in our CableCARD rules in order to improve consumers’ experience with retail navigation devices (such as set-top boxes and digital cable-ready television sets).”); *CableCARD FNPRM*, 25 FCC Rcd at 4304, ¶ 2 (“The CableCARD is a security device provided by the cable provider and inserted into a retail navigation device (including digital cable ready televisions) bought by a consumer in the retail market or a set-top box leased from the cable provider.”); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, 20888, ¶ 5 (2003) (“Section 629 covers not just equipment used to receive video programming, but also equipment used to access other services offered over MVPD systems, including televisions, VCRs, set-top boxes, personal computers, program guide equipment, and cable modems.”); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd 14775, 14778, ¶ 8 (1998) (“*Section 629 Implementation Order*”) (“Section 629 covers not just equipment used to receive video programming, but also equipment used to access ‘other services offered over multichannel video programming systems.’ Such equipment includes televisions, VCRs, cable set-top boxes, personal computers, program guide equipment, and cable modems. The focus of Section 629, however, is on cable television set-top boxes, devices that have historically been available only on a lease basis from the service provider.”).

that allows consumers to access multichannel video programming.<sup>72</sup> Devices that do not contain support for conditional access functionality at the time of manufacture will be classified as “digital apparatus” and covered by Section 204.

24. Our task in implementing Sections 204 and 205 of the CVAA requires that we identify for manufacturers which section governs their equipment. To give certainty to manufacturers, we conclude it is appropriate to take a snapshot view of the equipment at the time the manufacturer releases it into the stream of commerce, and to describe now, before the devices are designed and manufactured, the parameters we will use for determining whether a device is a navigation device. Accordingly, for purposes of Sections 204 and 205 of the CVAA, and consistent with our application of other provisions of the CVAA,<sup>73</sup> we will look to the device’s *built-in functionality* at the time of manufacture to determine whether a device is classified as a “navigation device” for purposes of determining which section of our rules will apply. Under this approach, we will not require manufacturers to anticipate possible adjustments that a consumer may independently make to the equipment after sale (for example, by installing an application post-sale).<sup>74</sup> Looking at the functionality that a manufacturer itself has chosen to include in a piece of equipment will bring certainty to industry and consumers alike as to what obligations apply to particular equipment.<sup>75</sup>

25. We conclude that the interpretation described above is consistent with both the language and the intent of Section 629 of the Act and Section 76.1200 of our rules. We have discretion to interpret statutory language that Congress left undefined, such as the language used in Section 629 and echoed in the Commission’s definition of “navigation devices.” Neither Congress nor the Commission has previously specified what the phrase “used by consumers to access” in the definition means, and our interpretation, described above, gives meaning to the term based on current market and technological considerations. Moreover, our interpretation is consistent with the other terms in the definition referring to “converter boxes” and “interactive communications equipment.” Those terms were also not defined by Congress or the Commission, but we believe that the term “interactive communications equipment” is most reasonably interpreted to mean equipment used for services such as video-on-demand and television-based commerce. Today, unlike at the time Section 629 was adopted, these functions are performed by the majority of today’s set-top boxes.<sup>76</sup> The term “converter box” refers to simpler equipment, more commonplace in 1998, that merely converts signals from the cable operator’s format to a format that could be received by legacy televisions – a function that digital tuning adapters (“DTAs”)

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<sup>72</sup> CenturyLink, Inc. states that it “is not aware of any navigation device manufacturers that either pre-install MVPD-provided mobile applications for accessing MVPD-delivered programming or require end users to install such applications after sale.” CenturyLink Reply at 3-4. To eliminate uncertainty in the event that this does happen, however, we clarify that such a device would be a navigation device under the rules we adopt in this *Report and Order*.

<sup>73</sup> Classifying a device based on its capabilities at the time of manufacture is consistent with our implementation of other CVAA provisions. *See, e.g., IP Closed Captioning Order*, 27 FCC Rcd at 841, ¶ 94; CEA Comments at 24-25.

<sup>74</sup> This also addresses the concerns of commenters who contend that they cannot “control the design of third-party devices running their apps” because those commenters can test their applications to ensure accessibility on the third-party devices before choosing to allow the manufacturers to pre-install the applications. *See* NCTA Sept. 12 *Ex Parte* Letter at 2. *See also* Letter from Natalie G. Roisman, Counsel to EchoStar, to Marlene H. Dortch, Secretary, FCC (Sept. 3, 2013).

<sup>75</sup> *Id.*

<sup>76</sup> *See* SNL Kagan, *Media Trends: Actionable Metrics, Benchmarks, & Projections for Major Media Sectors*, 72 (2012) (“The combined installed base of basic, standard-definition, stand-alone HD and SD and HD DVRs is expected to reach nearly 82 million at the end of 2012, accounting for 71% of the total devices installed for U.S. cable operators.”).

and similar devices perform today.<sup>77</sup> These interpretations are consistent with what the Commission envisioned when first adopting its definition of “navigation devices.”<sup>78</sup>

26. Our interpretation of the definition of “navigation devices” is also consistent with the intent of Congress that the scope of the term change over time as technology changes. Congress recognized the rapidly evolving nature of MVPD and consumer electronics technology. The portion of the Conference Report for the 1996 Telecommunications Act discussing navigation devices stated that, in implementing Section 629, the Commission should “avoid actions which could have the effect of freezing technologies and services. . . . Thus, in implementing this section, the Commission should take cognizance of the current state of the marketplace and consider the results of private standards setting activities.”<sup>79</sup> Similarly, in implementing Section 629, the Commission stated: “We do not believe, however, that our work with respect to these issues is complete. The markets involved are in the early stages of becoming competitive, and the participants in these markets are on the precipice of a change from analog to digital communications. . . . Our objective thus is to ensure that the goals of Section 629 are met without fixing into law the current state of technology.”<sup>80</sup> More recently, in the *AllVid NOI*, adopted in 2010, the Commission stated that “[t]raditionally, the Commission and interested parties have considered the term navigation devices to include televisions, set-top boxes (including DVRs), and home theater computers,” and sought comment on whether “these devices comprise the universe of navigation devices, and if not, what other devices could perform navigation device functions.”<sup>81</sup> The fact that the Commission in 2010 asked about the scope of the term “navigation devices” underscores that the definitions of the terms used in Section 629 and 76.1200(c) have not been definitively fixed and may change over time.<sup>82</sup>

27. Our interpretation of “navigation devices” is also consistent with the language of Sections 204 and 205 as well as Congress’s goals in enacting them. As compared with our proposal to apply Section 205 only to MVPD-provided navigation devices, this approach better honors the literal meaning of the terms of the provision. At the same time, it avoids the perverse outcome that would have resulted from an overly broad reading of “navigation devices” that would have largely nullified Section 204, thwarting Congress’s effort to craft different requirements for different categories of devices.<sup>83</sup> For example, this interpretation gives meaning to the provision that states that Section 204 applies to certain apparatus, “including apparatus designed to receive or display video programming transmitted in digital

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<sup>77</sup> *Id.* at 74 (“Low-cost DTAs are proving a durable component of the cable industry’s push to phase out analog delivery. Although we initially framed the units as a stop-gap measure because of their one-way limitations, as the installed base pushes beyond 32 million in 2012, the argument for their staying power has been cemented.”).

<sup>78</sup> This interpretation is consistent with the Commission’s *Seventh Video Competition Report*, which stated “in the last year, interactive television (‘ITV’) services are beginning to be offered through cable, satellite, and terrestrial technologies. ITV provides or has the potential to provide a wide range of services, including video on demand (‘VOD’), e-mail, TV-based commerce, Internet access, and program-related content, using digital set-top boxes and other devices that interface with television receivers. . . .” *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, Seventh Annual Report, 16 FCC Rcd 6005, 6014, ¶ 15 (2001).

<sup>79</sup> S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 181 (1996).

<sup>80</sup> *Section 629 Implementation Order*, 13 FCC Rcd at 14781, ¶ 16.

<sup>81</sup> *Video Device Competition; Implementation of Section 304 of the Telecommunication Act of 1996*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, Notice of Inquiry, 25 FCC Rcd 4275, 4288, ¶ 40 (2010) (“*AllVid NOP*”). See also *Section 629 Implementation Order*, 13 FCC Rcd at 14785, ¶ 26 (recognizing that the market for navigation devices is subject to “technical innovations not foreseeable at this time”).

<sup>82</sup> We also note that the *AllVid NOI* was adopted only months before enactment of the CVAA, which suggests that Congress was aware that the definition of “navigation devices” was continuing to evolve.

<sup>83</sup> See *supra* ¶ 18.

format using Internet protocol,”<sup>84</sup> under this approach not all devices that can display video programming will be deemed to be navigation devices and thus excluded from coverage under Section 204, a result we think would be at odds with Congress’s intent.<sup>85</sup> Thus, our approach gives meaning and effect to both Sections 204 and 205.

28. Having determined which devices are excluded from coverage under Section 204, we conclude that Section 204 will apply to “digital apparatus,” as defined in that section, that are not used by consumers to access multichannel video programming or other services offered over multichannel video programming systems, such as televisions and PCs without CableCARD or other conditional access technology, mobile devices (*i.e.*, tablets and smartphones) without MVPD applications pre-installed by the manufacturer, and removable media players.<sup>86</sup> We adopt the *NPRM*’s analysis that the references in Sections 204 and 205 to navigation devices were “designed to prevent overlap in coverage between Sections 204 and 205; that is, a device can be a Section 204 device or Section 205 device, but not both.”<sup>87</sup> AFB suggests that a single device may have accessibility requirements under both Sections 204 and 205 because a device can be both a “digital apparatus” and a “navigation device.”<sup>88</sup> AFB argues that the Commission has taken a similar approach in the past when implementing Section 716(f) of the Act, added by Section 104 of the CVAA, finding that a device could have obligations under both Section 716(f) and Section 255.<sup>89</sup> Other commenters that address the issue agree with the *NPRM* that Sections 204 and 205 are mutually exclusive in their coverage of devices.<sup>90</sup> We agree with CEA that the language from Section 716(f) that AFB cites in support of its position is distinguishable from “Section 204’s clear exclusion of navigation devices from its coverage and Section 205’s express application to navigation devices.”<sup>91</sup> While Section 205 applies to “navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations) for the display or selection of multichannel video programming,”<sup>92</sup> Section

<sup>84</sup> 47 U.S.C. § 303(aa)(1); *NPRM*, 28 FCC Rcd at 8512-13, ¶ 17 (seeking comment on how to give meaning to that clause if every IP-enabled device is a navigation device).

<sup>85</sup> See, e.g., NAD/Consumer Groups Comments at 3-4; AFB Reply at 1-3.

<sup>86</sup> As we discuss further below, video programming applications that are installed by the manufacturer (or those that the manufacturer directs consumers to install), such as Netflix, Hulu, and Amazon, must also be made accessible under Section 204. See *infra* ¶ 39.

<sup>87</sup> *NPRM*, 28 FCC Rcd at 8512, ¶ 17.

<sup>88</sup> AFB Reply at 4-5. See also Comments of the American Council of the Blind at 3-5, 11 (“ACB Comments”) (suggesting that a device can be both a digital apparatus and a navigation device).

<sup>89</sup> AFB Reply at 5, citing 47 U.S.C. § 617(f) (“The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010. Such services and equipment shall remain subject to the requirements of section 255.”). See also *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket Nos. 10-213, 10-145, WT Docket No. 96-198, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14570-73, ¶ 37 (2011) (“*ACS Order*”) (“With respect to multipurpose devices, including devices used for both telecommunications and advanced communications services, we agree with the vast majority of commenters that argued that Section 255 applies to telecommunications services and to services classified as interconnected VoIP as of October 7, 2010, as well as to equipment components used for those services, and Section 716 applies to non-interconnected VoIP, electronic messaging, and interoperable video conferencing services, as well as equipment components used for those services.”).

<sup>90</sup> See AT&T Comments at 7; CEA Comments at 6-7; CEA Reply at 6-7; DISH/EchoStar Comments at 4-5; Comments of the Entertainment Software Association at 2 (“ESA Comments”); Rovi Comments at 3.

<sup>91</sup> CEA Reply at 7.

<sup>92</sup> 47 U.S.C. § 303(bb)(1).



204 categorically excludes navigation devices. Therefore, it follows that a device cannot be subject to the requirements of both Section 204 and 205.

29. Several commenters seek an exemption or waiver from the requirements of Sections 204 and 205 for certain classes of equipment or otherwise request a determination that certain equipment is outside of the scope of Sections 204 and 205. Before discussing these specific types of equipment, we note that, unlike in other device-related provisions of the CVAA, such as Section 203,<sup>93</sup> Congress did not provide the Commission with authority to grant exemptions from or waive the statutory requirements imposed by Sections 204 and 205. Accordingly, we do not exempt otherwise covered devices from the statutory requirements of Sections 204 and 205.

30. *Professional and commercial equipment.* We conclude that professional and commercial video equipment, including professional movie theater projectors and studio-grade video monitors and recorders, is not subject to the requirements of Section 204 or 205.<sup>94</sup> As the Commission has found in the past, the CVAA is intended to address the accessibility needs of individual consumers.<sup>95</sup> Therefore, as the Commission found in the *IP Closed Captioning Order*, professional and commercial equipment is outside of the CVAA's scope.<sup>96</sup> Significantly, no commenters argue that the Commission's rules should cover this equipment. As the Commission did in the *IP Closed Captioning Order*, we note that other federal laws may impose accessibility obligations "to ensure that professional or commercial equipment is accessible to employees with disabilities or enables the delivery of accessible services."<sup>97</sup>

31. *Public safety and enterprise equipment.* We also find that public safety and enterprise equipment is not subject to the requirements of either Section 204 or 205.<sup>98</sup> Motorola Solutions, Inc. ("Motorola") requested such a determination, and its request was not opposed. Motorola correctly observes that nothing in Sections 204 or 205 evidences Congressional intent to cover these devices, which are not provided to individuals but rather are marketed or sold to "state or local governments, public safety organizations or other enterprise customers."<sup>99</sup> Therefore, we find that public safety and enterprise equipment is outside the scope of Section 204 or 205 of the CVAA.<sup>100</sup>

32. *Broadband equipment.* We agree with Panasonic that "general purpose broadband equipment," such as routers,<sup>101</sup> does not fall under Section 204 or Section 205 because it is not designed to display or play back video content and cannot be used by consumers to access MVPD services.<sup>102</sup> As we describe above, in the case of Internet service offered by MVPDs, the navigation device is the cable modem, as that device is the only device consumers use to access the MVPD's Internet service.<sup>103</sup>

<sup>93</sup> See *id.* § 303(u)(2) (providing the Commission with authority to exempt "display-only video monitors with no play back capability" and "waive the requirements of this subsection" for certain types or classes of apparatus).

<sup>94</sup> See CEA Comments at 10; Panasonic Comments at 6.

<sup>95</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 846-47, ¶ 101.

<sup>96</sup> See *id.*

<sup>97</sup> *Id.* at 847, ¶ 101, citing 42 U.S.C. §§ 12111-12117, 12181-12189; *Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description*, 75 Fed. Reg. 43467 (July 26, 2010).

<sup>98</sup> See *ACS Order*, 26 FCC Rcd at 14630-31, ¶ 172.

<sup>99</sup> Reply Comments of Motorola Solutions, Inc. at 2, 4-5.

<sup>100</sup> This approach is consistent with the Commission's actions in the ACS Order. See *ACS Order*, 26 FCC Rcd at 14630-31, ¶ 172.

<sup>101</sup> A router is a device that connects two or more computer networks together, such as by connecting a home network to a broadband network.

<sup>102</sup> Panasonic Comments at 6.

<sup>103</sup> See *supra* ¶ 22.



Routers and other equipment that interact with the cable modem are outside the scope of Section 205 because consumers do not use that equipment to access the MVPD's service. With respect to cable modems, although they are navigation devices, we find that because cable modems cannot display or select multichannel video programming and do not have "built-in closed captioning capability," cable modems have no compliance obligations under Section 205.<sup>104</sup>

33. *Removable media players.* We reject Panasonic's request that we find that removable media players, such as DVD and Blu-ray players, are not subject to Section 204.<sup>105</sup> Removable media players are designed to "play back" video programming simultaneously with sound<sup>106</sup> and Panasonic does not appear to dispute this. Instead, Panasonic argues that the inclusion in Section 204 of the clause "including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol" signifies that Congress intended the word "transmitted" to mean "the conveyance of content from a video programming provider (e.g. a broadcast) to a receiver or recorder which in turn plays back or displays the content to be viewed by a consumer."<sup>107</sup> Panasonic argues that removable media players do not "transmit" video programming and therefore fall outside the scope of Section 204.<sup>108</sup> We disagree with Panasonic's interpretation of Section 204. In interpreting a similar provision, the Commission found in the *IP Closed Captioning Order*, and recently reiterated in the *IP Closed Captioning Reconsideration Order*, that the word "transmitted" is best interpreted to "describe how the video programming is conveyed from the device (e.g., DVD player) to the end user . . . , rather than describe how the video programming arrived at the device."<sup>109</sup> We see no reason to deviate from this settled interpretation here. Accordingly, because removable media players can "play back video programming transmitted in digital format," we find that they are subject to the requirements of Section 204.<sup>110</sup>

<sup>104</sup> See 47 U.S.C. § 303(bb)(1) (requiring that "on-screen text menus and guides provided by navigation devices . . . for the display or selection of multichannel video programming" be made "audibly accessible"); § 303(bb)(2) (requiring accessibility of the closed captioning activation mechanism for "navigation devices with built-in closed captioning capability").

<sup>105</sup> Panasonic Comments at 5-6. Panasonic does not argue that removable media players with IP connections or tuners should be excluded from coverage. See Panasonic Comments at 6. Rather, Panasonic argues that removable media players without a tuner or an IP network connection are not covered under either Section 204 or 205. See *id.*

<sup>106</sup> See 47 U.S.C. § 303(aa)(1) (requiring "if achievable (as defined in section 716) that digital apparatus designed to . . . play back video programming transmitted in digital format simultaneously with sound" be built in a way so that "control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired"); *IP Closed Captioning Order*, 27 FCC Rcd at 845, ¶ 99; *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Order on Reconsideration and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8785, 8794-95, ¶¶ 17-18 (2013) ("*IP Closed Captioning Reconsideration Order*").

<sup>107</sup> Panasonic Comments at 6.

<sup>108</sup> *Id.*

<sup>109</sup> *IP Closed Captioning Order*, 27 FCC Rcd at 845-46, ¶ 99; *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8795, ¶ 17, n. 57.

<sup>110</sup> Panasonic also submits that "[i]n the case of DVD and Blu-Ray Disc™ players, these devices depend on disc content authors to provide audio tags that are included in a disc's menus in order to provide audio output for the on-screen text or visual indicators. The techniques for authoring accessible media are well known and accessible DVDs are widely available in the marketplace. For Blu-Ray Discs™, the Blu-Ray Disc™ Association allows 'button sounds' for the creation of accessible interactive menus. Therefore, if the Commission finds that standalone removable media players are subject to Section 204 (a point on which we disagree, as noted above), the Commission should recognize that this support for accessible menus in removable media already complies with this Section. Removable media players cannot support a requirement to enable accessibility of media content menus because such menus are not under the control of the equipment manufacturer." Panasonic Comments at 11 (internal citations omitted). We agree. Section 303(aa)(2) of the Act only applies to "on-screen text menus or other visual indicators

(continued....)

34. *Display-only monitors and video projectors.* We conclude that display-only monitors and video projectors qualify as covered digital apparatus under Section 204, consistent with the Commission's analysis in the *IP Closed Captioning Order*, because the term "apparatus" includes "physical devices capable of displaying video."<sup>111</sup> However, as discussed below, we will defer the compliance deadline under Section 204 for a period of five additional years for these devices.<sup>112</sup>

35. Panasonic argues that these devices should not be covered by Section 204 on the same grounds they argue that removable media players should not be covered, and we reject that argument for the same reasons described above.<sup>113</sup> CEA argues that under the language of Section 303(aa)(1) of the Act, a digital apparatus must be able independently to "receive or play back video programming," and display-only monitors do not have this capability.<sup>114</sup> We adopt the same analysis used in the *IP Closed Captioning Order*, in which the Commission determined that a device that is "capable of displaying video" is "designed to receive or play back video programming" and thus an apparatus under Section 203.<sup>115</sup> We believe that the language in Section 204, which states that a "digital apparatus" is a device "designed to receive or play back video programming," language that also is used in Section 203, should be interpreted in the same manner as in the *IP Closed Captioning Order*. Thus, because display-only monitors and video projectors can display video programming simultaneously with sound, such devices fall under Section 204. The Information Technology Industry Council ("ITIC") argues that the Commission should adopt a display-only monitor exemption in this proceeding similar to the exemption adopted in the *IP Closed Captioning Order*.<sup>116</sup> However, the display-only monitor exemption adopted by the Commission in the *IP Closed Captioning Order* relied on a specific statutory provision contained in Section 203 applicable to display-only monitors.<sup>117</sup> Section 204 lacks an analogous provision. We believe the inclusion of such an exemption in Section 203 and the omission of such an exemption in Section 204 evidences an intent on the part of Congress to include display-only monitors under Section

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built in to the digital apparatus." 47 U.S.C. § 303(aa)(2) (emphasis added). Because the menus of the removable media itself (e.g., a Blu-Ray disc) are not "built-in" to the digital apparatus, the manufacturer of the removable media player does not have a compliance obligation under Section 204 to make such menus accessible. The manufacturer of the removal media player does have an obligation under Section 204 to make accessible the "built-in" text menus and other visual indicators of the removable media player and any other "appropriate built-in apparatus functions." *Id.* § 303(aa)(1), (2). See also *infra* Section IV.A.1. This would include, for example, making accessible the text menus and other visual indicators of video applications, such as Netflix, Hulu, and Amazon, when such applications are pre-installed on the removal media player by the manufacturer.

<sup>111</sup> *IP Closed Captioning Order*, 27 FCC Rcd at 840, ¶ 93.

<sup>112</sup> The video projectors that we refer to in this section are those available for purchase by individual consumers, not professional projectors, such as movie theater projectors, which we find are outside the scope of Sections 204 and 205. See *supra* ¶ 30.

<sup>113</sup> Panasonic Comments at 5-6. See also *supra* ¶ 33.

<sup>114</sup> CEA Comments at 11. CEA also argues, and we agree, that display-only monitors are not navigation devices as they cannot independently access MVPD programming or other services and must rely on another device to provide access to MVPD programming or other services. See *id.* at 9.

<sup>115</sup> *IP Closed Captioning Order*, 27 FCC Rcd at 840, ¶ 93.

<sup>116</sup> Comments of the Information Technology Industry Council at 3 ("ITIC Comments").

<sup>117</sup> See 47 U.S.C. § 303(u)(2) ("notwithstanding paragraph (1) of this subsection -- . . . (B) any apparatus or class of apparatus that are display-only video monitors with no playback capability are exempt from the requirements of such paragraph."); *IP Closed Captioning Order*, 27 FCC Rcd at 850, ¶ 108. The *IP Closed Captioning Order* did not apply the display-only monitor exemption to video projectors. See *id.*

204.<sup>118</sup> Nevertheless, we observe that the record lacks evidence that individuals with disabilities rely upon display-only monitors and video projectors to watch video programming. And, significantly, the requests to exempt display-only monitors and video projectors from Section 204 were supported by ACB and AFB and not otherwise opposed.<sup>119</sup>

36. Although we do not believe we have the statutory authority under Section 204 to exempt display-only monitors and video projectors, we will defer the compliance deadline under Section 204 for five additional years (eight years after publication of the rules in the *Federal Register*) to allow consumer electronics manufacturers to focus on making accessible other devices, such as televisions, that blind and visually-impaired consumers commonly use. As discussed further below, we believe Congress's omission of a specific compliance deadline under Section 204 affords broad discretion to the Commission to establish an appropriate deadline.<sup>120</sup>

37. *Digital cameras and similar equipment subject to waiver under the IP Closed Captioning Reconsideration Order.* We will also defer compliance under Sections 204 for a period of five additional years (for a total of eight years after the rules are published in the *Federal Register*) for the devices, such as digital cameras and baby monitors, that received a waiver in the *IP Closed Captioning Reconsideration Order* pursuant to the Commission's authority under Section 203 of the CVAA.<sup>121</sup> CEA asks that we "clarify" that these devices are not subject to the rules adopted under Sections 204 and 205 and claims that the Commission has "ample authority" to use its waiver authority under Section 1.3,<sup>122</sup> or general rulemaking authority to exempt this equipment from Section 204 or 205 obligations.<sup>123</sup> As we stated earlier,<sup>124</sup> we disagree that we have the authority to provide exemptions from the statutory requirements for devices covered under Sections 204 and 205. The waiver adopted in the *IP Closed Captioning Reconsideration Order* was pursuant to the explicit statutory waiver authority provided under Section

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<sup>118</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

<sup>119</sup> See CEA/AFB Aug. 16 *Ex Parte* Letter at 2 ("CEA, AFB, and ACB agreed that certain simple consumer electronics devices, such as display-only video monitors, should be exempt from coverage under Sections 204 and 205.") (internal citation omitted).

<sup>120</sup> See *infra* ¶ 111. The only guidance that Congress provided with respect to compliance deadlines in Section 204 is mandating that the section's requirements not go into effect for a minimum of 24 months for mobile TV devices. See Pub. L. No. 111-260, § 204(d).

<sup>121</sup> *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8790-93, ¶¶ 11-15. Under its authority pursuant to Section 203, the Commission granted waiver for two classes of devices: (1) devices that are primarily designed to capture and display still and/or moving images consisting of consumer generated media, or of other images that are not video programming as defined under the CVAA and Commission rules, and that have limited capability to display video programming transmitted simultaneously with sound; and (2) devices that are primarily designed to display still images and that have limited capability to display video programming transmitted simultaneously with sound. *Id.* at 8790-91, ¶ 12. The first category includes, for example, digital still cameras, digital video cameras, baby monitors, security cameras, digital video camera microscopes, digital playback binoculars, and digital probes for viewing and playing video of enclosed spaces. *Id.* at 8791, ¶ 12, n. 40. The second category includes, for example, digital picture frames, but not those that are primarily designed to display both still photographs and video. *Id.* at 8791, ¶ 12, n. 41. We also note that devices with general purpose operating systems, such as Android or Windows, that can receive content from the Internet and easily display video programming transmitted simultaneously with sound, were not subject to the waiver granted in the *IP Closed Captioning Reconsideration Order* and similarly will not be subject to the deferred compliance deadline provided by this *Report and Order*. See *id.* at 8791-92, ¶¶ 13-14.

<sup>122</sup> 47 C.F.R. § 1.3.

<sup>123</sup> CEA Comments at 25-26.

<sup>124</sup> See *supra* ¶ 29.

203,<sup>125</sup> and Congress did not provide analogous authority in Sections 204 or 205. We find that these devices are “digital apparatus” under Section 204 because they can be used to “receive or play back video programming transmitted in digital format simultaneously with sound.”<sup>126</sup> We note, however, that CEA’s request that these devices be excluded from coverage under Section 204 is supported by ACB and AFB<sup>127</sup> and is not otherwise opposed. We are persuaded that a deferral of the compliance deadline is appropriate in this case because consumers are unlikely to use these devices to watch video programming due to the limited ability of these devices to access video programming, the inconvenience of configuring these devices to view video programming, and the inefficiency of actually viewing video programming on these devices.<sup>128</sup> As noted above with respect to display-only monitors and video projectors, we believe the focus of consumer electronics manufacturers at this time should be on making accessible other devices that will provide a greater benefit to consumers in the manner envisioned by Congress in enacting the CVAA.

#### **B. Responsibility and Definition of Digital Apparatus Under Section 204**

38. We find that digital apparatus manufacturers have the responsibility to comply with Section 204. We also adopt the tentative conclusions in the *NPRM* to interpret the meaning of “apparatus” and the scope of Section 204 the same way the Commission interpreted the scope of Section 203 in the *IP Closed Captioning Order*, but excluding navigation devices that are subject to Section 205.<sup>129</sup>

39. We find that Section 204 applies to the manufacturers of “digital apparatus” as we define that term below. Section 204 requires that digital apparatus be designed, developed and fabricated in a way that ensures that “built-in apparatus” functions are accessible.<sup>130</sup> Manufacturers of digital apparatus are uniquely positioned to design, develop, and fabricate the built-in functions of the devices they manufacture.<sup>131</sup> Furthermore, Section 204, unlike Section 205, does not explicitly address responsibility under that section for multiple different entities, such as manufacturers of software and manufacturers of hardware, suggesting that Congress intended for the requirements of Section 204 to apply to one entity.<sup>132</sup> CEA and the individual consumer electronics manufacturers that commented do not dispute that they are responsible for the accessibility compliance of the digital apparatus they manufacture.<sup>133</sup> We adopt the *NPRM*’s tentative conclusion to define the term “digital apparatus” as used in Section 204<sup>134</sup> the same way that the Commission defined the term “apparatus” when implementing Section 203,<sup>135</sup> but excluding

<sup>125</sup> See *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8790-91, ¶ 12 (granting waiver pursuant to 47 U.S.C. § 303(u)(2)(C)(i)).

<sup>126</sup> 47 U.S.C. § 303(aa)(1).

<sup>127</sup> See CEA/AFB Aug. 16 *Ex Parte* Letter at 2.

<sup>128</sup> See *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8791, ¶ 13.

<sup>129</sup> *NPRM*, 28 FCC Rcd at 8515-17, ¶¶ 25-29.

<sup>130</sup> 47 U.S.C. § 303(aa)(1).

<sup>131</sup> See *ACS Order*, 26 FCC Rcd at 14582, ¶ 63.

<sup>132</sup> See 47 U.S.C. § 303(bb)(3) (discussing responsibilities of software and hardware manufacturers); Pub. L. No. 111-260, § 205(b)(3) (discussing responsibility of “entities” that provide devices to requesting blind and visually impaired individuals).

<sup>133</sup> See, e.g., CEA Comments at 18-23 (discussing manufacturer obligations under Sections 204 and 205); ESA Comments at 2-6 (same); Comments of the Telecommunications Industry Association at 6-9 (“TIA Comments”) (same).

<sup>134</sup> 47 U.S.C. § 303(aa)(1).

<sup>135</sup> *Id.* § 303(u)(1).

navigation devices that are subject to Section 205, as specifically provided in Section 204.<sup>136</sup> Therefore, consistent with the analysis in both the *IP Closed Captioning Order* and the *ACS Order*, we find that the term digital apparatus should be defined to include “the physical device and the video players that manufacturers install into the devices they manufacture (whether in the form of hardware, software, or a combination of both) before sale, as well as any post-sale video players that manufacturers direct consumers to install.”<sup>137</sup> Included in the scope of digital apparatus are the video players that manufacturers embed in their devices, video players designed by third parties but installed by manufacturers in their devices before sale, and video players that manufacturers direct consumers to add to the device after sale in order to enable the device to play video.<sup>138</sup> We clarify that this includes the video players that are part of third-party applications that provide video programming, such as Netflix, Hulu, and Amazon, if those applications are pre-installed on digital apparatus or manufacturers direct consumers to install such applications. We find that Section 204 requires the manufacturer of the digital apparatus on which these types of video applications are pre-installed to ensure that the application’s user interfaces are accessible.<sup>139</sup> We expect in these instances that the manufacturers of the pre-installed video applications will cooperate with the device manufacturers to ensure the accessibility of such applications. Not included in the definition of a digital apparatus under Section 204 is any “third-party software that is downloaded or otherwise added to the device independently by the consumer after sale and that is not required by the manufacturer to enable the device to play video.”<sup>140</sup>

40. Consumer electronics manufacturers and commenters representing manufacturers support the Commission’s tentative conclusion to adopt the same definition of digital apparatus in Section 204 as adopted for apparatus in Section 203,<sup>141</sup> while consumer groups representing individuals with disabilities urge the Commission to include third-party software and other methods of viewing video programming, such as video players on websites, within the scope of Section 204.<sup>142</sup> While we are sympathetic to the concerns of the disability community with respect to accessibility of third-party software, we do not think that it would be reasonable to hold equipment manufacturers responsible for software components over which they have no control, nor do we think Congress intended that result.<sup>143</sup> Unlike Section 205, which

<sup>136</sup> *NPRM*, 28 FCC Rcd at 8515-16, ¶ 25.

<sup>137</sup> *Id.* at 8516, quoting *IP Closed Captioning Order*, 27 FCC Rcd at 840, ¶ 93. See also *ACS Order* 26 FCC Rcd at 14582, ¶ 63. We find that Section 204’s inclusion of the term “digital” to modify the term apparatus, a modifier not present in Section 203, does not require that we establish a different definition for purposes of Section 204, given that all apparatus are digital apparatus and no purely analog apparatus are currently being manufactured. Indeed, the only two commenters to directly address the modifier’s inclusion, ACB and NAD/Consumer Groups, agreed that the term’s inclusion does not require a different implementation of Section 204 from that used for Section 203. See ACB Comments at 9; NAD/Consumer Groups Comments at 5.

<sup>138</sup> *NPRM*, 28 FCC Rcd at 8516, ¶ 25, citing *IP Closed Captioning Order*, 27 FCC Rcd at 840, ¶ 93. In addition, if a manufacturer offers updates or upgrades to a video player component of a device, it must also ensure that those updates or upgrades meet the accessibility requirements of Section 204.

<sup>139</sup> See *infra* note 220.

<sup>140</sup> *NPRM*, 28 FCC Rcd at 8516, ¶ 25, n. 65, quoting *IP Closed Captioning Order*, 27 FCC Rcd at 840, ¶¶ 93-94. Consistent with the approach taken in the *IP Closed Captioning Order* and *ACS Order*, we find that digital apparatus manufacturers are also responsible for software upgrades made available by the manufacturers for download. *IP Closed Captioning Order*, 27 FCC Rcd at 841, ¶ 94, n. 370, citing *ACS Order*, 26 FCC Rcd at 14588-89, ¶ 13.

<sup>141</sup> See, e.g., CEA Comments at 11-12; ITIC Comments at 2-3; Verizon Comments at 3, 6; Reply Comments of CTIA—The Wireless Association at 10-13 (“CTIA Reply”); Reply Comments of the National Cable & Telecommunications Association at 12 (“NCTA Reply”).

<sup>142</sup> See ACB Comments at 8; NAD/Consumer Groups Comments at 4.

<sup>143</sup> See *ACS Order*, 26 FCC Rcd at 14588, ¶¶ 77-78.



directly addresses the responsibility of software manufacturers,<sup>144</sup> Section 204 has no such parallel language, and therefore we believe it is more appropriate to follow the same approach used in the *ACS Order* and *IP Closed Captioning Order*.

41. We also adopt the *NPRM*'s tentative conclusion that the inclusion of the phrase "including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol," a phrase not included in Section 203, should not result in a different interpretation of the scope of Section 204. As the *NPRM* stated, we believe this phrase is best interpreted as a clarification that Section 204 applies not only to traditional video-programming apparatus without IP functionality, such as non-IP enabled televisions, but also to devices with IP-functionality, such as "smart" TVs, tablets, and smartphones.<sup>145</sup> No commenters objected to this tentative conclusion.

42. In addition, we adopt the *NPRM*'s tentative conclusion to interpret the term "designed to," as used in Section 204, the same way that the Commission interpreted that term in the *IP Closed Captioning Order*.<sup>146</sup> There, the Commission concluded that "to determine whether a device is designed to receive or play back video programming, and therefore covered by the statute, we should look to the device's functionality, *i.e.*, whether it is capable of receiving or playing back video programming."<sup>147</sup> The consumer groups support this interpretation,<sup>148</sup> but both Panasonic and the Telecommunications Industry Association ("TIA") argue that the design intent of the manufacturer should play a role in determining whether devices are covered under Section 204.<sup>149</sup> The Commission recently reaffirmed the interpretation of "designed to" made in the *IP Closed Captioning Order* and we see no reason to deviate from that interpretation here.<sup>150</sup> We believe interpreting the phrase "designed to" to focus on a device's capability rather than the intent of the manufacturer provides more regulatory certainty for manufacturers and consumers.<sup>151</sup> Conversely, Panasonic and TIA's interpretation could harm consumers by allowing the manufacturer to dictate unilaterally whether a device falls within the scope of the statute by claiming that they did not intend that a device be used for a particular purpose even if it in fact has that capability, which could render the accessibility requirements of Section 204 effectively voluntary.<sup>152</sup> We do not believe that Congress intended to allow manufacturers to evade the statutory requirements. No commenters addressed the *NPRM*'s proposal to apply to Section 204 the limitation in Section 203 to apparatus "manufactured in the United States or imported for use in the United States."<sup>153</sup> We believe it is appropriate to apply such a limitation to Section 204 in our implementing rules to clarify that our rules only apply to devices manufactured in the United States or imported for domestic use.

### C. Entities Responsible for Compliance Under Section 205

43. We conclude that both MVPDs leasing or selling navigation devices to their subscribers and equipment manufacturers placing navigation devices into the chain of commerce for purchase by

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<sup>144</sup> 47 U.S.C. § 303(bb)(3) ("with respect to navigation device features and functions – (A) delivered in software, the requirements set forth in this subsection shall apply to the manufacturer of such software").

<sup>145</sup> *NPRM*, 28 FCC Rcd at 8516-17, ¶ 28.

<sup>146</sup> *Id.* at 8517, ¶ 29, citing *IP Closed Captioning Order*, 27 FCC Rcd at 842, ¶ 95.

<sup>147</sup> *IP Closed Captioning Order*, 27 FCC Rcd at 842, ¶ 95.

<sup>148</sup> See ACB Comments at 9; NAD/Consumer Groups Comments at 5-6.

<sup>149</sup> See Panasonic Comments at 5; TIA Comments at 5.

<sup>150</sup> See *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8788-89, ¶¶ 6-7.

<sup>151</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 842, ¶ 95.

<sup>152</sup> See *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8788-88, ¶ 7, citing *Emergency Information/Video Description Order*, 28 FCC Rcd at 4916, ¶ 64.

<sup>153</sup> *NPRM*, 28 FCC Rcd at 8517, ¶ 29.



consumers are responsible for complying with Section 205.<sup>154</sup> In addition, we conclude that Section 205 imposes responsibilities on manufacturers of navigation device hardware and software.

44. *Responsibility Under Section 303(bb)(1) of the Act For Making On-Screen Text Menus and Guides Audibly Accessible.* Section 303(bb)(1) of the Act states, that “if achievable (as defined in section 716), that the on-screen text menus and guides provided by navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations) for the display or selection of multichannel video programming are audibly accessible in real-time upon request, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement[.]”<sup>155</sup> We find that both MVPDs that provide navigation devices to their subscribers and the manufacturers of navigation devices, such as retail set-top boxes with CableCARDS (e.g., TiVo boxes), that sell such devices to consumers at retail are responsible for providing compliant equipment under Section 303(bb)(1) of the Act.<sup>156</sup> Section 205(b)(3) provides that “[a]n entity shall only be responsible for compliance with the requirements added by the section with respect to navigation devices that it provides to a requesting blind or visually impaired individual.”<sup>157</sup> Section 205 does not define the terms “provide” and “entity” used in this provision. We believe the most reasonable interpretation of the word “provide” is to offer a navigation device to customers for lease or to place a navigation device into the chain of commerce for sale to consumers. It follows that the most reasonable interpretation of the word “entity” is an MVPD providing navigation devices for lease or purchase, and a navigation device manufacturer that places its navigation devices into the chain of commerce for sale to consumers. No commenters object to holding MVPDs and navigation device manufacturers responsible for compliance under Section 205,<sup>158</sup> and commenting MVPDs and manufacturers of retail navigation devices appear to accept that they have the responsibility to provide compliant devices in accordance with the requirements of Section 303(bb)(1) of the Act.<sup>159</sup> We clarify

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<sup>154</sup> We find that the requirements of Section 205 would also apply to MVPDs in situations in which the MVPDs lease or otherwise give equipment to customers at no charge.

<sup>155</sup> 47 U.S.C. § 303(bb)(1).

<sup>156</sup> We clarify, as requested by the American Cable Association (“ACA”), that Section 205 does not apply to a cable channel providing program listings, often in the form of a scrolling grid. *See* Reply Comments of the American Cable Association at 6 (“ACA Reply”). ACA requested clarification that the requirements of Section 205(a) do not apply to “a separate video channel that displays over the course of a few minutes the title of the program currently playing on each network carried by the system.” *Id.* While Section 205 applies accessibility requirements to “the on-screen text menus and guides *provided by navigation devices*,” *see* 47 U.S.C. § 303(bb)(1), ACA explains that the information offered on such a programming channel “is provided entirely by equipment in the cable headend, and not by any navigation device on the customer’s premises that has been provided by the cable operator.” ACA Reply at 6. Therefore, a cable channel providing program listings is not required to be made accessible by Section 205. Similarly, as requested by ACA, *see id.*, we clarify that, to the extent that an MVPD does not provide navigation devices to its subscribers, it is not directly subject to the requirements of Section 205. We note that no party opposed ACA’s requests for clarification.

<sup>157</sup> Pub. L. No. 111-260, § 205(b)(3).

<sup>158</sup> We note that both AFB and NAD/Consumer Groups generally object to including navigation devices other than MVPD-provided navigation devices within the scope of Section 205, but would have the Commission hold the manufacturers of these non-MVPD-provided navigation devices responsible for compliance under Section 204. *See* NAD/Consumer Groups Comments at 3-4; AFB Reply at 2-4.

<sup>159</sup> *See, e.g.*, ACA Comments at 5 (discussing MVPD compliance obligations under Section 205); AT&T Comments at 6-7 (recognizing MVPD obligation to provide compliant devices under Section 205); CEA Comments at 18-23 (discussing manufacturer obligations under Sections 204 and 205); Comments of DIRECTV, LLC at 3-8 (“DIRECTV Comments”) (discussing MVPD compliance obligations under Section 205); DISH/EchoStar Comments at 5-6, 13 (discussing manufacturer compliance obligations under Section 205 and observing that MVPDs have compliance obligations under Section 205); NCTA Comments at 2 (stating that cable operators and

(continued....)

that MVPDs bear responsibility under Section 205(b)(3) only for the devices they directly provide to customers.<sup>160</sup> Therefore, an MVPD would not be responsible for ensuring the compliance of a device that one of its customers procures at retail or through some other means and then uses to obtain MVPD service, because the MVPD is not providing that device. We note that the navigation device manufacturer would have compliance responsibilities under Section 205 in the event the customer purchases at retail a CableCARD-compatible set-top box or other device containing conditional access functionality for use in obtaining MVPD service.

45. *Responsibility Under Section 303(bb)(2) of the Act for Providing Ready Access to Captions.* Section 303(bb)(2) of the Act provides that “for navigation devices with built-in closed captioning capability, [] access to that capability through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features[.]”<sup>161</sup> We find that both MVPDs that provide navigation devices to their customers (either for purchase or lease) and the manufacturers of navigation devices that place devices into the chain of commerce for sale to consumers are the entities responsible for providing compliant equipment – including the mechanism required under Section 303(bb)(2) of the Act. No commenters argue that MVPDs and navigation device manufacturers should not be held responsible for compliance under Section 205 and we believe the most reasonable approach in implementing Section 205 is to hold those entities responsible for providing devices that comply with both Sections 303(bb)(1) and 303(bb)(2) of the Act as these entities are best positioned to ensure that the devices they lease or manufacture have a compliant closed captioning activation mechanism.

46. *Responsibility of Manufacturers of Navigation Device Hardware and Software.* In addition to our finding that Section 205 imposes responsibilities on MVPDs who lease or sell navigation devices and on manufacturers who sell navigation devices at retail, we also find that Section 205 imposes responsibility on the manufacturers of navigation device hardware and software, even if they are not the entity that leases or sells the navigation device to consumers. Section 303(bb)(3) of the Act provides that “with respect to navigation device features and functions-- (A) delivered in software, the requirements set forth in this subsection shall apply to the manufacturer of such software; and (B) delivered in hardware, the requirements set forth in this subsection shall apply to the manufacturer of such hardware.”<sup>162</sup> The *NPRM* requested comment on the meaning of this provision.<sup>163</sup> We find that these provisions require that manufacturers of navigation device hardware and software each have responsibility to ensure that the navigation device accessibility features are functional.<sup>164</sup> For instance, if the navigation device uses a hardware-based solution to enable accessibility, the manufacturer of the navigation device’s hardware has responsibility for ensuring that solution works correctly.

47. We agree with Verizon’s formulation that this provision should be interpreted consistent with other provisions of the CVAA so that the Commission has the authority to “assign entities

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other MVPDs must satisfy Section 205 requirements); Rovi Comments at 3-5 (stating that Section 205 can apply to MVPDs and manufacturers); Verizon Comments at 12 (recognizing MVPD obligation to provide compliant devices under Section 205).

<sup>160</sup> See Verizon Comments at 12. As we discuss below, MVPDs may also have separate Section 205 compliance responsibilities pursuant to Section 303(bb)(3)(A) of the Act if the MVPD is the manufacturer of navigation device hardware or software, including pre-installed MVPD applications. See *infra* ¶¶ 46-51.

<sup>161</sup> 47 U.S.C. § 303(bb)(2).

<sup>162</sup> 47 U.S.C. § 303(bb)(3).

<sup>163</sup> *NPRM*, 28 FCC Rcd at 8513, ¶ 20.

<sup>164</sup> Such a responsibility also includes ensuring that any updates or upgrades that a manufacturer may offer meet the accessibility requirements of Section 205.

responsibility for compliance in accordance with their roles in any alleged noncompliance.<sup>165</sup> Therefore, when the Commission receives a complaint regarding a violation of Section 205, the Commission will determine which entity (or entities), if any, is potentially responsible for the violation.<sup>166</sup> The Commission will undertake this effort because it is better positioned than individual consumers to determine the potentially responsible entity. As discussed above, we find that the entity that provides a navigation device to a requesting blind or visually impaired individual (whether an MVPD or equipment manufacturer that places navigation devices into the chain of commerce) has a responsibility to provide that consumer with an accessible device. At the same time, we believe that the language of Section 303(bb)(3) of the Act requires us to recognize that MVPDs or manufacturers that supply navigation devices are not the only entities responsible for compliance under Section 205. Rather, there may be some instances in which the manufacturer of navigation device hardware or software fails to meet its Section 205 compliance responsibility and bears liability in addition to, the MVPD or manufacturer supplying the navigation device.<sup>167</sup> We intend to investigate complaints and determine violations under Section 205 on a case-by-case basis.<sup>168</sup> In adopting this interpretation of Section 205, we emphasize that even if a complaint proceeding results in a finding that a violation stems from a failure by the manufacturer of hardware or software included in navigation devices provided by MVPDs or sold at retail, such a finding would not relieve the MVPD or equipment manufacturer that placed the navigation device into the chain of commerce of its distinct and separate responsibility under Section 205 to ensure that a consumer is provided with an accessible device.<sup>169</sup> Pursuant to the terms of Section 205, we have the authority to impose liability on any responsible party (or parties) that we find violate Section 205.<sup>170</sup>

48. When a device that would otherwise be a digital apparatus becomes a navigation device because the device manufacturer installs an application that performs conditional access so that a consumer can access multichannel video programming or other services offered over multichannel video

<sup>165</sup> Verizon Comments at 13, citing *Emergency Information/Video Description Order*, 28 FCC Rcd at 4899-900, ¶ 36. See also CTIA Reply at 12-13 (agreeing with Verizon approach); TIA Comments at 9-10 (submitting that hardware and software manufacturers have separate responsibilities under Section 205).

<sup>166</sup> See *infra* ¶¶ 123, 125.

<sup>167</sup> ACB argues that MVPDs should not be able to shift responsibility onto manufacturers or software developers under Section 205 for the equipment the MVPD distributes. ACB Comments at 7. As our discussion herein indicates, MVPDs will not be able to shift responsibility for providing accessible devices to consumers onto navigation software and hardware manufacturers; however manufacturers of navigation device hardware and software also have compliance responsibilities under Section 205.

<sup>168</sup> See *infra* ¶ 127.

<sup>169</sup> For example, an MVPD that provided a device to a requesting blind or visually impaired subscriber that the MVPD believed was accessible but had a hardware or software malfunction that rendered the device inaccessible would still be responsible for providing that subscriber with a working device that provided accessibility; it could not merely point to the hardware or software manufacturer and escape liability for its own obligations. See *supra* ¶¶ 44-45, 47 and n. 167, 169; Pub. L. No. 111-260, § 205(b)(3). Similarly, if a hardware or software failure on a retail navigation device occurred that rendered the device inaccessible, the manufacturer that placed the navigation device into the chain of commerce would have responsibility under the Act to ensure that the customer had a functioning accessible device. In a situation in which a device is classified as a navigation device because it has a pre-installed MVPD application, see *supra* ¶ 23, the equipment manufacturer of that navigation device is responsible for providing accessible devices to requesting blind or visually impaired individuals, and would not be relieved of that responsibility by virtue of the fact that the device was not compliant as a result of a software problem with the MVPD application that caused the application itself to become inaccessible. As discussed, in all these instances the entity providing the device, the hardware manufacturer, and the software manufacturer are all potentially liable for violations of Section 205. Of course, in many instances, the manufacturer of the hardware or software in a given device may be the MVPD or navigation device manufacturer itself.

<sup>170</sup> See AT&T Comments at 13; Verizon Comments at 13; CTIA Reply at 12-13 (all arguing that joint and several liability is inappropriate under Section 205).

programming systems (hereinafter collectively referred to as “MVPD applications”), we find that pursuant to Section 303(bb)(3)(A), Section 205 applies.<sup>171</sup> Therefore, to the extent that an MVPD application makes use of “text menus and guides” “for the display or selection of multichannel video programming,” such text menus and guides must be made audibly accessible.<sup>172</sup> In addition, if the device on which the MVPD application is installed has built-in closed captioning,<sup>173</sup> the application must have a “mechanism reasonably comparable to a button, key, or icon designated for activating the closed captioning.”<sup>174</sup> For instance, an application offered by an MVPD that enables subscribers to watch multichannel video programming on a mobile device that was pre-installed by the mobile device manufacturer would need to be made accessible pursuant to the requirements of Section 205.<sup>175</sup>

49. NCTA argues that “if a non-MVPD provides a navigation device to a consumer (even if pre-loaded at sale with an MVPD app), the non-MVPD would be responsible for providing a requesting consumer with an audibly accessible on-screen text menu or guide.”<sup>176</sup> As discussed above,<sup>177</sup> we agree

<sup>171</sup> NCTA agrees that when an MVPD application is pre-installed on a device, its on-screen text menus and guides must be made accessible. See Letter from Rick Chessen, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Oct. 23, 2013) (“NCTA Oct. 23 *Ex Parte* Letter”) (“Thus, we stated that if a non-MVPD provides a navigation device to a consumer (even if pre-loaded at sale with an MVPD app), the non-MVPD would be responsible for providing a requesting consumer with an audibly accessible on-screen text menu or guide.”).

<sup>172</sup> 47 U.S.C. § 303(bb)(1).

<sup>173</sup> After the effective date of the regulations adopted under Section 203 of the CVAA in the *IP Closed Captioning Order*, new navigation devices with video players that are capable of downloading MVPD-provided applications will generally have built-in closed captioning capability. We also note that MVPDs are required under the rules adopted by the *IP Closed Captioning Order* to pass through or render closed captioning on MVPD applications. See *IP Closed Captioning Order*, 27 FCC Rcd at 796-97, 805-06, ¶¶ 12, 27. In requiring that pre-installed MVPD applications make the closed caption activation mechanism accessible, our rules are ensuring that Sections 202, 203, and 205 of the CVAA are working in tandem to make the captioning both available on the hardware and software and easily accessible.

<sup>174</sup> 47 U.S.C. § 303(bb)(2). NCTA argues that even if MVPD applications are subject to Section 205, those applications would not be required to provide a closed captioning activation mechanism reasonably comparable to a button, key, or icon because Section 303(bb)(2) of the Act only applies to “navigation devices with *built-in captioning capability*” and MVPD applications downloaded on a third-party device are not “built-in” to the device. NCTA Reply at 12 (emphasis original). We disagree with NCTA’s interpretation. Section 303(bb)(3)(A) of the Act applies the accessibility requirements of Section 205, including the closed captioning activation mechanism requirement, to the manufacturers of software to the extent a navigation device’s features and functions are being delivered in software. See 47 U.S.C. § 303(bb)(3)(A). The pre-installed MVPD application itself need not be considered a navigation device for the manufacturers of the application’s software to have compliance responsibilities under Section 303(bb)(3)(A) of the Act. See *infra* ¶¶ 50-51.

<sup>175</sup> Similar applications to those offered by MVPDs that use text menus and guides for the display or selection of multichannel video programming and allow consumers to access multichannel video programming and other services, such as the TiVo application for smartphones and tablets, would also need to be made accessible under Section 205 if such applications were pre-installed by the device manufacturer. See TiVo, TiVo app for smartphones and tablets, <http://www.tivo.com/discover/mobile>. We are not addressing here other services that provide access to video programming, such as Netflix, Hulu, and Amazon, though we note pursuant to our Section 204 analysis that these video applications must be made accessible under Section 204 if pre-installed by the digital apparatus manufacturer. See *supra* ¶ 39.

<sup>176</sup> Letter from Rick Chessen, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (Oct. 24, 2013) (“NCTA Oct. 24 *Ex Parte* Letter”). See also Verizon Comments at 5 (under Section 205, the entity providing the navigation device is not responsible “for making accessible any device purchased by a consumer that can access video programming through an MVPD’s application, widget or Internet solution.”) (internal citation omitted).

<sup>177</sup> See *supra* ¶¶ 44, 47.

that the non-MVPD manufacturer in this scenario is responsible for complying with Section 205(b)(3) by providing an accessible navigation device to a requesting blind or visually impaired individual. We do not agree, however, that this precludes the Commission from holding MVPDs responsible under Section 205 for the accessibility of pre-installed MVPD applications' on-screen text menus and guides. We believe such a reading of Section 205 would render meaningless Section 303(bb)(3) of the Act, which explicitly states that "the requirements of this subsection shall apply to the manufacturer of . . . software" when "navigation device features and functions" are "delivered in software" and "shall apply to the manufacturer of . . . hardware" when "navigation device features and functions" are "delivered in hardware."<sup>178</sup> If Congress intended the only responsible entities under Section 205 to be those that provided navigation devices to requesting blind or visually impaired individuals, there would have been no need for Congress to include the provisions of Section 303(bb)(3) of the Act. We believe our interpretation of Section 205 is more reasonable as it gives effect to all provisions of the statute.<sup>179</sup> That is, under our interpretation, both the manufacturer of the navigation device and the manufacturer of the software application are held responsible for ensuring compliance with Section 205's requirements.

50. We note that the entity providing the navigation device with the pre-installed MVPD application (which may be an MVPD, but in most cases we anticipate will be the equipment manufacturer that placed the navigation device into the chain of commerce) will be responsible for ensuring the accessibility of on-screen text menus and guides for the display or selection of multichannel video programming on its device to requesting blind or visually impaired individuals.<sup>180</sup> In the event that the

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<sup>178</sup> 47 U.S.C. § 303(bb)(3).

<sup>179</sup> Prior to NCTA's October 24, 2013 *ex parte* letter on this issue, NCTA, AFB, and ACB, stated that "Section 205 grants MVPDs maximum flexibility to provide a requesting customer an accessible solution and should not be construed to require that MVPD-provided apps running on third-party devices must be accessible regardless of whether the MVPD provides the customer with another accessible solution." NCTA/AFB/ACB Sept. 12 *Ex Parte* Letter at 2. While we appreciate the industry working to achieve consensus with the organizations representing individuals with disabilities, we do not believe this agreement represents the correct legal interpretation of Section 205. As an initial matter, we note that the provisions of Section 205 that grant "maximum flexibility" to the entity responsible for compliance grant such maximum flexibility to "the entity providing the navigation device." *See* Pub. L. No. 111-260, §§ 205(b)(3), (b)(6). When an MVPD application is pre-installed on a device by that device's manufacturer, the device manufacturer is the "entity providing the navigation" device and is entitled to the maximum flexibility in complying with Section 205, not the MVPD. The MVPD in this example, as the manufacturer of the pre-installed application, is the manufacturer of a "navigation device feature and function delivered in software." 47 U.S.C. § 303(bb)(3)(A). Under Section 205, the software manufacturer is not given "maximum flexibility" to select the manner of compliance. Instead, Section 303(bb)(3)(A) of the Act simply requires the software manufacturer to make its software functionality compliant. *See id.* In other words, unlike with respect to the entity providing the consumer with the navigation device, Section 205 gives no leeway to the software manufacturer to provide a separate solution to comply with the CVAA's requirements. In any event, even if the "maximum flexibility" provision of Section 205 were to apply here, it would give the entity flexibility to select the "manner of compliance," not to select whether or not to comply. *See* Pub. L. No. 111-260, § 205(b)(6). Moreover, the fact that an MVPD may provide compliant navigation devices to its subscribers that choose to lease or purchase such a device from the MVPD, does not relieve the MVPD from its potential separate compliance obligation as a software manufacturer of a pre-installed MVPD application to make such an application accessible. We observe that NCTA's subsequent *ex parte* submissions appear to acknowledge that MVPD applications must be made accessible if pre-installed; they argue the responsibility for ensuring such accessibility is on the navigation device provider. *See* NCTA Oct. 23 *Ex Parte* Letter at 1-2; NCTA Oct. 24 *Ex Parte* Letter at 1.

<sup>180</sup> *See* Pub. L. No. 111-260, § 205(b)(3). Pursuant to the Act, the entity providing the navigation device to the consumer is obligated to provide audible accessibility of the MVPD application's text menus and guides "upon request" to individuals who are blind or visually impaired and has the maximum flexibility in determining the manner by which the MVPD application is made audibly accessible. *See* 47 U.S.C. § 303(bb)(1); Pub. L. No. 111-260, §§ 205(b)(3), (4). *See also* NCTA Oct. 23 *Ex Parte* Letter at 2 (arguing that entities required to provide CVAA-compliant navigation devices "must be given 'maximum flexibility' to determine how to provide this accessibility").



provider of the navigation device and the software manufacturer of the MVPD application use an accessibility solution that incorporates the accessibility into the application itself, the software manufacturer would also have responsibility for compliance under Section 303(bb)(3)(A).<sup>181</sup> In such circumstances, we believe that the most reasonable interpretation of Section 303(bb)(3)(A) is to find that the MVPD itself is the “manufacturer” of its software application because under the current marketplace reality, the MVPD has exclusive rights to offer such software for use by its subscribers.<sup>182</sup> Therefore, the MVPD, as the software manufacturer, has a responsibility under Section 303(bb)(3)(A) of the Act for ensuring that its pre-installed software applications meet the accessibility requirements of Section 205.<sup>183</sup> Similarly, the hardware manufacturer of the navigation device with the pre-installed MVPD application has a responsibility under Section 303(bb)(3)(B) of the Act for ensuring that the device’s hardware allows for the accessibility of the pre-installed MVPD application.

51. While some commenters would have us apply Section 205 to all MVPD applications,<sup>184</sup> regardless of whether they are pre-installed by the manufacturer of the device or later downloaded by the consumer after purchase, at this time, we only impose obligations under Section 205 on MVPD applications that are pre-installed on devices. We believe such an approach is reasonable because in these instances, the manufacturer will only be responsible for ensuring the accessibility of applications that it chooses to pre-install on devices. Moreover, MVPDs will have consented to such pre-installation and will be well positioned to work with manufacturers to ensure the accessibility of pre-installed applications. Such an approach is also consistent with the approach taken in the *IP Closed Captioning Order* and *ACS Order*, where the Commission found that the CVAA provisions being implemented in those proceedings did not apply to “third-party software” the installation of which is not controlled or

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<sup>181</sup> See 47 U.S.C. § 303(bb)(3)(A). We find that an MVPD application that allows a consumer to access and navigate an MVPD’s video programming is delivering “navigation device features and functions” within the meaning of Section 303(bb)(3)(A) of the Act because the installation and use of applications is a feature or function of a navigation device with the MVPD application pre-installed by the device manufacturer. NCTA is correct that Section 205 does not require the MVPD application itself to provide accessibility; the entity providing the navigation device can choose the means by which the text menus and guides of the application are made accessible. See NCTA Oct 23 *Ex Parte* Letter at 2.

<sup>182</sup> Cf. *ACS Order*, 26 FCC Red at 14587, ¶ 75 (concluding that a manufacturer has “direct control over the products produced, and provides a ready point of contact for consumers and the Commission in getting answers to accessibility questions and resolving complaints”). In the case of a third-party application that offers access to multichannel video programming but is not provided by the MVPD, such as the TiVo application, the third-party provider of the application would be the “manufacturer” under Section 205. For instance, using the example of TiVo’s application referenced above, see *supra* note 175, TiVo would be the responsible entity under Section 205.

<sup>183</sup> Some MVPD commenters argue that imposing accessibility requirements on MVPD applications will stunt the development of this type of software as it will require MVPDs to ensure that their applications are accessible across numerous platforms. See DIRECTV Comments at 20; NCTA Reply at 6. However, MVPDs will only have compliance obligations in relation to MVPD applications that are pre-installed on devices. In these circumstances, the MVPD will have already consented to have its application pre-installed, and thus presumably has coordinated with the device manufacturer. To the extent that, in certain circumstances, an MVPD believes that it will not be “achievable” to build accessibility into its application as installed on certain platforms, it is free to seek a determination that it is not “achievable.” See *infra* ¶¶ 77-78. DIRECTV, LLC (“DIRECTV”) argues that it would be “grossly unfair” to require MVPDs to design accessible software under Section 205 while other non-MVPD distributors of video programming would not be required to provide accessible software applications. See DIRECTV Comments at 21. To the contrary, we find that our approach treats both MVPD applications and other video applications similarly. As our above discussion of Section 204 explains, pre-installed video applications on digital apparatus subject to Section 204 must be made accessible similarly to how pre-installed MVPD applications on navigation devices must be made accessible under Section 205.

<sup>184</sup> See ACB Comments at 4-5, 8; NAD/Consumer Groups Comments at 4-5, 7; Comments of Montgomery County, Maryland at 6 (“Montgomery County Comments”); Reply Comments of the Rehabilitation Engineering Research Center for Wireless Technologies at 3-4 (“Wireless RERC Reply”).



directed by the manufacturer.<sup>185</sup> MVPD commenters and CEA argue that Section 205 does not provide the Commission with authority to regulate software applications because MVPD applications are not “devices” or “equipment” and therefore do not meet the definition of a navigation device under Section 76.1200(c) of the Commission’s rules.<sup>186</sup> However, our conclusion that pre-installed MVPD applications must be covered under Section 205 is not predicated on MVPD applications themselves being navigation devices,<sup>187</sup> it is predicated on MVPD applications being a “navigation device feature[] or function[]” that is “delivered in software” under Section 303(bb)(3)(A) of the Act, which imposes responsibility for compliance under Section 205 directly on the manufacturers of navigation device software.<sup>188</sup> With respect to MVPD applications that are not pre-installed by the device manufacturer, but rather installed by consumers after purchase, the record indicates that MVPDs and software application manufacturers will face significant technical challenges in ensuring that consumer-installed MVPD applications comply with Section 205 on all devices.<sup>189</sup> Given these technological challenges, we believe at this time it is not appropriate to impose compliance obligations under Section 205 on MVPD applications that are not pre-installed by device manufacturers.<sup>190</sup>

52. *Other Entities.* We disagree with AFB that Section 205(b)(3) requires that we impose Section 205 requirements on businesses such as restaurants and bars because such business make “navigation devices . . . available to their customers” and therefore “must provide accessible equipment upon the request of a customer who is blind or visually impaired.”<sup>191</sup> We also decline to impose obligations on consumer electronics retailers, as AT&T Services, Inc. (“AT&T”) suggests.<sup>192</sup> There is no indication that Congress intended to apply Section 205 to any entities other than MVPDs and manufacturers of hardware and software included in navigation devices. If Congress had intended to extend Section 205’s reach to cover retailers or businesses such as those in the travel, entertainment, or food industries that purchase or lease navigation devices for the use of their customers, we believe it would have done so explicitly. As noted above, however, other federal laws may impose accessibility obligations on some of the businesses that AFB discusses that are not contemplated by the provisions of the CVAA.<sup>193</sup>

<sup>185</sup> *IP Closed Captioning Order*, 27 FCC Rcd at 840, ¶ 93; *ACS Order* 26 FCC Rcd at 14582, ¶ 62.

<sup>186</sup> See NCTA Comments at 8-9; DIRECTV Comments at 20; Reply Comments of AT&T Services, Inc. at 3 (“AT&T Reply”); CenturyLink Reply at 3-4; Letter from Alison A. Minea, Director and Senior Counsel, DISH Network, and John Card II, Director of Standards and Technology, EchoStar, to Marlene H. Dortch, Secretary, FCC, at 2-3 (Aug. 21, 2013) (“DISH/EchoStar Aug. 21 *Ex Parte* Letter”); Letter from Gregory Alan Barnes, General Counsel, Digital Media Association (“DiMA”), to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 6, 2013) (“DiMA Sept. 6 *Ex Parte* Letter”).

<sup>187</sup> Rather, the navigation device is the device that includes the pre-installed MVPD application.

<sup>188</sup> 47 U.S.C. § 303(bb)(3)(A).

<sup>189</sup> See DIRECTV Comments at 20; NCTA Reply at 6. See also CTIA Reply at 11 (submitting that ensuring the accessibility of software on all devices would require extensive coordination between parties that at best have an arm’s length relationship); DiMA Sept. 6 *Ex Parte* Letter at 2 (discussing difficulty of ensuring compliance when applications can run on thousands of different devices using “a myriad of proprietary platforms”). Commenters that support requiring the accessibility of all MVPD applications do not provide countervailing evidence.

<sup>190</sup> We will continue to monitor the development of accessible technology in this area and will reevaluate whether we should require the accessibility of consumer-installed MVPD applications at a later date if it appears necessary to ensure access to MVPD programming by people who are blind or visually impaired.

<sup>191</sup> See AFB Reply at 4.

<sup>192</sup> AT&T Comments at 6-7. We also disagree with AFB that a literal interpretation of Section 205(b)(3) would require that the Commission impose obligations on resellers of used consumer electronics, such as Goodwill. See AFB Reply at 4.

<sup>193</sup> See *supra* note 97 and accompanying text.

#### IV. ACCESSIBILITY REQUIREMENTS OF SECTIONS 204 AND 205 OF THE CVAA

##### A. Functions that Must be Made Accessible Under Sections 204 and 205

###### 1. Section 204 Requirements for Digital Apparatus

53. As mandated by Section 204, we adopt rules requiring that covered “digital apparatus” “if achievable . . . be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired.”<sup>194</sup> We also adopt rules to ensure that “if on-screen text menus or other visual indicators built in to the digital apparatus are used to access the [appropriate built-in] functions of the apparatus . . . such functions shall be accompanied by audio output that is either integrated or peripheral to the apparatus, so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired in real-time.”<sup>195</sup> In the discussion that follows, we set forth the compliance requirements for manufacturers of covered apparatus with regard to accessibility of appropriate built-in functions and related on-screen text menus and visual indicators.

54. *Accessibility of Appropriate Built-In Apparatus Functions.* We require that covered digital apparatus “if achievable . . . be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired.”<sup>196</sup> As discussed more thoroughly below, we find that the “appropriate” built-in apparatus functions are those functions that are used for the reception, play back, or display of video programming and that, at this time, those are limited to the VPAAC 11 essential functions.<sup>197</sup> Further, we clarify that an apparatus covered by Section 204 is not required to include all 11 functions if those functions are not otherwise included in the device generally. That is, we do not impose an obligation on a manufacturer to add any of the 11 functions; rather, we require only that those functions that are already included in the device be made accessible.

55. In the *NPRM*, we tentatively concluded that the “appropriate” functions that must be made accessible under Section 204 include *all* user functions of a covered device, with the exception of diagnostic and debugging functions.<sup>198</sup> ACB, Verizon, and the Rehabilitation Engineering Research Center for Wireless Technologies (“Wireless RERC”) agree that all user functions on a covered device should be made accessible.<sup>199</sup> However, a number of industry commenters explain that multipurpose

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<sup>194</sup> 47 U.S.C. § 303(aa)(1).

<sup>195</sup> *Id.* § 303(aa)(2).

<sup>196</sup> *Id.* § 303(aa)(1).

<sup>197</sup> As described herein, in the *VPAAC Second Report: User Interfaces*, the VPAAC “define[d] the set of [11] functions considered essential to the video consumption experience.” *VPAAC Second Report: User Interfaces* at 8. *See infra* ¶ 58.

<sup>198</sup> *NPRM*, 28 FCC Rcd at 8517, ¶ 30.

<sup>199</sup> *See* ACB Comments at 9-10 (“[I]t should be sufficient to provide to the manufacturers the information that all functions, if they happen to have been included on a device or software, must be accessible.”); Verizon Comments at 6-7 (“agree[ing] with the . . . conclusion that all user controls and functions on a device subject to either Section 204 or 205 must be accessible to visually-impaired consumers”) (footnote omitted); Wireless RERC Reply at 4 (“[T]o ensure parity across the continuum of the viewing experience, from program selection to malfunction remediation, it is essential that *all available* functions be made accessible.”) (emphasis in original). ACB and the Wireless RERC disagree with the *NPRM*’s tentative conclusion to the extent that it excludes diagnostic and debugging functions from accessibility requirements. *See* ACB Comments at 9; Wireless RERC Reply at 4. We address this issue below. *See infra* note 221. Although AFB’s reply comments expressed support for the proposal in the *NPRM* that all functions must be made accessible under Section 204, a later *ex parte* letter that AFB filed jointly with CEA states that the 11 essential functions identified by the VPAAC are the set of functions subject to Section 204 accessibility requirements. *See* AFB Reply at 5; CEA/AFB Aug. 16 *Ex Parte* Letter at 1-2; *infra* ¶ 58.

devices include functions unrelated to the display of video programming, and they argue that the tentative conclusion is overbroad because it encompasses those functions.<sup>200</sup> For example, the Entertainment Software Association (“ESA”) argues that the *NPRM*’s tentative conclusion “is broader than needed to achieve the accessibility goals behind Sections 204 and 205, which clearly are focused on video programming,” and “also creates significant uncertainty for manufacturers in determining how to handle other device functions that are completely unrelated to video programming, such as game play features of a game console.”<sup>201</sup> Other commenters argue that imposing accessibility requirements on all user functions of a device is contrary to the plain language of the statute, which imposes obligations only with respect to “appropriate built-in apparatus functions.”<sup>202</sup> Upon further consideration of the arguments raised in the record, we decline to adopt our tentative conclusion to extend Section 204 accessibility requirements to all user functions of a device, excluding diagnostic and debugging functions. We agree with commenters that Congress’s use of the term “appropriate” as a qualifier indicates that it did not intend for the requirements to broadly cover user functions that are unrelated to video programming.

56. Instead, we conclude that the “appropriate” apparatus functions are those functions that are used for the reception, play back, or display of video programming. We believe that interpreting “appropriate” user functions to include those related to video programming and to exclude those unrelated to video programming is consistent with the intent of the CVAA “to help ensure that individuals with disabilities are able to . . . better access video programming.”<sup>203</sup> We also believe that this interpretation of the term “appropriate” is consistent with the scope of Section 204, which specifies that covered digital apparatus are those that “receive” or “play back” video programming transmitted in digital format simultaneously with sound, as well as those that “receive” or “display” video programming transmitted in

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<sup>200</sup> See ESA Comments at 5, n. 21 (arguing that “nothing in the CVAA nor the legislative history suggests that Section 204 or 205 was to cover the entire user interface of multipurpose devices; for example, the user interface of game consoles controls several other functions, including game play, online marketplaces, and music streaming, that are not within the scope of this CVAA proceeding”); ITIC Comments at 6 (“Congress did not intend Section 204 to apply to the entire [user interface] of [multifunction] devices, but rather, only to the interface functions used to play[ ]back video programming. For example, on a PC, tablet, mobile device or gaming console, the *non-video programming features* of the user interface are not subject to Section 204.”) (emphasis in original); Panasonic Comments at 9-10 (stating that “Congress did not intend to sweep in all the functions of multifunctional devices . . . but only [ ] those functions necessary to control the reception or play back of video programming”); TIA Comments at 8 (asking for clarification that non-video programming features on multipurpose devices are not subject to Section 204 “[b]ecause it is clear in Section 204 that requirements under this section [are] limited to the interface functions used to play back video programming”); CTIA Reply at 7 (arguing that devices such as “tablets, smartphones, and other mobile devices . . . have numerous functions beyond the reception and display of video programming, and the statute is clear that those functions are not subject to Section 204”); DiMA Sept. 6 *Ex Parte* Letter at 4 (making same point as ITIC).

<sup>201</sup> ESA Comments at 5 (footnote omitted). See also Reply Comments of the Entertainment Software Association at 1-2 (“ESA Reply”).

<sup>202</sup> See CEA Comments at 13 (arguing that “[t]he plain language of Section 204, which imposes requirements on ‘appropriate built-in apparatus functions,’ contradicts” a conclusion that Section 204’s requirements apply to all user functions) (footnote omitted) (emphasis in original); ITIC Comments at 4 (arguing that if Congress had intended the term “appropriate built-in apparatus functions” to include all user functions of a device, “they would not have used qualifying language in the Act”); Panasonic Comments at 9 (arguing that “Congress intended to limit the requirement to only the ‘appropriate’ functions that are necessary to control an apparatus in order to receive or play back video programming”); TIA Comments at 6 (“TIA does not agree that Congress intended for ‘all functions’ to be synonymous with their use of the word ‘appropriate.’”); CEA Reply at 10 (“The plain language of Section 204 limits the scope of the functions subject to the statutory requirements to those functions deemed to be ‘appropriate.’”) (footnote omitted); CenturyLink Reply at 5 (“Interpreting the statute to mean that *all* end-user functions must be accessible . . . would render the words ‘appropriate’ and ‘built-in’ meaningless.”) (emphasis in original).

<sup>203</sup> House Committee Report at 19. See also Senate Committee Report at 2.

digital format via Internet protocol.<sup>204</sup> Commenters including CEA, CTIA—The Wireless Association (“CTIA”), ESA, and Panasonic agree that “appropriate” built-in apparatus functions should encompass only those functions that relate in some manner to video programming.<sup>205</sup> In particular, CEA suggests that “[b]ecause Section 204 applies specifically to digital apparatus designed to receive or play back video programming, the functions to be considered ‘appropriate’ are limited to those that are *necessary* for the apparatus to receive or play back that programming.”<sup>206</sup> We are concerned, however, that the “necessary for” formulation put forth by CEA may be construed more narrowly than Congress had intended, resulting in the exclusion of some appropriate functions that are related to video programming from the accessibility requirements of Section 204. We believe that the approach more consistent with Congress’s intent is to interpret “appropriate” more broadly as including those functions that are used for the reception, play back, or display of video programming.<sup>207</sup> Further, we disagree with AT&T’s and CEA’s contention “that Congress used the word ‘appropriate’ to mean ‘appropriate for a person who is blind or visually impaired’” and, therefore, “appropriate” apparatus functions should include only “those functions that a person who is blind or visually impaired would need to use to select or access video programming.”<sup>208</sup> As AFB explains, “if a control or function is made available to all customers generally, there should be a presumption that people who are blind or visually impaired, just like all other customers, may be expected, and possibly required, to use it.”<sup>209</sup> We agree with AFB that we should presume that any functions used to receive, play back, or display video programming would be used by a person who is blind or visually impaired and, therefore, there is no need to distinguish between video programming functions that would and “would not be used by a person with a vision disability”<sup>210</sup> for purposes of determining which functions are “appropriate” under Section 204.

57. We disagree with commenters who suggest that manufacturers should have the discretion to determine which functions are “appropriate.”<sup>211</sup> We believe that leaving this determination to the

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<sup>204</sup> 47 U.S.C. § 303(aa)(1).

<sup>205</sup> See CEA Comments at 13; ESA Comments at 6; Panasonic Comments at 9-10; CTIA Reply at 8. See also ITIC Comments at 6; TIA Comments at 8.

<sup>206</sup> CEA Comments at 13 (footnote omitted) (emphasis added). See also Panasonic Comments at 9 (“Congress intended to limit the requirement to only the ‘appropriate’ functions that are *necessary* to control an apparatus in order to receive or play back video programming.”) (emphasis added); CEA Reply at 10.

<sup>207</sup> See CTIA Reply at 8 (stating that Section 204-covered functions should include “video programming functions”). See also ESA Comments at 6 (stating that “manufacturers should render accessible those functions that directly control reception or playback of video programming, including the selection and display of video programming, as well as any controls necessary to access those functions”).

<sup>208</sup> AT&T Comments at 9-10. See CEA Reply at 11.

<sup>209</sup> AFB Reply at 5.

<sup>210</sup> AT&T Comments at 10.

<sup>211</sup> See CEA Comments at 14 (stating that “[a]s a practical matter, because manufacturers design and determine the functionality of the products that they sell, under the terms of the statute the Commission should afford manufacturers discretion in determining the functions that are ‘appropriate functions’ of covered digital apparatus to be made accessible pursuant to Section 204”); DISH/EchoStar Comments at 5 (stating that “the Commission should allow manufacturers to determine which functions of particular devices best satisfy the requirements of the CVAA”); CEA Reply at 10-11 (stating that “it is reasonable under the terms of the statute for the Commission to grant manufacturers discretion in determining the functions that are ‘appropriate functions’ to be made accessible pursuant to Section 204”) (footnote omitted); CTIA Reply at 9 (“Congress made clear that it must be left up to the covered entity to determine which functions must be accessible to achieve the required programming accessibility.”). See also Reply Comments of the Carl and Ruth Shapiro Family National Center for Accessible Media at WGBH at 2 (“NCAM Reply”) (suggesting that covered entities be permitted to make decisions as to what is “appropriate” “via a formal or informal process informed by user input, with examination of specific devices and not just generic and general opinions,” and with decisions guided by experts and individuals with disabilities).

discretion of manufacturers will lead to inconsistencies in compliance across devices and uncertainty for consumers with regard to which video programming functions are required to be accessible on covered apparatus. The discretionary framework suggested by these commenters could lead to a chaotic retail experience for consumers who could not be certain which functions would be accessible on particular devices. We also believe that allowing manufacturers to dictate which functions are “appropriate” is potentially harmful to consumers to the extent manufacturers can unilaterally decide not to make certain functions accessible to individuals with visual disabilities, even if such functions are related to video programming.<sup>212</sup> Given these concerns, we believe the suggested approach would be at odds with the intent of the CVAA to make the functionality of the apparatus “accessible to and usable by individuals who are blind or visually impaired.”<sup>213</sup> We find that instead of permitting manufacturers to decide which functions on a covered device are the “appropriate” functions subject to accessibility requirements, we will provide clarity to the industry and consumers by specifying which user functions we consider to be “appropriate” (*i.e.*, used for the reception, play back, or display of video programming).

58. We find that, at this time, the 11 essential functions identified in the *VPAAC Second Report: User Interfaces* are the “appropriate” built-in apparatus functions used for the reception, play back, or display of video programming that must be made accessible to individuals who are blind or visually impaired pursuant to Section 204 if these functions are included in the device. Thus, we decline to adopt our tentative conclusion that the VPAAC functions are representative, but not an exhaustive list, of the categories of user functions on an apparatus that must be made accessible.<sup>214</sup> We note that AFB and CEA agree with limiting the “appropriate” functions to the VPACC 11 essential functions.<sup>215</sup> In its

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<sup>212</sup> See, e.g., *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8788-89, ¶ 7. See also Montgomery County Comments at 8 (“To ensure the goals of the CVAA are fully achieved, the Commission . . . cannot leave to the voluntary efforts of the MVPDs the interpretation of what are the appropriate standards.”).

<sup>213</sup> 47 U.S.C. § 303(aa)(1).

<sup>214</sup> *NPRM*, 28 FCC Rcd at 8518, ¶ 32. The record reflects opposing views with regard to this tentative conclusion. ACB, NAD/Consumer Groups, Montgomery County, Maryland (“Montgomery County”), Verizon, and the Carl and Ruth Shapiro Family National Center for Accessible Media at WGBH (“NCAM”) agree with the tentative conclusion. See ACB Comments at 10; Montgomery County Comments at 8; NAD/Consumer Groups Comments at 6; Verizon Comments at 7; NCAM Reply at 2. See also CTIA Reply at 9; Wireless RERC Reply at 5. These commenters maintain that Congress did not intend for Section 204 to apply to a subset of user functions deemed “essential” by an advisory committee, and that the list of essential functions delineated by the VPAAC omits certain video programming-related functions that should be made accessible. See *id.* But see *infra* notes 222-25 (interpreting the VPAAC list of 11 essential functions to include the examples of other video programming-related functions cited by commenters). On the other hand, numerous industry commenters argue that the 11 VPAAC functions comprise an exhaustive list of apparatus functions that are subject to Section 204 accessibility requirements, and they emphasize that the VPAAC viewed the 11 essential functions as the set of functions that must be made accessible under Section 204. See AT&T Comments at 10; CEA Comments at 14-15; ITIC Comments at 4-5; Panasonic Comments at 10; Rovi Comments at 7; TIA Comments at 6-7; CEA Reply at 11; CenturyLink Reply at 5. See also AFB Reply at 5 (“[I]t is critical that the Commission, at a minimum, require that section 204-covered equipment must offer people who are blind or visually impaired the full array of accessible controls that allow them to make full use of equipment to enjoy video programming of all kinds. The VPAAC articulated this array of accessible features in the so-called list of eleven essential functions.”).

<sup>215</sup> See CEA/AFB Aug. 16 *Ex Parte* Letter at 1-2 (“[T]he VPAAC’s list of eleven essential functions refers to the complete set of ‘appropriate built-in apparatus functions’ that must be accessible, if achievable, under Section 204.”). See also AFB Reply at 5 (“It is our belief that there is no disagreement among industry and consumer advocates that the eleven essential functions are both necessary and legally appropriate.”); Letter from Mark D. Richert, Director, Public Policy, AFB, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 3, 2013) (“AFB Sept. 3 *Ex Parte* Letter”) (“[W]ith respect to equipment functionality, the so-called eleven essential functions list is the benchmark against which each piece of equipment is evaluated to determine its accessibility.”); Letter from Danielle Coffey, Vice President & General Counsel, Government Affairs, TIA, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 5, 2013) (“TIA Sept. 5 *Ex Parte* Letter”) (agreeing with the CEA/AFB Aug. 16 *Ex Parte* Letter and stating

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report, the VPAAC observed that “the CVAA does not define the set of intended functions that must be made accessible and usable by individuals with disabilities,” and, thus, as its first task, the VPAAC “define[d] the set of functions considered essential to the video consumption experience,” as “applicable to devices covered under CVAA Section 204 and CVAA Section 205.”<sup>216</sup> We recognize that the VPAAC was not specifically instructed to determine the “appropriate” user functions referred to in Section 204 of the CVAA,<sup>217</sup> nor are we bound by the VPAAC’s recommendations. We attach great weight, however, to their findings on this subject, which were based on deliberations among industry and consumer representatives. The VPAAC defined these “essential functions” as the “set of appropriate built-in apparatus functions” under Section 204.<sup>218</sup> We concur with the VPAAC<sup>219</sup> and find that, at this time, the apparatus functions that must be made accessible to individuals who are blind or visually impaired if they are included in the device<sup>220</sup> are the following:<sup>221</sup>

- Power On / Off: Function that allows the user to turn the device on or off.
- Volume Adjust and Mute: Function that allows the user to adjust the volume and to mute or un-mute the volume.
- Channel / Program Selection: Function that allows the user to select channels and programs (e.g., via physical numeric or channel up/channel down buttons or via on-screen guides and menus).<sup>222</sup>

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that the Commission should “make clear that its requirements are limited to only video functions within the device and specifically to the eleven functions”).

<sup>216</sup> VPAAC Second Report: *User Interfaces* at 8.

<sup>217</sup> See Pub. L. No. 111-260, § 201(e)(2).

<sup>218</sup> VPAAC Second Report: *User Interfaces* at 7, citing Pub. L. No. 111-260, § 204(a) (emphasis added). See also Senate Committee Report at 3 (stating that the reports submitted by the VPAAC “would likely form the basis of the Commission’s rulemakings on . . . matters” including access to user interfaces and programming guides and menus).

<sup>219</sup> VPAAC Second Report: *User Interfaces* at 10-15.

<sup>220</sup> See *infra* ¶ 60. Consistent with our analysis in Section III.B above, we emphasize that if a third-party video programming application is pre-installed by the manufacturer on a covered apparatus (i.e., if Netflix is pre-installed on a smart television), any of the 11 VPAAC functions that are included in that application must be made accessible. See *supra* Section III.B.

<sup>221</sup> ACB and the Wireless RERC argue that diagnostic and debugging functions should be subject to accessibility requirements because users who are blind or visually impaired may need to make use of such functions, for example when receiving technical support over the phone. See ACB Comments at 9; Wireless RERC Reply at 4. ACB also points out that the technicians who are expected to access and utilize diagnostic and debugging functions may themselves be blind or visually impaired. ACB Comments at 9. Although we understand that individuals who are blind or visually impaired may want to directly access diagnostic and debugging functions on occasion, the record does not demonstrate that there is a broad need for consumers to regularly access such functions in order to receive, play back, or display video programming. See, e.g., CEA/AFB Aug. 16 *Ex Parte* Letter at 2 (stating that “AFB[] and ACB reached consensus [with CEA] that the VPAAC’s list of eleven essential functions,” which does not include diagnostic and debugging functions, “refers to the complete set of ‘appropriate built-in apparatus functions’ that must be accessible”). Therefore, at this time, we find that that the costs of imposing such a requirement outweigh its limited benefit. We also note that the VPAAC did not consider such functions to be essential to the video consumption experience.

<sup>222</sup> We interpret this to include, for example, the ability to select programs that are available on demand or on a digital video recorder (“DVR”), in addition to the ability to select linear programming that is available in real-time. See ACB Comments at 10. We also interpret this to include the ability to launch applications that are used for the selection and display of video programming. See AFB Reply at 5-6.

- Display Channel / Program Information: Function that allows the user to display channel or program information.<sup>223</sup>
- Configuration – Setup: Function that allows the user to access and change configuration or setup options (*e.g.*, configuration of video display and audio settings, selection of preferred language for on-screen guides or menus, etc.).<sup>224</sup>
- Configuration – CC Control: Function that allows the user to enable or disable the display of closed captioning.
- Configuration – CC Options: Function that allows the user to modify the display of closed caption data (*e.g.*, configuration of the font size, font color, background color, opacity, etc.).
- Configuration – Video Description Control: Function that allows the user to enable or disable the output of video description (*i.e.*, allows the user to change from the main audio to the secondary audio stream that contains video description, and from the secondary audio stream back to the main audio).
- Display Configuration Info: Function that allows the user to display how user preferences are currently configured.
- Playback Functions: Function that allows the user to control playback functions (*e.g.*, pause, play, rewind, fast forward, stop, and record).<sup>225</sup>
- Input Selection: Function that allows the user to select their preferred input source.

59. We emphasize that at this time we consider the abovementioned functions to be the set of “appropriate” functions that are used for receiving, playing back, or displaying video programming based on current technology, but the Commission may revisit this list if and when technology evolves to a point where devices incorporate new user functions related to video programming that were not contemplated by the VPAAC.<sup>226</sup> We understand NAD/Consumer Groups’ and other commenters’ concern that “[a]s technology evolves, we can expect more functions to be added to devices and apparatus.”<sup>227</sup> However, industry commenters argue that taking an expansive view of which apparatus functions are subject to accessibility requirements beyond the VPAAC 11 functions “would leave apparatus manufacturers

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<sup>223</sup> We interpret this to include, for example, the ability to display channel and program information for programs that are available on demand or on a DVR, in addition to the ability to display channel and program information for linear programming that is available in real-time.

<sup>224</sup> We interpret this to include, for example, the ability to change setup options for V-chip and parental controls. *See* Montgomery County Comments at 8.

<sup>225</sup> We interpret this to include, for example, the ability to control playback functions for programs that are available on demand or on a DVR, in addition to the ability to control playback functions for linear programming that is available in real-time. *See* Wireless RERC Reply at 5.

<sup>226</sup> *See* CenturyLink Reply at 6 (“[T]o the extent what is ‘appropriate’ changes over time as new capabilities and functions emerge, the Commission can expand the list of . . . functions through notice-and-comment rulemaking so that the rules remain relevant and clear.”). *See also* AT&T Comments at 10, n. 22 (“Given the pace of technological change, it would be reasonable for the Commission to reconvene the VPAAC, or similar body, periodically to review and modify these ‘essential’ functions as needed.”). Any such modifications to this list will be made by the full Commission.

<sup>227</sup> NAD/Consumer Groups Comments at 7 (arguing further that “Congress clearly intended for the CVAA to be flexible enough to cover new functions”). *See also* NCAM Reply at 2 (“For the FCC to enshrine in its regulations now only those 11 functions is to bar the possibility of accessibility of new features that are introduced over the coming years.”).

guessing what other functions are ‘appropriate,’ and will stifle innovation.”<sup>228</sup> While we do not reach the conclusion here that incorporating accessibility features for functions other than the VPAAC 11 functions will stifle innovation, and believe, based on past experience, that the incorporation of access features in some cases can enhance innovation and result in the development of improved products for the general public,<sup>229</sup> we agree that delineating the current set of “appropriate” functions with some specificity is necessary to eliminate uncertainty for manufacturers as they embark on designing and developing accessible products. We also believe that such an approach is consistent with our determination that decisions about what functions are made accessible should not be left to the discretion of manufacturers. The approach we implement balances the need to provide certainty to manufacturers when they are designing devices with the need to ensure that those functions currently used to receive, play back, or display video programming are made accessible to individuals who are blind or visually impaired, while also recognizing that the Commission may need to assess whether future, innovative functions on devices used to view video programming are subject to accessibility requirements.<sup>230</sup> We strongly encourage digital apparatus manufacturers, when designing innovative new functions, to concurrently design such features to be accessible to individuals who are blind or visually impaired.

60. We clarify that an apparatus covered by Section 204 is not required to *include* all 11 functions deemed to be “appropriate,” understanding that some of these functions may not be provided for any users on certain devices.<sup>231</sup> We agree with commenters that Section 204 “do[es] not mandate the inclusion of any specific functions” in the design of a covered apparatus.<sup>232</sup> However, to the extent that

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<sup>228</sup> Rovi Comments at 7. *See also* Panasonic Comments at 10 (arguing that “[t]hese eleven functions include all that are necessary to control an apparatus to receive or play back video programming” and that “[a]ny additional functions may greatly complicate product designs and add to consumer costs”); CenturyLink Reply at 5 (“Applying the eleven functions identified in the VPAAC report as a non-exhaustive list . . . would create a moving compliance target that would frustrate efforts by companies acting in good faith to improve accessibility.”).

<sup>229</sup> As we have previously noted, in many instances, innovative accessibility features are used by people without disabilities. *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Consumer Electronics Association; National Cable & Telecommunications Association; Entertainment Software Association; Petitions for Class Waivers of Sections 716 and 717 of the Communications Act and Part 14 of the Commission’s Rules Requiring Access to Advanced Communications Services (ACS) and Equipment by Peoples with Disabilities*, CG Docket No. 10-213, Order, 27 FCC Rcd 12970, 12992, ¶ 40, n. 184 (CGB 2012) (noting that talking caller ID systems, which enable people who are blind to ascertain the identities of incoming callers, are used by sighted people seeking to enjoy dinner without getting up from the table to answer a call). Closed captioning, an innovation originally designed to provide access to television programming for people who are deaf and hard of hearing, is now widely used by the general public in noisy locations, such as restaurants, bars and, exercise facilities, as well as locations where a quiet environment is preferred, such as legislative offices.

<sup>230</sup> A number of industry commenters advocate for the adoption of a safe harbor for the VPAAC 11 functions. *See* AT&T Comments at 10; CEA Comments at 15; ESA Comments at 6; ITIC Comments at 5; TIA Comments at 7-8; CEA Reply at 12; CenturyLink Reply at 5; ESA Reply at 4; DiMA Sept. 6 *Ex Parte* Letter at 3; TIA Sept. 5 *Ex Parte* Letter at 2. *But see* NCAM Reply at 2; Wireless RERC Reply at 5. We believe the approach we adopt is preferable because it provides more certainty to manufacturers and consumers, while allowing the Commission to reevaluate whether the set of functions that must be made accessible on covered apparatus should be updated to include new functions to the extent technology evolves in the future.

<sup>231</sup> *See* AT&T Comments at 12; CEA Comments at 15; DIRECTV Comments at 17; Panasonic Comments at 10; CEA Reply at 12; CTIA Reply at 10; ESA Reply at 4; DiMA Sept. 6 *Ex Parte* Letter at 3. *See also* AFB Reply at 5 (“We think it would be appropriate for the Commission to simply make note of the fact that the requirement to make the eleven essential functions accessible does not impose an obligation on a manufacturer to add features or functions to the equipment that the manufacturer would not otherwise offer to customers generally.”).

<sup>232</sup> AT&T Comments at 12. *See also* ITIC Comments at 5, n. 10 (stating “that if an apparatus does not include all 11 functions on the VPAAC list, Section 204 does not give the Commission authority to require a manufacturer to add any missing function to the device”); CTIA Reply at 10 (same).

an apparatus is designed to include an “appropriate” built-in apparatus function, such function must be made accessible in accordance with our rules.

61. As contemplated by the Act, we do not adopt any technical standards or other technical requirements for how covered apparatus should make the appropriate built-in apparatus functions “accessible to and usable by individuals who are blind or visually impaired.”<sup>233</sup> We believe that Congress’s intent is clear, and the Commission is prohibited by Section 303(aa)(1) from specifying the technical means by which covered entities must meet their accessibility obligations.<sup>234</sup>

62. While we do not adopt rules specifying the technical requirements for compliance with the accessibility mandate in Section 204, we will apply the definition of “accessible” in Section 6.3(a) of the Commission’s rules to explain generally what “accessible” means for those functions that are not specifically required to be audibly accessible. To the extent the appropriate built-in apparatus functions are accessed through on-screen text menus or other visual indicators built in to the apparatus, the statute specifies that they must be made audibly accessible, and we find herein that this requirement is self-implementing.<sup>235</sup> However, if the appropriate built-in apparatus functions are *not* accessed through on-screen text menus or other visual indicators built in to the apparatus, they must be made accessible generally to individuals who are blind or visually impaired, but need not be made audibly accessible.<sup>236</sup> In the *NPRM*, we asked whether we should apply relevant parts of the definition contained in Section 6.3(a) of the Commission’s rules,<sup>237</sup> which implements Sections 255 and 716 of the Act,<sup>238</sup> to define what “accessible” means for those appropriate built-in apparatus functions that must be accessible, but are not specifically required to be audibly accessible (*e.g.*, power on/off).<sup>239</sup> ACB and Montgomery County support applying the definition of “accessible” in Section 6.3(a) to the requirements we adopt pursuant to

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<sup>233</sup> 47 U.S.C. § 303(aa)(1).

<sup>234</sup> Section 303(aa)(1) of the Act states that “the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting” the accessibility and usability requirements of this section. *Id.* See CEA Comments at 26; DISH/EchoStar Comments at 6, n. 23; Verizon Comments at 1; AT&T Reply at 6; CTIA Reply at 5; ESA Reply at 3, n. 8.

<sup>235</sup> 47 U.S.C. § 303(aa)(2). See *infra* ¶ 63.

<sup>236</sup> 47 U.S.C. §§ 303(aa)(1)-(2).

<sup>237</sup> 47 C.F.R. § 6.3(a). The relevant parts of the definition include those provisions that relate to accessibility for individuals who are blind or visually impaired.

<sup>238</sup> Section 6.3(a) of the Commission’s rules implements Section 255 of the Act (requiring telecommunications providers and equipment manufacturers to make their products “accessible to and usable by” persons with disabilities), and Section 14.21(b) of the Commission’s rules, which is analogous to Section 6.3(a), implements Section 716 of the Act (requiring providers of advanced communications services and manufacturers of equipment used for such services to make their products “accessible to and usable by” persons with disabilities). *Id.* §§ 6.3(a), 14.21(b).

<sup>239</sup> *NPRM*, 28 FCC Rcd at 8521, ¶ 37. We also inquired whether we should specify how a device accepts input from and provides feedback to users with respect to such functions. *Id.* The VPAAC explained that user input refers to “the need for users to be able to locate, identify, and interact with the control mechanism for each essential function of the device . . . in order to express their intent, for control of playback operations, setting preferences, making selections of content of interest, and the like,” and that user feedback should “not depend on the impaired ability.” *VPAAC Second Report: User Interfaces* at 9. Verizon, the only commenter who addresses this issue, opposes any specific requirements with regard to user input and feedback. Verizon Comments at 9 (stating that “the Commission should not adopt any rules for how a device accepts input or provides feedback to individuals who are blind or visually-impaired,” because “there may be multiple ways to make user input and feedback accessible” and “[i]mposing rules or guidelines may limit innovation in developing accessible equipment”). See also CEA Comments at 12 (arguing that FCC should not mandate that user feedback required under Section 204 be tactile). Given the concerns raised by Verizon about the potential to hinder innovation by mandating the mechanisms for user input and feedback, we decline at this time to adopt rules specifying user input and feedback requirements.

Sections 204 and 205 of the CVAA.<sup>240</sup> Although NCTA and DIRECTV oppose using the Section 6.3(a) definition of “accessible” in the context of Section 205 because the on-screen text menus and guides covered by Section 205 are specifically required by statute to be made audibly accessible,<sup>241</sup> we do not propose to apply the definition in this context. To provide some clarity to industry in determining what it means to make a function generally accessible to individuals who are blind or visually impaired, we apply the following parts of Section 6.3(a) of the Commission’s rules to explain that “accessible” means:

- (1) Input, control, and mechanical functions shall be locatable, identifiable, and operable in accordance with each of the following, assessed independently:
  - (i) Operable without vision. Provide at least one mode that does not require user vision.
  - (ii) Operable with low vision and limited or no hearing. Provide at least one mode that permits operation by users with visual acuity between 20/70 and 20/200, without relying on audio output.
  - (iii) Operable with little or no color perception. Provide at least one mode that does not require user color perception.<sup>242</sup>

63. *Accessibility of On-Screen Text Menus or Other Visual Indicators Used to Access Appropriate Built-In Apparatus Functions.* We codify the statutory language in Section 204 that requires “that if on-screen text menus or other visual indicators built in to the digital apparatus are used to access the [appropriate built-in] functions of the apparatus . . . , such functions shall be accompanied by audio output that is either integrated or peripheral to the apparatus, so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired in real-time.”<sup>243</sup> In the *NPRM*, we tentatively concluded that the requirement that on-screen text menus or other visual indicators “be accompanied by audio output” is self-implementing.<sup>244</sup> No commenter addresses this tentative conclusion, but Verizon and CTIA argue generally that the obligations imposed by Section 204 should be self-implementing.<sup>245</sup> We adopt our tentative conclusion and find that this requirement is self-implementing, and therefore simply codify this requirement in our rules. Panasonic emphasizes that Section 204 applies only to those on-screen text menus or visual indicators that are used to access the appropriate built-in apparatus functions, and not to all on-screen text menus or visual indicators on a device, and that Section 204 permits the audio output functionality to be either integrated or peripheral to the device.<sup>246</sup> We agree.

## 2. Section 205 Requirements for Navigation Devices

64. We codify in our rules the language in Section 303(bb)(1) of the Act, which requires “that the on-screen text menus and guides provided by navigation devices . . . for the display or selection

<sup>240</sup> See ACB Comments at 11 (“[W]e agree that the FCC should apply the guidance contained in Section 6.3(a) of FCC’s rules (which implements Section 255 and 716 of the CVAA), to explain [what] ‘accessible’ means.”); Montgomery County Comments at 15 (stating that it is “appropriate” for the Commission to “use its definition of ‘accessible’ contained in Section 6.3(a) of its rules for guidance as to what ‘accessible’ means”).

<sup>241</sup> See DIRECTV Comments at 17-18; NCTA Comments at 6.

<sup>242</sup> 47 C.F.R. §§ 6.3(a)(1)(i)-(iii).

<sup>243</sup> 47 U.S.C. § 303(aa)(2).

<sup>244</sup> *NPRM*, 28 FCC Rcd at 8521, ¶ 37.

<sup>245</sup> See Verizon Comments at 1 (stating that “with the exception of a few definitional issues and timing requirements, the Commission should view Sections 204 and 205 as self-implementing, and, should adopt only minimal regulatory directions in this proceeding”); CTIA Reply at 6-7 (stating that “the statute itself is largely self-implementing” and “[t]he language of Sections 204 and 205 clearly describes the obligations Congress[] intended to create”). See also AT&T Reply at 6.

<sup>246</sup> Panasonic Comments at 10-11.



of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired.<sup>247</sup> In the discussion that follows, we set forth the compliance requirements for MVPDs and manufacturers with regard to accessibility of on-screen text menus and program guides on navigation devices. Specifically, we conclude that nine of the 11 VPAAC functions must be made audibly accessible on navigation devices because they are accessed through on-screen text menus and guides and used for the display or selection of multichannel video programming. We further conclude that the remaining two VPAAC functions must be made accessible to people who are blind or visually impaired because they are controls necessary to access covered functions, but that these need not be made *audibly* accessible. In addition, as we did with regard to Section 204, we find that the audible accessibility requirement is self-implementing, and therefore simply codify this requirement in our rules.

65. In the *NPRM*, we tentatively concluded that all user functions that are offered via on-screen text menus and guides should be accessible on navigation devices covered by Section 205.<sup>248</sup> We also sought comment on whether there should be any substantive difference between the functions of apparatus that must be accessible under Section 204 as opposed to the functions of navigation devices that must be accessible under Section 205.<sup>249</sup> With the exception of ACB and AT&T,<sup>250</sup> commenters argue that Congress adopted distinct requirements for apparatus subject to Section 204 and navigation devices subject to Section 205.<sup>251</sup> According to these commenters, navigation devices subject to Section 205 are governed by a more narrow provision that focuses on access to “on-screen text menus and guides . . . for the display or selection of multichannel video programming,” whereas Section 204 applies more broadly to the “appropriate built-in functions” of an apparatus.<sup>252</sup> As discussed below, we take these differences into account in our analysis. Further, commenters point out that a navigation device may include functions unrelated to video programming.<sup>253</sup> Thus, based on the record, we no longer believe it is accurate to conclude that all of a navigation device’s user functions that are activated via text menus and

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<sup>247</sup> 47 U.S.C. § 303(bb)(1).

<sup>248</sup> *NPRM*, 28 FCC Rcd at 8520, ¶ 35.

<sup>249</sup> *Id.*

<sup>250</sup> See ACB Comments at 11 (arguing that “the requirements for interface accessibility should not differ[] whether a device is covered by Section 204 or Section 205,” because “devices and software covered under Section 205 are a subset of those covered in Section 204,” and because having different requirements “will only sow unnecessary confusion”); AT&T Comments at 11 (arguing that “a more reasonable interpretation is that audio accessibility is required for those same functions that must be accessible under Section 204,” because “[a]pplying the same interpretation as with Section 204 would allow Sections 204 and 205 to work in tandem,” and “would also prevent confusion among persons with disabilities, allowing them to easily predict the accessible functions in all covered devices”). As discussed above, we disagree with ACB’s contention that Section 205 devices are a subset of Section 204 devices. See *supra* Section III.A.

<sup>251</sup> See ACA Comments at 3-4; CEA Comments at 16-17; DIRECTV Comments at 10, 12-14; NCTA Comments at 4; Panasonic Comments at 11-12; Rovi Comments at 7-8; NCTA Reply at 7; Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 5, 2013) (“DIRECTV Sept. 5 *Ex Parte* Letter”).

<sup>252</sup> See *id.*

<sup>253</sup> See DIRECTV Comments at 14-15 (arguing that the tentative conclusion that all user functions offered via on-screen text menus and guides should be accessible on navigation devices assumes that such devices “ha[ve] no functions unrelated to the display or selection of multichannel video programming” and “does not accurately reflect the state of modern technology”). See also CEA Comments at 16-17 (arguing that “the Commission should not apply Section 205 to ‘user functions that are offered via on-screen text menus and guides’ but that are *not* used for the display or selection of multi-channel video programming”) (emphasis in original). But see Verizon Comments at 6-7 (“agree[ing] with the . . . conclusion that all user controls and functions on a device subject to either Section 204 or 205 must be accessible to visually-impaired consumers”) (footnote omitted).

guides are used for the display or selection of multichannel video programming.<sup>254</sup> Instead, we agree with DIRECTV that we “must determine which functions or categories of functions on a navigation device properly relate to the display or selection of multichannel video programming.”<sup>255</sup>

66. Thus, we decline to adopt our tentative conclusion that *all* user functions that are offered via on-screen text menus and guides should be accessible on navigation devices, and instead find that Section 205 requires audible accessibility for those navigation device functions that are offered via on-screen text menus and guides and used *for the display or selection of multichannel video programming*, and more general accessibility for controls necessary to access those covered functions. For the same reasons we expressed in the Section 204 context, we disagree with DISH Network L.L.C. and EchoStar Technologies L.L.C. (“DISH/EchoStar”) that the Commission should “allow manufacturers to determine which functions of particular devices best satisfy the requirements of [Section 205 of] the CVAA.”<sup>256</sup> If a function is provided via an on-screen text menu or guide and it is used for the display or selection of multichannel video programming, Section 205 mandates that it must be made audibly accessible. Our rules implementing Section 205 will reflect this mandate. Also, consistent with our implementation of Section 204, we are not requiring covered entities to add any particular functionality offered via an on-screen text menu or guide for the display or selection of video programming that it had not otherwise included on a navigation device. Rather, we require only that the functionality that is already included in the device be made accessible.<sup>257</sup>

67. Given the divergent views in the record, we believe it is necessary to specify which functions we consider to be used “for the display or selection of multichannel video programming.” In the *NPRM*, we asked whether making the VPAAC 11 essential functions accessible on navigation devices would achieve Section 205’s requirement that on-screen text menus and guides for the display or selection of multichannel video programming be made audibly accessible, and we tentatively concluded that the VPAAC 11 functions are representative, but not an exhaustive list, of the categories of functions that a navigation device must make accessible.<sup>258</sup> Certain MVPD commenters argue that, while the VPAAC list may be useful in providing some examples of functions that should be made accessible under Section 205, it includes functions that are beyond the scope of the accessibility mandate in Section 205.<sup>259</sup>

68. Rather than adopt our tentative conclusion that the entire VPAAC list is representative of what functionality is required to be accessible pursuant to Section 205, we now identify nine of the 11 functions on the VPAAC list of essential functions,<sup>260</sup> as defined in paragraph 58 above, as those that are used for the display or selection of multichannel video programming and therefore, are required to be

<sup>254</sup> *NPRM*, 28 FCC Rcd at 8520, ¶ 35.

<sup>255</sup> DIRECTV Comments at 16.

<sup>256</sup> DISH/EchoStar Comments at 6. *See supra* ¶ 57.

<sup>257</sup> *See supra* ¶ 60; AT&T Comments at 12; DIRECTV Comments at 17; NCTA Reply at 7-8.

<sup>258</sup> *NPRM*, 28 FCC Rcd at 8520, ¶ 36.

<sup>259</sup> *See* DIRECTV Comments at 16-17; DISH/EchoStar Comments at 5-6; NCTA Comments at 3-4. *But see* AT&T Comments at 11 (stating that “making the 11 essential functions in a navigation device used for multichannel video programming audibly accessible should be a safe harbor to meet the accessibility requirement for on-screen text menus and guides in Section 205”); CenturyLink Reply at 5 (arguing that the VPAAC 11 essential functions should be a regulatory safe harbor for navigation devices).

<sup>260</sup> We do not include the VPAAC categories of “Power On/Off” and “Volume Adjust and Mute” with the understanding that such functions are not typically accessed via on-screen text menus or guides, but instead, are functions that are accessed via a physical button on the remote control or device. *See, e.g.*, DISH/EchoStar Aug. 21 *Ex Parte* Letter at 2, n. 5 (“Because Power On/Off and Volume Adjust/Mute functions typically are not accessed via on-screen menus and guides, in many cases Section 205’s audible output requirement would not apply to these functions.”). However, we require these functions to be generally accessible because they are controls necessary to access covered functions. *See infra* ¶¶ 72-73.

made audibly accessible on navigation devices under Section 205 if they are offered via an on-screen text menu or guide: Channel / Program Selection; Display Channel / Program Information; Configuration – Setup; Configuration – CC Control; Configuration – CC Options; Configuration – Video Description Control; Display Configuration Info; Playback Functions; and Input Selection.<sup>261</sup> We believe that all of these functions are used for the *display* of multichannel video programming. To be more specific, the functions “Configuration – Setup” and “Display Configuration Info” are used to view and change the settings for the display of multichannel video programming; the functions “Channel / Program Selection” and “Display Channel / Program Information” are used to select and display specific channels and programs of multichannel video programming; the functions “Configuration – CC Control” and “Configuration – CC Options” are used to control and configure the captions that are part of the display of multichannel video programming;<sup>262</sup> the function “Configuration – Video Description Control” is used to control the audibly-described portions of the display of multichannel video programming; “Playback Functions” is used to play, pause, fast forward, and rewind multichannel video programming that is displayed; and “Input Selection” is used to select the input that permits the display of multichannel video programming. In addition, two of these functions – “Channel / Program Selection” and “Display Channel / Program Information” – also are used for the *selection* of multichannel video programming.

69. We find unpersuasive the arguments of MVPD commenters for excluding certain of these nine functions from the audible accessibility requirements of Section 205. NCTA and DISH/EchoStar agree that most of the nine functions are accessed by means of on-screen text menus or guides for the display or selection of multichannel video programming covered by Section 205.<sup>263</sup> NCTA argues that one category, “Input Selection,” is not covered by Section 205 because it “is generally performed by the television set or audio/video receiver” and “is not part of an MVPD’s program guide or menu.”<sup>264</sup> We note that navigation devices covered by Section 205 include not only MVPD-provided set-top boxes but also CableCARD televisions and other navigation devices sold at retail and, therefore, it is appropriate to require that the “Input Selection” function, when offered via an on-screen text menu or guide on any navigation device, be made accessible under Section 205.<sup>265</sup> DISH/EchoStar argues that two categories, “Configuration – Setup” and “Display Configuration Info,”<sup>266</sup> are not covered by Section 205 because they are “broad, umbrella categories of functions” that “may not relate to the display or selection of

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<sup>261</sup> Although we find that these functions are used for the display of multichannel video programming and subject to Section 205 audible accessibility requirements when they are accessed via an on-screen text menu or guide, we note that to the extent such functions are provided by means of a mechanism other than an on-screen text menu or guide (e.g., if playback functions are accessed via dedicated play, pause, rewind, and fast forward buttons on a remote; if closed captioning or video description is activated through a dedicated button on a remote, etc.), they are not subject to Section 205 audible accessibility requirements. However, we strongly encourage navigation device manufacturers to design such features to be accessible to individuals who are blind or visually impaired.

<sup>262</sup> We reject the presumption that a person who is blind or visually impaired does not need to access closed captioning features and that, therefore, closed captioning features should not be subject to Section 205 audible accessibility requirements. *See* DIRECTV Comments at 17. For example, a person who is both visually impaired and deaf or hard of hearing may use the closed captioning control and settings when viewing video programming.

<sup>263</sup> NCTA Reply at 8; DISH/EchoStar Aug. 21 *Ex Parte* Letter at 2.

<sup>264</sup> NCTA Reply at 8 (delineating those of the “VPAAC’s ‘essential functions’ [that] relate to MVPDs’ program guides and menus”). We note that NCTA does not argue that the input selection function is not provided through on-screen text menus or guides, but rather that it is not provided at all on MVPD-provided navigation devices. As we note above, if a particular function is not included on a navigation device, then there is no obligation to add that functionality; rather, we require only that the functionality that is already included in the device be made accessible.

<sup>265</sup> However, when a navigation device accesses the input selection for that device or another device through a button on an included remote control, there is no obligation to make such a button accessible.

<sup>266</sup> *See supra* ¶ 58.

multichannel video programming.<sup>267</sup> However, a configuration menu that is used to view or adjust the display settings for multichannel video programming on a navigation device is covered by Section 205, regardless of whether it can *also* be used to view or adjust the display settings for features other than multichannel video programming. DIRECTV contends that only four of the VPAAC 11 functions are required to be accessible under Section 205.<sup>268</sup> We believe that DIRECTV's proposal is an inappropriately narrow interpretation of the phrase "display or selection of video programming" because it excludes five functions that we consider to be used for the display of video programming as explained in paragraph 68 above.<sup>269</sup>

70. In the *NPRM*, we tentatively concluded that the statutory requirement that on-screen text menus or guides be audibly accessible is self-implementing.<sup>270</sup> No commenter disagrees.<sup>271</sup> Further, Section 303(bb)(1) of the Act indicates that "the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement."<sup>272</sup> Given this statutory limitation, we do not adopt any technical standards or other requirements for how navigation devices should make covered on-screen text menus and guides "audibly accessible in real-time" to individuals who are blind or visually impaired, and instead find that this requirement is self-implementing and codify it in our rules.

71. DIRECTV, NCTA, and AT&T argue that the Commission should clarify that the audible accessibility requirement for text menus and guides does not require exactly replicating in audible form the complete on-screen text.<sup>273</sup> We conclude that the audible accessibility requirement requires consumers to receive the essential information from the on-screen text menus and guides that they seek, but we do not require that the audible version of an on-screen text menu or guide be an exact replication of the text. We recognize that covered entities need flexibility in implementing the audible accessibility requirement so that they can best respond to the needs of consumers who are blind or visually impaired. For example, a consumer may not want the entire programming guide made audible but rather may just want to know what programming is on a particular channel. Similarly, there may be a need to provide relevant information that may not appear as on-screen text (for example, a contextual description such as "displaying rows 10 through 20 of 100 channels," or "displaying menu 1 of 5 menus"). We emphasize,

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<sup>267</sup> DISH/EchoStar Aug. 21 *Ex Parte* Letter at 2 & n. 4.

<sup>268</sup> DIRECTV Comments at 17 (endorsing just four functions from the VPAAC list – channel and program selection; channel and program information; playback functions; and input selection – as those for which on-screen text menus and guides must be made audibly accessible under Section 205).

<sup>269</sup> Specifically, DIRECTV excludes "Configuration – Setup," "Configuration – CC Control," "Configuration – CC Options," "Configuration – Video Description Control," and "Display Configuration Info." *See id.*

<sup>270</sup> *NPRM*, 28 FCC Rcd at 8521, ¶ 37.

<sup>271</sup> *See* DIRECTV Comments at 4; NCTA Comments at 6; NCTA Reply at 7. *See also* Verizon Comments at 1; CTIA Reply at 6-7.

<sup>272</sup> 47 U.S.C. § 303(bb)(1). *See* NCTA Comments at 2; NCTA Reply at 6-7.

<sup>273</sup> *See* DIRECTV Comments at 4-5 (stating that "MVPDs should be allowed to design systems that make text menus and guides audibly accessible in a manner that enhances functionality and the viewer experience, even if that means that only certain portions of the screen are relayed audibly at a given time, or even if relevant information *not* presented on-screen is relayed audibly") (emphasis in original); NCTA Reply at 4, citing DIRECTV's argument; AT&T Reply at 7 ("agree[ing] with DirectTV that audibly accessible menus and guides need not consist of a word for word replication of the full on-screen text," because "[a] read-out of the full menu or guide may be too voluminous and detailed to be helpful for the visually impaired") (footnote omitted). *See also* Verizon Comments at 9 (stating that "the Commission should allow the industry maximum discretion in developing accessibility mechanisms").

however, that all of the essential information from the on-screen text menu or guide must be made audibly accessible as requested or selected by the consumer.<sup>274</sup>

72. *Accessibility of Controls Needed to Access Covered Functions.* We also conclude that covered entities must make certain functions accessible to individuals who are blind or visually impaired because they are necessary for individuals who are blind and visually impaired to access the audibly accessible on-screen text menus and guides for the display or selection of multichannel video programming.<sup>275</sup> Specifically, we conclude that “Power On/Off” and “Volume Adjust and Mute,” as defined in paragraph 58 above, must be made accessible because they are necessary to make other covered functions of the device accessible. If a consumer who is blind or visually impaired cannot turn on a navigation device, then the device and all of its functionality are rendered inaccessible. And, if a consumer who is blind or visually impaired cannot adjust the volume to hear audible output, then those functions that are required to be audibly accessible under Section 205 are rendered inaccessible.<sup>276</sup>

73. We find our authority to require that these two functions be made accessible in Section 205(b)(1), which provides the Commission with authority to “prescribe such regulations as are necessary to implement” the requirements in Section 303(bb) of the Act.<sup>277</sup> We find that requiring the power on/off and volume adjust/mute functions to be accessible is *necessary* to ensure that on-screen text menus and guides for the display or selection of multichannel video programming are audibly accessible by individuals who are blind or visually impaired, as required by Section 303(bb)(1) of the Act.<sup>278</sup> Congress’s directive to require audibly accessible guides and menus for multichannel video programming on navigation devices would be meaningless if individuals who are blind or visually impaired are not even able to turn on the device or to adjust the volume. However, we do not require that the power on/off and volume controls be *audibly* accessible, so long as covered entities make these functions accessible to individuals who are blind or visually impaired, in accordance with the definition of “accessible” in Section 6.3(a) of the Commission’s rules.<sup>279</sup>

74. *Program Information for PEG Channels.* We do not require MVPDs to include particular program information in their program guides at this time, but we inquire in the *Further Notice* about Commission authority to impose such a requirement. Aside from the comments of public, educational, and governmental (“PEG”) programmers, there is little discussion in the record about imposing such requirements. In particular, there is limited discussion in the record about the costs to MVPDs if we adopt this requirement and whether it would be technically feasible to require all MVPDs

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<sup>274</sup> We expect that covered entities will consult with individuals who are blind or visually impaired in their efforts to ensure that on-screen text menus and guides are made accessible in a manner that effectively meets the accessibility needs of those individuals.

<sup>275</sup> See ESA Comments at 6 (stating that “manufacturers should render accessible those functions that directly control . . . the selection and display of video programming, *as well as any controls necessary to access those functions*”) (emphasis added).

<sup>276</sup> The ability to control volume for audible output is particularly important for individuals who are blind or visually impaired and also deaf or hard of hearing. See, e.g., Comments of Dorothy L. Walt at 1 (“Walt Comments”) (stating that the Commission should address the accessibility needs of individuals who are blind or visually impaired and deaf or hard of hearing).

<sup>277</sup> Pub. L. No. 111-260, § 205(b)(1). *But see* Letter from Diane B. Burstein, Vice President & Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 3, 2013) (“NCTA Sept. 3 *Ex Parte* Letter”) (“express[ing] concern that expanding the rules to cover functions not included in on-screen text menus and guides, such as volume control and power on and off, would exceed the scope of Section 205”).

<sup>278</sup> 47 U.S.C. § 303(bb)(1).

<sup>279</sup> See *supra* ¶ 62.



to include program titles and other information in their program guides.<sup>280</sup> Montgomery County, the Alliance for Communications Democracy, the Alliance for Community Media, and the National Association of Counties *et al.*, along with numerous providers of PEG programming from across the country (collectively, “PEG commenters”) advocate for the Commission “to adopt rules that would require video programming guides and menus which display channel and program information [to] include, for all channels, high level channel and program descriptions and titles, as well as a symbol identifying the programs with accessibility options (captioning and video description).”<sup>281</sup> PEG commenters argue that the level of information that is currently provided for PEG channels on MVPD program guides is inadequate to satisfy the accessibility goals of the CVAA because viewers who are blind or visually impaired are unable to determine from the guide what the PEG program options are and whether such programs are accessible and, thus, are unable to make meaningful video program choices.<sup>282</sup>

75. We believe there is not sufficient information in the record to require MVPDs to include particular information in program guides. Section 205 of the CVAA requires that on-screen text menus and guides provided by navigation devices for the display or selection of multichannel video programming be made audibly accessible, but it does not govern the underlying content in the menus and guides.<sup>283</sup> In other words, this section requires that *if* there is text in a menu or program guide on the screen, then *that text* must be audibly accessible, but it does not impose requirements with regard to what substantive information must appear in the on-screen text.<sup>284</sup> To the extent a program guide lacks adequate information about the title and description of a program, this inadequacy affects the ability of all subscribers to make meaningful program choices, not just the ability of those who are blind or visually impaired to do so. Although we find the record insufficient to decide this issue at this time, we seek comment in the *Further Notice* on possible sources of authority for requiring MVPDs to include specific information for PEG programming in video programming guides and menus, as well as on the technical

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<sup>280</sup> The only two industry commenters that respond to the PEG issue, NCTA and AT&T, argue that the proposed requirement is beyond the scope of the CVAA. *See* NCTA Comments at 11-12; AT&T Reply at 9; NCTA Reply at 14.

<sup>281</sup> Comments of Lowell Telecommunications Corporation at 1-2 (“LTC Comments”). *See, e.g.*, Comments of the Alliance for Communications Democracy at 2 (“ACD Comments”); Comments of the Alliance for Community Media at 2-3 (“ACM Comments”); Comments of Chicago Access Corporation at 2 (“CAN TV Comments”); Montgomery County Comments at 9; Comments of the National Association of Counties *et al.* at 1-2 (“Nat’l Assoc. of Counties Comments”). In addition, a subset of PEG commenters contend that consumers who are blind or visually impaired face unique challenges in accessing PEG channels on AT&T’s U-Verse system, and they ask the Commission to require that AT&T provide its U-Verse subscribers with access to PEG programming that is equivalent to the access provided to linear commercial programming channels on its system. *See, e.g.*, ACD Comments at 6-9; ACM Comments at 2; CAN TV Comments at 2. We note that there is a separate Commission proceeding with a record that specifically addresses these issues, and the instant proceeding may not be the appropriate place to resolve these issues. *See* Petition for Declaratory Ruling of The Alliance for Community Media, *et al.*, that AT&T’s Method of Delivering Public, Educational and Government Access Channels Over Its U-Verse System is Contrary to the Communications Act of 1934, as Amended, and Applicable Commission Rules, MB Docket No. 09-13. *See also* AT&T Reply at 7-8. We also note that, pursuant to the rules we adopt herein, AT&T will be required to ensure that the on-screen text guides for selecting PEG programs on U-Verse are audibly accessible.

<sup>282</sup> *See, e.g.*, LTC Comments at 1. For this reason, PEG commenters argue that the Commission has direct authority under Section 205 of the CVAA to require MVPDs to provide more specific content in video programming guides and menus, as well as ancillary authority to do so. *See, e.g.*, Montgomery County Comments at 14-18; Nat’l Assoc. of Counties Comments at 1; Letter from James N. Horwood, Counsel for the Alliance for Communications Democracy, to Marlene H. Dortch, Secretary, FCC, at 2 & Att. 2 (Sept. 9, 2013).

<sup>283</sup> *See* NCTA Comments at 11-12; AT&T Reply at 9; NCTA Reply at 14.

<sup>284</sup> *See* 47 U.S.C. § 303(bb)(1).

issues and costs for MVPDs to comply with such requirements.<sup>285</sup> We recognize the important role of PEG providers in informing the public, including those who are blind or visually impaired, on local community issues, and we encourage MVPDs to provide more detailed information in their program guides for PEG programs where such information is provided by PEG providers and where it is technically feasible.

### 3. Performance Objectives

76. At this time, we decline to adopt performance objectives to evaluate accessibility or compliance with the rules we adopt pursuant to Sections 204 and 205. As noted above, Section 303(aa)(1) of the Act prohibits the Commission from “specify[ing] the technical standards, protocols, procedures, and other technical requirements for meeting” the accessibility requirements of this section.<sup>286</sup> Section 303(bb)(1) of the Act includes a similar restriction.<sup>287</sup> In the *NPRM*, we inquired whether we can adopt specific metrics to evaluate accessibility and compliance with Sections 204 and 205, given this limitation.<sup>288</sup> We also asked whether there are performance objectives or functional criteria that covered entities can look to voluntarily as an aid in meeting their Section 204 and 205 accessibility obligations.<sup>289</sup> CTIA cautions that “[w]hile guidance from the Commission on what it means to be ‘accessible’ may be appropriate and helpful, the rules should not contain any particular standards, objectives, or other metrics,” because “[s]uch ‘voluntary’ standards or performance objectives will inevitably become the standards against which covered entities’ accessibility approaches are judged, and so will serve as *de facto* requirements in contravention of Congress’ intent.”<sup>290</sup> Because we are providing guidance on what it means to be “accessible” by applying the definition in Section 6.3(a) of the Commission’s rules and because we do not wish to impede innovation in the design of accessible apparatus by prematurely adopting performance objectives, we decline to adopt any voluntary performance objectives, functional criteria, or any other specific metrics for accessibility at this time, but we can reconsider whether there is a need for voluntary guidelines on accessibility after the requirements go into effect. In the meantime, we encourage covered entities to engage in the type of voluntary effort envisioned by NCAM, which would involve coordination between industry and consumer groups on considering “a set of common and translatable approaches” to accessibility as a means to reduce confusion for consumers and to promote commonality across devices.<sup>291</sup> We also note that the *VPAAC Second Report: User Interfaces* describes accessibility criteria agreed upon by industry and consumer groups, which may be a helpful reference for covered entities as they undertake voluntary efforts to develop approaches to accessibility.<sup>292</sup>

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<sup>285</sup> See *infra* ¶ 144.

<sup>286</sup> 47 U.S.C. § 303(aa)(1).

<sup>287</sup> *Id.* § 303(bb)(1).

<sup>288</sup> *NPRM*, 28 FCC Rcd at 8522, ¶ 38.

<sup>289</sup> *Id.*

<sup>290</sup> CTIA Reply at 5. See also CEA Comments at 26-27; Verizon Comments at 9; AT&T Reply at 6. But see ACB Comments at 12-13 (“urg[ing] the FCC to establish performance objectives that will ensure that the devices and software will be usable,” and suggesting use of the Department of Justice’s “effective communication” standard); DISH/EchoStar Comments at 6, n. 23 (stating that “[s]pecific metrics to evaluate accessibility and compliance’ could be useful if based on functional criteria, but must not be any more specific than that”); AllVid Reply at 4-5 (“While the CVAA does not allow the Commission to mandate a particular technology to accomplish Section 205’s specific access objectives, the agency could create performance standards or other guidelines.”) (footnotes omitted).

<sup>291</sup> NCAM Reply at 4 (noting that “[c]ooperative trade associations, consumer groups and organizations with expertise in this field can be brought into a process that can aid in the implementation of better and more coherent solutions, with innovation supported and encouraged”).

<sup>292</sup> See generally *VPAAC Second Report: User Interfaces*. See also CTIA Reply at 7, n. 18 (observing that “[t]o the extent that covered entities feel they need greater guidance on what the community considers to be the meaning of

(continued....)

#### 4. Achievability

77. We adopt rules for “achievability” that are consistent with our implementation of standards for achievability in other CVAA contexts. Section 303(aa)(1) of the Act indicates that apparatus covered by Section 204 are required to make appropriate built-in apparatus functions accessible to and usable by individuals who are blind or visually impaired only “if achievable (as defined in section 716).”<sup>293</sup> Similarly, Section 303(bb)(1) requires on-screen text menus and guides for the display or selection of multichannel video programming on navigation devices covered by Section 205 to be audibly accessible by individuals who are blind or visually impaired only “if achievable (as defined in section 716).”<sup>294</sup> Section 716 of the Act defines “achievable” as “with reasonable effort or expense, as determined by the Commission,” and it directs the Commission to consider the following factors in determining whether the requirements of a provision are achievable: “(1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question. (2) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies. (3) The type of operations of the manufacturer or provider. (4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.”<sup>295</sup>

78. As proposed in the *NPRM*, we adopt a flexible approach to achievability, consistent with the approach adopted in the *Emergency Information/Video Description Order*, the *IP Closed Captioning Order*, and the *ACS Order*.<sup>296</sup> When faced with a complaint or enforcement action for a violation of the requirements adopted herein pursuant to either Section 204 or Section 205 of the CVAA, a covered entity may raise as a defense that a particular apparatus or navigation device does not comply with the rules because compliance was not achievable under the statutory factors.<sup>297</sup> Alternatively, a covered entity may seek a determination from the Commission that compliance with all of our rules is not achievable *before* manufacturing or importing the apparatus or navigation device.<sup>298</sup> Covered entities that do not make a particular apparatus or navigation device accessible, and subsequently claim as a defense that it is not achievable for them to do so, bear the burden of proof on this defense.<sup>299</sup> Consistent with our implementation of achievability in prior CVAA contexts, we find that it is appropriate to weigh each of the four statutory factors equally, and that achievability should be evaluated on a case-by-case basis.<sup>300</sup>

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‘accessible,’ such guidance already exists in the [*VPAAC Second Report: User Interfaces*],” which “contain[s] thoughtful discussions that covered entities may find helpful”).

<sup>293</sup> 47 U.S.C. § 303(aa)(1).

<sup>294</sup> *Id.* § 303(bb)(1).

<sup>295</sup> *Id.* § 617(g).

<sup>296</sup> See *NPRM*, 28 FCC Rcd at 8522-23, ¶ 39.

<sup>297</sup> See *Emergency Information/Video Description Order*, 28 FCC Rcd at 4918-19, ¶ 68; *IP Closed Captioning Order*, 27 FCC Rcd at 848, ¶ 105.

<sup>298</sup> See *Emergency Information/Video Description Order*, 28 FCC Rcd at 4919, ¶ 68; *IP Closed Captioning Order*, 27 FCC Rcd at 848-49, ¶ 105. See also 47 C.F.R. § 1.41 (permitting parties to file informal requests for Commission action, based on a clear and concise showing of the facts relied on and relief sought, among other requirements).

<sup>299</sup> See *ACS Order*, 26 FCC Rcd at 14567, 14651-52, ¶¶ 24, 220-22.

<sup>300</sup> *Emergency Information/Video Description Order*, 28 FCC Rcd at 4918, ¶ 68; *IP Closed Captioning Order*, 27 FCC Rcd at 848, ¶ 105; *ACS Order*, 26 FCC Rcd at 14608, ¶¶ 122-23.

Commenters agree with this approach.<sup>301</sup> In evaluating evidence offered to prove that compliance is not achievable, we will be informed by the analysis in the *ACS Order*, in which the Commission provided a detailed explanation of each of the four statutory factors.<sup>302</sup> We remind parties that the achievability limitation is applicable to Sections 303(aa)(1) and 303(bb)(1) of the Act.

**B. Activating Accessibility Features Through a Mechanism Reasonably Comparable to a Button, Key, or Icon**

**1. Reasonably Comparable Requirement**

79. We codify in our rules the language in Sections 303(aa)(3) and 303(bb)(2) of the Act, which provides that certain accessibility features must be accessible through a mechanism reasonably comparable to a button, key, or icon. Specifically, Section 303(aa)(3) requires digital apparatus covered by Section 204 of the CVAA to provide “built in access to [] closed captioning and video description features *through a mechanism that is reasonably comparable to a button, key, or icon* designated for activating the closed captioning or accessibility features.”<sup>303</sup> Similarly, Section 303(bb)(2) requires “navigation devices with built-in closed captioning capability” covered by Section 205 of the CVAA to provide “access to that capability *through a mechanism [that] is reasonably comparable to a button, key, or icon* designated for activating the closed captioning, or accessibility features.”<sup>304</sup> In the discussion that follows, we provide guidance to covered entities with regard to which activation mechanisms are “reasonably comparable to a button, key, or icon.” In determining whether an activation mechanism is reasonably comparable to a button, key, or icon, we will consider the simplicity and ease of use of the mechanism.

80. Based on the record, we decline to adopt our proposal to require that closed captioning or video description features be activated in a single step.<sup>305</sup> In the *NPRM*, we explained that such a requirement would allow users to activate the closed captioning or video description immediately in a single step just as a button, key, or icon can be pressed or clicked in a single step.<sup>306</sup> Commenters

<sup>301</sup> See DISH/EchoStar Comments at 6, n. 24; Montgomery County Comments at 19; NAD/Consumer Groups Comments at 7; Panasonic Comments at 13; Verizon Comments at 10.

<sup>302</sup> See *ACS Order*, 26 FCC Rcd at 14607-19, ¶¶ 119-48. Panasonic urges the Commission to “recognize that products are positioned at differing features and price points which may influence the achievability of accessibility features.” Panasonic Comments at 13. We note that, pursuant to the fourth statutory factor, the Commission must consider “the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points” and weigh this consideration equally with the other three factors. 47 U.S.C. § 617(g). See also *ACS Order*, 26 FCC Rcd at 14616-19, ¶¶ 140-48. In interpreting this factor, the Commission has found that “[a] covered entit[y] generally need not consider what is achievable with respect to every product, if the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at differing price points.” *Id.* at 14617, ¶ 142. Montgomery County asserts that all classes of devices should have accessibility features and that “[t]here is no basis for requiring only a subset of available devices [to] have the accessibility features.” See Montgomery County Comments at 20-21. To the extent Montgomery County is arguing that all models of navigation devices must be made accessible, we believe that requiring a covered entity to make all models of navigation devices accessible would be at odds with Congress’s intent in adopting the fourth factor of the achievability test, provided that the covered entity offers a full range of functionality within a line of products as well as a full range of prices within the product line, if achievable. See *ACS Order*, 26 FCC Rcd at 14617, ¶ 142 (“To satisfy the fourth achievability standard, a covered entity is required by the CVAA to offer people with each type of disability accessibility features within a line of products that includes the full range of functionality within the product line as well as a full range of prices within the product line, if achievable.”).

<sup>303</sup> 47 U.S.C. § 303(aa)(3) (emphasis added).

<sup>304</sup> *Id.* § 303(bb)(2) (emphasis added).

<sup>305</sup> See *NPRM*, 28 FCC Rcd at 8524-25, ¶¶ 43, 46.

<sup>306</sup> *Id.* at 8524, ¶ 43.

generally oppose a single step requirement.<sup>307</sup> NAD/Consumer Groups believe that the single step proposal is too vague because it does not specify from where the single step is permitted.<sup>308</sup> Other commenters argue that a single step requirement would hinder innovation, observing that there are other useful activation mechanisms (*e.g.*, voice or gesture control) that may be reasonably comparable to a button, key, or icon and relatively simple for consumers to use, but would not satisfy a single step mandate.<sup>309</sup> Commenters also emphasize that Section 204 permits “alternate means of compliance,” while Section 205 gives entities that provide navigation devices subject to that section “maximum flexibility in the selection of means for compliance with section 303(bb)(2) of the [Act],” and that requiring a single step contravenes the flexibility that Congress intended for covered entities.<sup>310</sup> Given the concerns raised in the record about its potential to inhibit simplified and innovative solutions, we decline to adopt a single step requirement. We are mindful of the need to ensure that covered entities can continue to develop innovative compliance solutions, without being precluded from using a particular technology to achieve an activation mechanism that is “reasonably comparable to a button, key, or icon.”

81. Although we codify the statutory language that requires a mechanism reasonably comparable to a button, key, or icon to activate certain accessibility features and reject a single step requirement, we believe it is useful to provide guidance to covered entities as to what “reasonably comparable to a button, key, or icon” means.<sup>311</sup> In determining whether an activation mechanism is reasonably comparable to a button, key, or icon, the Commission will consider the simplicity and ease of use of the mechanism.<sup>312</sup> We believe this approach is consistent with Congress’s intent “to ensure ready

<sup>307</sup> See AT&T Comments at 15-17; CEA Comments at 18-20; DIRECTV Comments at 8-9; DISH/EchoStar Comments at 7-8; ESA Comments at 7-8; ITIC Comments at 6-7; NAD/Consumer Groups Comments at 9; NCTA Comments at 13-15; Rovi Comments at 8-9; TIA Comments at 10-11; Verizon Comments at 11; CEA Reply at 13-15; CenturyLink Reply at 6; CTIA Reply at 4; NCTA Reply at 9-11. *But see* Montgomery County Comments at 18-19; AFB Reply at 6; Reply Comments of Montgomery County, Maryland at 11 (“Montgomery County Reply”).

<sup>308</sup> See NAD/Consumer Groups Comments at 9. See also Letter from Andrew S. Phillips, Policy Counsel, NAD, to Marlene H. Dortch, Secretary, FCC, at 2 (Aug. 1, 2013) (“NAD/Consumer Groups Aug. 1 *Ex Parte* Letter”).

<sup>309</sup> See AT&T Comments at 15-17; CEA Comments at 20; DIRECTV Comments at 9; DISH/EchoStar Comments at 8; ITIC Comments at 7; NCTA Comments at 14-15; Rovi Comments at 8-9; TIA Comments at 11; Verizon Comments at 11; CEA Reply at 14-15; CenturyLink Reply at 6; NCTA Reply at 10. CEA also explains that imposing a single step requirement would pose a unique hardship for touchscreen devices, which typically have a small number of buttons. CEA Comments at 20.

<sup>310</sup> Pub. L. No. 111-260, §§ 204(c), 205(b)(5). See *NPRM*, 28 FCC Rcd at 8526-27, ¶ 49; AT&T Comments at 14 (“Section 205(b)(5) requires the Commission to permit the entity providing the navigation device used to access multichannel video programming ‘maximum flexibility’ in selecting the best means to make closed captioning accessible via a mechanism that is reasonably comparable to a button, key, or icon.”) (footnote omitted); CEA Comments at 19 (stating that, in addition to “maximum flexibility” in Section 205 and “alternate means of compliance” in Section 204, “Congress’s use of the phrase ‘reasonably comparable’ in Sections 204 and 205 demonstrates its intent to preserve industry flexibility to devise and implement innovative activation mechanisms for closed captioning and video description features”) (footnote omitted). See also CEA Reply at 13-15; ESA Reply at 3; NCTA Reply at 9. *But see* NAD/Consumer Groups Comments at 11 (arguing that “an entity should be given flexibility as to where on a remote control the button for accessing the closed captioning control is placed, but the entity must provide a clearly labeled button on the remote, otherwise accessibility will not be achieved”).

<sup>311</sup> We note that the VPAAC did not reach consensus on what the phrase “reasonably comparable to a button, key, or icon” means, and the discussion of this issue in the *VPAAC Second Report: User Interfaces* reflects the disparate views of industry and consumer groups as to the meaning of this phrase that are evident in the record of this proceeding. See *VPAAC Second Report: User Interfaces* at 20-21. See also *NPRM*, 28 FCC Rcd at 8523-24, ¶ 42.

<sup>312</sup> See ESA Comments at 8 (stating that the reasonably comparable requirement “should be interpreted to include *any simple means* for activating the specified capabilities”) (emphasis added); AFB Reply at 6 (stating that the Commission should “at a minimum, expect equipment to offer a *simple straightforward mechanism* that is, like a button, key or icon, self-evident and that also requires minimal, if any, consultation with any accompanying documentation or on-board guidance.”) (emphasis added).



access to these features by persons with disabilities,”<sup>313</sup> while still giving covered entities the flexibility contemplated by the statute. To provide some clarity to covered entities, we provide some examples of mechanisms that we consider to be and consider not to be reasonably comparable to a button, key, or icon. For example, we believe that compliant mechanisms include, but are not limited to, the following: a dedicated button,<sup>314</sup> key, or icon; voice commands;<sup>315</sup> gestures,<sup>316</sup> and a single step activation from the same location as the volume controls. In contrast, for example, we find that having to turn off the device in order to access the closed captioning activation mechanism through another menu is not a mechanism that is reasonably comparable to a button, key, or icon.<sup>317</sup>

82. Consistent with the statute’s “reasonably comparable” and “maximum flexibility” provisions, we do not require covered entities to use a specific mechanism to satisfy the requirements of Sections 303(aa)(3) and 303(bb)(2) of the Act. For example, if Congress had intended for the only permissible activation mechanism to be a button, or a key, or an icon, as some advocate,<sup>318</sup> we expect that Congress would have expressly stated this. Instead, Congress required a mechanism “*reasonably*

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<sup>313</sup> House Committee Report at 31; Senate Committee Report at 14.

<sup>314</sup> In the *NPRM*, we asked how the “reasonably comparable” requirement should apply with respect to programmable universal remotes that can be programmed with different features. *NPRM*, 28 FCC Rcd at 8524, ¶ 44. NAD/Consumer Groups argue that use of programmable buttons that can be programmed for activation of closed captioning is “completely at odds with the plain language of Sections 204 and 205 of the CVAA, which do not permit an apparatus to be delivered to the user without a *fully realized* mechanism comparable to a button, key, or icon able to activate or deactiv[ate] closed captions.” NAD/Consumer Groups Aug. 1 *Ex Parte* Letter at 2 (emphasis in original). *But see* Letter from James R. Coltharp, Chief Policy Advisor, FCC & Regulatory Policy, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, at 1 (Aug. 1, 2013) (noting that Comcast’s demonstration of its next-generation, cloud-based video platform with accessibility features used a remote with “programmable ‘soft keys’ that will be configurable to enable quick access to a number of features, including accessibility features”). While we recognize that the process of programming buttons on a remote control may not be simple and straightforward, particularly for an individual with disabilities, we believe that once a button is programmed for closed captioning or video description activation, it offers a mechanism that has the equivalent simplicity and ease of use as a dedicated physical button. Thus, we find that a button on a remote control that can be programmed as a dedicated activation mechanism for closed captioning or video description satisfies the “reasonably comparable to a button, key, or icon” requirement if the covered entities who choose to rely on this mechanism to satisfy their statutory obligation either ensure that the remote can be programmed in a simple, straightforward manner by an individual with disabilities, or provide customer support at the consumer’s home to assist with programming the remote.

<sup>315</sup> *See, e.g.*, CEA Comments at 20 (“[S]ome devices do not include any buttons but instead rely on voice or gesture recognition to activate and deactivate certain features, which for some users may be better accessibility solutions than a designated physical button.”); ITIC Comments at 7 (“[S]ome devices do not have buttons at all, but rather, rely either on touch interfaces, gestures or voice commands. Indeed, voice control may provide greater accessibility than physical buttons for individuals who are blind or visually-impaired.”).

<sup>316</sup> *See id.* *See also* NCTA Comments at 14-15 (stating that “operators may eventually deploy devices with gesture recognition that will revolutionize accessibility”).

<sup>317</sup> *See* NAD/Consumer Groups Comments at 8 (“Most infamously difficult to find, a specific cable box must be first ‘turned off’ before the closed captioning mechanism can be accessed through a special menu feature.”).

<sup>318</sup> *See* Walt Comments at 1; Comments of Maggie Tonkinson at 1; NAD/Consumer Groups Aug. 1 *Ex Parte* Letter at 2 (“The CVAA’s mandate is clear: *covered apparatuses must have a dedicated button, key, or icon* that can be easily identified.”) (emphasis in original); Wireless RERC Reply at 5-6 (stating that a “minimal step accessibility button, key, and/or icon” should be included on navigation devices). *But see* CEA Comments at 20; DISH/EchoStar Comments at 9; ESA Comments at 6-7; NCTA Comments at 14, n. 45; Rovi Comments at 9; CEA Reply at 13-14; CTIA Reply at 4. Although Sections 204 and 205 do not require dedicated physical buttons, keys, or icons, these are examples of mechanisms that would satisfy Sections 204 and 205. *See supra* ¶ 81.

comparable to a button, key, or icon”<sup>319</sup> and, with respect to Section 205, gave providers and manufacturers of navigation devices “maximum flexibility in the selection of means for compliance.”<sup>320</sup> For the same reason, we disagree with NAD/Consumer Groups that we should “require the closed captioning control to be activated in a single action from all of the same locations from which the volume can be adjusted in a single action, or if the apparatus lacks a volume control, from all of the same locations where the apparatus’ other primary controls, such as play/pause or fast-forward and rewind buttons, are located.”<sup>321</sup> The statute does not require that the mechanism be activated from the same location as the volume controls or other primary controls, and, with respect to Section 205, such a requirement would be inconsistent with the “maximum flexibility” granted to covered entities in determining the means of compliance.<sup>322</sup>

83. We also reject the notion put forth by CEA that “reasonably comparably to a button, key, or icon” means that a person with disabilities can access the covered accessibility features in the same or a similar number of steps as a person without disabilities.<sup>323</sup> Such an interpretation would lead to results that are wholly inconsistent with the intent of the statute to ensure that persons with disabilities have not only access but “ready” access to the features that make video programming accessible to them.<sup>324</sup> For example, under this approach, a mechanism that requires a person with disabilities to take ten steps to activate closed captioning would be permissible, as long as it also takes a person without disabilities ten steps to activate closed captioning. Such an approach is clearly inconsistent with Congress’s intent in enacting Sections 204 and 205.<sup>325</sup> For similar reasons, we find unpersuasive DISH/EchoStar’s assertion that “the Commission should interpret ‘reasonably comparable’ to mean the same number of steps required to access other core features of a device (*e.g.*, for set-top boxes, the display and selection of programming).”<sup>326</sup> By DISH/EchoStar’s own admission, “[t]he core features and number of steps may

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<sup>319</sup> CEA, DISH/EchoStar, DIRECTV, and Rovi suggest that “[w]hen dedicated physical buttons are used to control volume and/or channel selection, the controls for access to closed captions . . . must also be reasonably comparable to physical buttons, comparable in accessibility to those provided for control of volume or channel selection.” DIRECTV Comments at 9, citing *VPAAC Second Report: User Interfaces* at 20. See also CEA Comments at 20-21; DISH/EchoStar Comments at 8; Rovi Comments at 9. We do not think that requiring a mechanism to be “reasonably comparable to physical buttons” if physical buttons are used for volume and channel selection differs in a meaningful way from the general requirement that activation mechanisms must be “reasonably comparable to a button, key, or icon;” in both instances, a physical button is not required. And, if an activation mechanism for closed captioning or video description is “comparable in accessibility” to the volume and channel selection controls, that may be an indication that it is simple and easy to use, but is not necessarily determinative.

<sup>320</sup> See 47 U.S.C. §§ 303(aa)(3), 303(bb)(2) (emphasis added); Pub. L. No. 111-260, § 205(b)(5).

<sup>321</sup> See NAD/Consumer Groups Aug. 1 *Ex Parte* Letter at 2. But see NCTA Reply at 9, n. 35 (arguing that NAD/Consumer Groups’ approach “would provide even less flexibility than a ‘single step’ approach”). Although Sections 204 and 205 do not require an activation in a single action from the same location as the volume controls, we believe this is an example of a mechanism that would satisfy Sections 204 and 205. See *supra* ¶ 81.

<sup>322</sup> Pub. L. No. 111-260, § 205(b)(5). We note NCAM’s caution that “quite often hearing and sighted users are just as frustrated by poor user interface design, so reliance on an ‘equivalence’ requirement could result in captioning and video description controls that are just as frustrating, just equally so with every other user.” NCAM Reply at 3-4.

<sup>323</sup> See CEA Comments at 21; CEA Reply at 15.

<sup>324</sup> House Committee Report at 31 (stating that the purpose of the “reasonably comparable” requirement “is to ensure ready access to these features by persons with disabilities”); Senate Committee Report at 14 (same). See AFB Reply at 6 (“Since the ‘same number of steps’ standard is in effect what we are living with today and which Congress has clearly rejected, the requirement must certainly be stronger than some might suggest.”).

<sup>325</sup> See *supra* note 324 and accompanying text.

<sup>326</sup> DISH/EchoStar Aug. 21 *Ex Parte* Letter at 3.

vary” even “among devices designed by a single manufacturer,”<sup>327</sup> and DISH/EchoStar’s explanation of what constitutes a “core feature” is vague; thus, such a standard would not ensure that individuals with disabilities have “ready” access to closed captioning and video description features, as Congress intended.

## 2. Accessibility Features Covered by Sections 204 and 205

84. *Section 204 Requirements.* Section 303(aa)(3) of the Act requires covered digital apparatus to provide “built in access to [] *closed captioning and video description features* through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features.”<sup>328</sup> We conclude that the statutory language is clear that closed captioning and video description on apparatus covered by Section 204 must have an activation mechanism that is reasonably comparable to a button, key, or icon. No commenter disagrees.<sup>329</sup>

85. *Section 205 Requirements.* Section 303(bb)(2) of the Act requires “navigation devices with *built-in closed captioning capability*” to provide “access to *that capability* through a mechanism [that] is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features.”<sup>330</sup> We conclude that Section 303(bb)(2) clearly applies to activation of closed captioning on navigation devices covered by Section 205. No commenter disagrees.<sup>331</sup> With regard to video description, in the *NPRM*, we noted that Section 205 includes a similar requirement for a mechanism reasonably comparable to a button, key, or icon as in Section 204, but that the provision in Section 205 explicitly references only closed captioning capability; video description is not expressly mentioned.<sup>332</sup> ACB, Montgomery County, and Rovi Corporation (“Rovi”) believe that we should require a mechanism reasonably comparable to a button, key, or icon to activate video description in navigation devices covered by Section 205.<sup>333</sup> In particular, Montgomery County argues that requiring a mechanism reasonably comparable to a button, key, or icon to activate video description is a “reasonable interpretation[], consistent with the goals of the CVAA,”<sup>334</sup> and Rovi asserts that “the Commission should reasonably interpret ‘or accessibility features’ in Section 205 as including video description.”<sup>335</sup> Other commenters disagree, arguing that the literal language of the statute makes clear that Congress did not intend for Section 205 to apply to any features other than closed captioning.<sup>336</sup> CEA and other commenters further argue that the phrase “accessibility features” “merely describes an activation mechanism — *i.e.*, a mechanism for activating multiple accessibility features — to which the mandated user control mechanism for closed captioning . . . may be reasonably comparable to satisfy the requirements of the statute,” and that it does not encompass video description.<sup>337</sup> Based on the record, at this time, we do not require Section 205 navigation devices to provide an activation mechanism that is

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<sup>327</sup> *Id.*

<sup>328</sup> 47 U.S.C. § 303(aa)(3) (emphasis added).

<sup>329</sup> See AT&T Comments at 17; CEA Comments at 18; DIRECTV Comments at 18; DISH/EchoStar Comments at 9.

<sup>330</sup> 47 U.S.C. § 303(bb)(2) (emphasis added).

<sup>331</sup> See AT&T Comments at 17; DIRECTV Comments at 18-19; DISH/EchoStar Comments at 9; NCTA Comments at 16.

<sup>332</sup> *NPRM*, 28 FCC Rcd at 8525, ¶ 45.

<sup>333</sup> See ACB Comments at 13; Montgomery County Comments at 18; Rovi Comments at 8.

<sup>334</sup> Montgomery County Comments at 18.

<sup>335</sup> Rovi Comments at 8.

<sup>336</sup> See AT&T Comments at 17-18; CEA Comments at 22; DIRECTV Comments at 18-19; DISH/EchoStar Comments at 9; NCTA Comments at 16; CEA Reply at 15-16; CenturyLink Reply at 7; NCTA Reply at 9, n. 34.

<sup>337</sup> CEA Comments at 22 (footnote omitted). See also AT&T Comments at 17; DIRECTV Comments at 19; CEA Reply at 16-17; CenturyLink Reply at 7.

reasonably comparable to a button, key, or icon for video description because we believe we are constrained by Congress's omission of video description in Section 205, but we inquire in the *Further Notice* whether the secondary audio stream for audible emergency information (which is also used for video description) must be activated through a mechanism reasonably comparable to a button, key, or icon pursuant to Section 203 of the CVAA.<sup>338</sup> However, we strongly encourage manufacturers and providers of navigation devices to provide a simple and easy means to access video description for consumers who are blind or visually impaired.

86. *Other Accessibility Features.* At this time, the record does not support requiring accessibility features other than closed captioning (for Section 204 and Section 205 devices) and video description (for Section 204 devices) to be activated by a mechanism reasonably comparable to a button, key, or icon. In the *NPRM*, we sought comment on whether there are additional "accessibility features" that Sections 204 and 205 require to be activated via a mechanism similar to a button, key, or icon.<sup>339</sup> For example, we asked whether "accessibility features" includes activation of the audible output of on-screen text menus or guides and related settings (*e.g.*, volume, speed, and verbosity), and whether it includes closed captioning settings (*e.g.*, font, color, and size of captions), and whether such settings should be required to be in the first level of a menu.<sup>340</sup> Montgomery County, NAD/Consumer Groups, and Dorothy L. Walt support a broad interpretation of the term "accessibility features" to include other accessibility settings.<sup>341</sup> CEA and other industry commenters argue that the phrase "accessibility features" "is *not* an invitation to impose new, and hitherto unspecified, regulatory requirements on additional accessibility features besides closed captioning and video description (in Section 204) and closed captioning (in Section 205)."<sup>342</sup> Because the record does not fully address how accessibility features that involve the selection of settings on a menu (as opposed to simply activating and deactivating the feature) can be "activated" through a mechanism reasonably comparable to a button, key, or icon, we do not adopt requirements for additional accessibility features at this time. However, we inquire in the *Further Notice* whether we should impose such requirements and, if so, how such requirements could be implemented.<sup>343</sup> In addition, we strongly encourage covered entities, when designing their devices, to provide a simple and easy means to access accessibility settings for persons with disabilities.

## V. OBLIGATION OF COVERED ENTITIES TO PROVIDE ACCESSIBILITY UNDER SECTION 205

### A. Obligation to Provide Accessibility Upon Request Under Section 303(bb)(1)

87. In this section, we discuss the respective obligations of MVPDs and manufacturers of navigation devices pursuant to Section 205(a) of the CVAA, which adds Section 303(bb)(1) to the Act, to provide navigation devices with audibly accessible on-screen text menus and guides "upon request" to individuals who are blind or visually impaired.<sup>344</sup> In the *NPRM*, the Commission sought comment on

<sup>338</sup> See *infra* ¶¶ 145-47. Section 203 of the CVAA requires that apparatus designed to receive or play back video programming transmitted simultaneously with sound "have the capability to . . . make available emergency information (as that term is defined in section 79.2 of the Commission's regulations [ ]) in a manner that is accessible to individuals who are blind or visually impaired." 47 U.S.C. § 303(u)(1)(C).

<sup>339</sup> *NPRM*, 28 FCC Red at 8525, ¶ 47.

<sup>340</sup> *Id.* at 8525-26, ¶¶ 47-48.

<sup>341</sup> See Montgomery County Comments at 18; NAD/Consumer Groups Comments at 11; Walt Comments at 1; Montgomery County Reply at 12.

<sup>342</sup> CEA Comments at 22 (emphasis in original). See also AT&T Comments at 17; CEA Comments at 22-23; DIRECTV Comments at 19; DISH/EchoStar Comments at 9-10; CEA Reply at 16-17; CenturyLink Reply at 7.

<sup>343</sup> See *infra* ¶¶ 140-43.

<sup>344</sup> 47 U.S.C. § 303(bb)(1). See also Pub. L. No. 111-260, §§ 205(b)(3) ("to a requesting blind or visually impaired individual"), 205(b)(4)(A) and (B) ("to the requesting blind or visually impaired individual"). As discussed above, (continued....)

how Section 205 should be implemented if it were to conclude that retail navigation devices come within the scope of that provision.<sup>345</sup> The Commission also inquired how it should implement Section 205 requirements if it were to conclude that Section 205 applied to entities other than MVPDs.<sup>346</sup> As discussed below, we conclude that when the covered entity is an MVPD that leases or sells navigation devices to subscribers, the obligation to provide compliant navigation devices “upon request” requires that such MVPD permit blind or visually impaired subscribers to request compliant devices through any means made available generally to other subscribers requesting navigation devices. Similarly, when the covered entity is a manufacturer of navigation devices, we conclude that such manufacturer can comply with its Section 303(bb)(1) obligation to provide compliant navigation devices “upon request” by offering such devices through the same means that it generally uses to provide navigation devices to other consumers (*i.e.*, via retail outlets or by providing such devices directly to requesting consumers). We also conclude that, as part of its Section 303(bb)(1) obligation, a manufacturer that relies on retailers to fulfill requests from blind or visually impaired consumers must make a good faith effort to have such retailers make available compliant navigation devices to the same extent they make available navigation devices to other consumers generally. We also conclude that the obligation in Section 303(bb)(1) of the Act to provide compliant navigation devices “upon request” requires covered entities to provide such accessibility within a reasonable time and in a manner that is not more burdensome to requesting blind or visually impaired individuals than is required for other consumers generally to obtain navigation devices.<sup>347</sup>

88. *MVPDs.* Section 205 of the CVAA directs the Commission to require, among other things, that on-screen text menus and guides be made accessible in real time “upon request” and states that “[a]n entity shall only be responsible for compliance with the requirements added by this section with respect to navigation devices that it provides to a *requesting* blind or visually impaired individual.”<sup>348</sup> Section 205 does not define the phrase “upon request” or otherwise indicate what Congress envisioned in imposing this obligation.<sup>349</sup> When the covered entity is an MVPD that leases or sells navigation devices to subscribers, we conclude that such MVPD must permit blind or visually impaired subscribers to request compliant devices through any means that it generally makes available to other subscribers requesting navigation devices in order to satisfy its statutory obligation to provide such devices “upon request.”<sup>350</sup> For example, if an MVPD generally allows subscribers to order equipment by means of a phone call, email, in-person request or via the MVPD website, it must allow blind or visually impaired subscribers to request accessible devices by those means as well.<sup>351</sup> We emphasize, however, that

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we have determined that the entities principally responsible for compliance with Section 205 are MVPDs that lease or sell navigation devices and manufacturers of navigation devices. *See supra* ¶¶ 43-44.

<sup>345</sup> *See NPRM*, 28 FCC Rcd at 8527, ¶ 50. *See also id.* ¶ 19 (seeking comment on whether Section 205 could be interpreted to apply to set top boxes provided at retail, and, if so, how to apply the requirements of Section 205 to such equipment).

<sup>346</sup> *See id.* ¶ 50.

<sup>347</sup> However, under certain limited circumstances, an MVPD may require verification that the consumer is blind or visually impaired. *See infra* ¶ 132.

<sup>348</sup> *See* 47 U.S.C. § 303(bb)(1); Pub. L. No. 111-260, § 205(b)(3) (emphasis added). *See also* Pub. L. No. 111-260, §§ 205(b)(4)(A), (B).

<sup>349</sup> In the *NPRM*, the Commission sought comment on “whether a ‘request’ could take any form (*e.g.*, a phone call, an email, or a request made in-person).” *See NPRM*, 28 FCC Rcd at 8528, ¶ 53.

<sup>350</sup> *See* Montgomery County Comments at 20 (“the Commission should require MVPDs to permit subscribers to request the device in any manner that they may now order any other MVPD-supplied equipment”).

<sup>351</sup> *See* AFB Reply at 6-7 (“The statute does not allow requests to be restricted only to written requests. . . . [R]equests [should] be accepted verbally, in person, by phone, via electronic messaging, or through any other means of the customer’s choosing.”).



although we agree with parties that covered entities should have discretion to select the means or processes by which consumers can make requests,<sup>352</sup> an MVPD must permit blind or visually impaired subscribers to make requests at least through those means it has established for accepting requests for navigation devices from other consumers. In addition, the means for accepting requests for devices compliant with Section 303(bb)(1) must not be more burdensome to blind or visually impaired subscribers than the means that the MVPD makes available to other consumers. For example, if an MVPD accepts requests for non-compliant navigation devices through a telephone number, the MVPD's customer service representatives must be prepared to handle requests for accessible devices in the same manner. In this regard, we note that an MVPD would not satisfy its obligation to provide Section 303(bb)(1)-compliant navigation devices "upon request" by, for example, requiring a blind or visually impaired consumer to make requests for accessible devices in person if it accepted requests for other navigation devices by phone. Likewise, if an MVPD establishes a website through which blind or visually impaired subscribers can request accessible devices, such website must be screen readable or otherwise allow the subscriber to request the device as seamlessly as could other consumers requesting navigation devices.

89. In the *NPRM*, the Commission interpreted Section 205 to require covered entities "to provide accessible navigation devices to requesting subscribers 'within a reasonable time.'"<sup>353</sup> We affirm the Commission's interpretation and conclude that the "upon request" obligation contained in Section 303(bb)(1) of the Act requires covered entities to provide compliant navigation devices within a reasonable time. Although Section 303(bb)(1) contains no express requirement that accessibility be provided "within a reasonable time," we believe that requiring covered entities to provide compliant navigation devices in a timely fashion is implicit in the phrase "upon request," and is necessary to implement the requirements of Section 205.<sup>354</sup> We also find that requiring the timely provision of accessible devices is consistent with the overriding objectives of the CVAA and advances the public interest because delay in providing such devices would undermine the goal of the CVAA "to increase the access of persons with disabilities to modern communications."<sup>355</sup> Several parties support this interpretation,<sup>356</sup> and no party has asserted that navigation devices compliant with Section 303(bb)(1) should not be provided within a reasonable time.

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<sup>352</sup> See Verizon Comments at 13 (stating that the Commission need not specify the form or content of requests for accessible devices "because any reasonable communication method between the consumer and the MVPD should be sufficient to make such a request"); DISH/EchoStar Comments at 12 (stating that the Commission should permit providers to specify their own processes, which could include a phone call, email, online form, or in-person request); ACA Comments at 5 (asserting that the Commission should allow flexibility in how requests must be received).

<sup>353</sup> See *NPRM*, 28 FCC Rcd at 8527, ¶ 50.

<sup>354</sup> Pub. L. No. 111-260, § 205(b)(1) (directing the Commission to "prescribe such regulations as are necessary to implement [section 205]").

<sup>355</sup> See 47 U.S.C. § 303(bb)(1) (directing the Commission to require accessibility of on-screen text menus and guides "as public convenience, interest or necessity requires"); Pub. L. No. 111-260, preamble (stating that the general purpose of the CVAA is "[t]o increase the access of persons with disabilities to modern communications").

<sup>356</sup> See ACB Comments at 13 ("After the implementation of these regulations and the passage of the deadlines, consumers should expect no delay in obtaining the equipment or software."); DISH/EchoStar Comments at 11-12 (asserting that the Commission should require covered entities to provide accessible navigation devices to requesting subscribers within a reasonable time); Montgomery County Comments at 20. We decline to require that compliant devices be provided within a specified time period, as advocated by Montgomery County, but will revisit this decision if we find that covered entities are failing to provide such devices in a timely fashion. *Id.* (proposing that the Commission require compliance within a specific time period, such as seven or fourteen days, to eliminate uncertainty). Because the benchmark for compliance with the "reasonable time" requirement is the amount of time in which an MVPD typically provides navigation devices to consumers who are not blind or visually impaired, the issue of whether an MVPD has met this requirement will necessarily be MVPD-specific.

90. To comply with its obligation to provide Section 303(bb)(1)-compliant devices “within a reasonable time,” we conclude that an MVPD must provide such devices to requesting blind or visually impaired consumers within a time period comparable to the time that the MVPD’s other subscribers generally receive navigation devices from the MVPD.<sup>357</sup> Absent such a requirement, an MVPD might choose not to order compliant devices in advance of a request, but rather to leave the requesting individual waiting while the MVPD seeks a compliant solution, a result that would be contrary to what Congress intended by requiring that compliant devices be provided “upon request.” The Commission may consider a variety of factors in assessing whether an MVPD has provided an accessible navigation device within a time period equivalent to the period in which it typically provides navigation devices to subscribers who are not blind or visually impaired. As DISH/EchoStar notes, for example, factors that the Commission might consider include the amount of time necessary to schedule a truck roll, identify and deploy a specialist, or take any other action that is part of the process for providing any device to any customer.<sup>358</sup>

91. *Manufacturers.* When the covered entity is a manufacturer of navigation devices, we conclude that, in order to satisfy its obligation to provide Section 303(bb)(1)-compliant navigation devices “upon request,” the manufacturer must make available such devices to blind or visually impaired individuals through the same means that it generally provides navigation devices to other consumers (*i.e.*, via retailers or by providing such devices directly to requesting consumers).<sup>359</sup> For example, in cases where a manufacturer makes available navigation devices at retail, it can comply with its obligation to provide Section 303(bb)(1)-compliant devices “upon request” by offering accessible devices (*e.g.*, at retail stores, the Internet) in the same way that it generally makes available other navigation devices. Similarly, where a manufacturer has established means for accepting and fulfilling consumer requests for navigation devices directly (*e.g.*, through a telephone number or email address), we require that it make available those means to blind or visually impaired consumers who may wish to request navigation devices compliant with Section 303(bb)(1). As we concluded with respect to MVPDs above, any means that a manufacturer employs to accept requests for accessible devices must not be more burdensome to blind or visually impaired individuals than the means made available to other consumers for requesting navigation devices generally.

92. The phrase “upon request” in Section 303(bb)(1) does not lend itself to ready application to manufacturers because, in contrast to MVPDs, which lease equipment directly to their subscribers, manufacturers often sell their products through retail outlets.<sup>360</sup> For this reason, we interpret the phrase “upon request” with respect to situations involving manufacturers in a manner consistent with the statutory scheme and Congress’s intent in the CVAA to “help ensure that individuals with disabilities are

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<sup>357</sup> See AFB Sept. 3 *Ex Parte* Letter at 1 (asserting that “[w]ith regard to equipment made available from cable and satellite providers, consumers expect that a simple, straight forward request for an accessible set-top box or comparable equipment will result in delivery of that equipment promptly,” and that MVPDs should be required to deliver and install accessible equipment “at the same time equipment ordinarily would be delivered and installed for customers generally”).

<sup>358</sup> DISH/EchoStar Comments at 12.

<sup>359</sup> See AFB Sept. 3 *Ex Parte* Letter at 2 (“When fully implemented, the CVAA will mean that accessible TV and TV-like equipment will saturate the consumer electronics marketplace and be commonly available via retail outlets throughout the country.”). We encourage manufacturers that make their accessible navigation devices available through retail stores to meet their Section 303(bb)(1) obligations, to also employ mechanisms that facilitate the provision of accessible devices to blind or visually impaired consumers, such as establishing a telephone number and/or an accessible Internet presence through which a consumer can find accessible devices at retail stores near them.

<sup>360</sup> See Daniel F. Spulber, *Should Business Method Inventions Be Patentable?*, 3 J. Legal Analysis 265, 321-22 (2010) (explaining the relationships among suppliers, wholesalers, and retail outlets, and the business functions they perform).

able to fully utilize communications services and equipment and better access video programming,”<sup>361</sup> while at the same time recognizing the way in which the retail supply chain works. Consumers have made clear in the record that they prefer to be able to obtain accessible devices “off the shelf” at retail stores.<sup>362</sup> We conclude, therefore, that a manufacturer’s Section 303(bb)(1) obligations require that it make a good faith effort to have retailers make available compliant devices to the same extent as navigation devices made available to other consumers generally. Because we do not wish to implement Section 303(bb)(1) in a way that intrudes unduly on manufacturers’ business practices and find no basis in the record for doing so, we decline at this time to prescribe detailed rules governing manufacturers’ agreements with retailers. Should we find after the compliance date for these rules that navigation device manufacturers’ good faith obligations or efforts are not resulting in compliant devices being available through retailers, however, we will revisit this decision in the future.

93. We also emphasize that the obligation to provide compliant devices “upon request” rests with the manufacturer, not the retailer. Thus, it is incumbent on the manufacturer to make a good faith effort for accessible devices to be available at retail to blind or visually impaired consumers to the same extent that navigation devices are made available to other consumers generally. In cases where a manufacturer satisfies its “upon request” obligation by providing accessible devices directly to blind or visually impaired consumers, the means made available for accepting such requests (*e.g.*, a telephone number, email address, and/or website, whether or not dedicated for this purpose) may be no more burdensome to a requesting blind or visually impaired consumer than is obtaining navigation devices generally for other consumers. Based on the record, we believe that implementing Section 303(bb)(1) in the manner set forth above will address the needs and expectations of consumers who are blind or visually impaired while permitting manufacturers to discharge their Section 303(bb)(1) duties in a way that is consistent with their existing processes. Finally, we conclude that manufacturers must provide Section 303(bb)(1)-compliant devices to requesting blind or visually impaired consumers “within a reasonable time.” Manufacturers can satisfy this requirement by providing such devices in a time period comparable to the time in which they provide navigation devices to other consumers (whether through retail outlets or directly to consumers).

**B. Obligation of Covered Entities Complying with Section 303(bb)(1) through the Use of Separate Equipment or Software**

94. In this section, we find that under Section 205(b)(4) of the CVAA, a covered entity that chooses to comply with the requirements of Section 303(bb)(1) of the Act through the use of a separate solution must provide such solution to the requesting blind or visually impaired individual; ensure that any separate solution relied upon provides accessibility in accordance with Section 303(bb)(1) and its

<sup>361</sup> House Committee Report at 19; Senate Committee Report at 1.

<sup>362</sup> *See, e.g.*, Reply Comments of Claude Everett at 1 (“[I]t is the expectation of people who are blind or visually impaired across America, that accessible TVs and TV-like equipment will be readily and regularly available at commercial retail stores.”); Reply Comments of DeAnna Noriega at 1 (asserting that accessible devices should be made available in retail stores and that “[b]egging for an accessible TV or similar equipment directly from a manufacturer is absolutely unacceptable”); Reply Comments of Gaylen Kapperman at 1 (“I would ask that accessible TV equipment should be made available in any regular retail outlet. We blind people are the last to have full access to television broadcasts which everyone else takes for granted and just assumes that their TV equipment will work properly in enabling them to watch any TV presentation they wish.”); Reply Comments of Natalie Castro at 1 (“I want my right to accessible electronics just like everyone else has, not some ancient process where I have to jump through hoops in order to beg for a partial half-effort ‘compromise.’”); Reply Comments of Spero Pipakis at 1 (“They want us to go directly to manufacturers rather than to local stores to purchase accessible equipment. This is not what [the CVAA] intended. I don’t want to be separate but equal, I want to have the same rights and opportunities everyone else has to purchase accessible equipment.”); Reply Comments of Thomas Tobin at 1 (asserting that he should have the same access that his sighted family and friends have to accessible equipment); Reply Comments of Mika Pyyhkala at 1-2 (asserting that he wants to obtain accessible devices off the shelf at a retail store); Reply Comments of Bruce Richman at 1-2 (same); Reply Comments of Karyn Campbell at 1 (same).

implementing rules; and provide such solution within a reasonable time and at no additional charge. We also adopt our tentative conclusion in the *NPRM* and find that if a navigation device has any functions that are required to be made accessible pursuant to the rules we adopt in this *Report and Order*, any separate solution relied upon to achieve accessibility must make all of those functions accessible or enable the accessibility of those functions.<sup>363</sup> In addition, any separate solution relied upon to achieve accessibility must be provided in a manner that is not more burdensome to requesting blind or visually impaired individuals than the manner in which a covered entity generally provides navigation devices to other consumers.

95. Section 205(b)(4)(A) permits a covered entity to comply with Section 303(bb)(1) of the Act through the use of software, a peripheral device, specialized consumer premises equipment, a network-based service or other solution.<sup>364</sup> Section 205(b)(4)(B) further provides that:

If an entity complies with section 303(bb)(1) of the . . . Act . . . [through the use of separate equipment or software], the entity providing the navigation device to the requesting blind or visually impaired individual shall provide any such software, peripheral device, equipment, service, or solution at no additional charge and within a reasonable time to such individual and shall ensure that such software, device, equipment, service or solution provides the access required by such regulations.<sup>365</sup>

The Commission's rules implementing Section 303(bb)(1) of the Act must provide such entity "maximum flexibility to select the manner of compliance."<sup>366</sup> Thus, although a covered entity may choose to comply with its Section 303(bb)(1) obligations by building in accessibility to its navigation devices, the statute does not mandate that it do so.

#### 1. Provision of Separate Equipment or Software that Ensures Accessibility

96. Based on the language of Section 205(b)(4), we adopt the Commission's tentative conclusion and require that an MVPD or navigation device manufacturer that complies with its Section 303(bb)(1) obligations through the use of separate equipment or software is responsible for providing such equipment or software to the requesting individual who is blind or visually-impaired.<sup>367</sup> Specifically, Section 205(b)(4)(B) states that "the *entity providing the navigation device . . . shall provide* any such software, peripheral device, equipment, service or solution" to the requesting blind or visually impaired individual.<sup>368</sup> In addition, Section 205(b)(4)(B) states that "the *entity providing the navigation device . . . shall ensure that* such software, device, equipment, service or *solution provides* the access required by such regulations."<sup>369</sup> We interpret this language to mean that the obligation to provide an effective accessibility solution under Section 205(b)(4) rests with the entity that provides the navigation device to the requesting blind or visually impaired consumer, even in cases where such entity relies on a retailer to provide accessible devices to requesting consumers. This interpretation finds considerable

<sup>363</sup> See *NPRM*, 28 FCC Rcd at 8523, ¶ 40 ("We tentatively conclude that [a separate] solution must achieve the same functions as a built-in accessibility solution.").

<sup>364</sup> Pub. L. No. 111-260, § 205(b)(4)(A).

<sup>365</sup> *Id.* § 205(b)(4)(B).

<sup>366</sup> *Id.* § 205(b)(4)(A).

<sup>367</sup> See *NPRM*, 28 FCC Rcd at 8523, ¶ 40 ("We tentatively conclude that [separate equipment or software] . . . must be provided by the entity providing the navigation device, rather than requiring the customer to seek out such solution from a third party.").

<sup>368</sup> See Pub. L. No. 111-260, § 205(b)(4)(B) (emphasis added).

<sup>369</sup> See *id.* § 205(b)(4)(B) (emphasis added).

support in the record,<sup>370</sup> and no party has asserted that a covered entity relying on a separate solution to achieve accessibility is not responsible for providing such solution to a requesting blind or visually impaired consumer. Pursuant to our authority in Section 205(b)(1) to prescribe regulations necessary to implement the requirements in Section 205(a),<sup>371</sup> we further conclude that any separate solution relied upon to achieve accessibility must be provided in a manner that is not more burdensome to requesting blind or visually impaired individuals than the manner in which other consumers obtain navigation devices.<sup>372</sup> For example, a covered entity could not subject requesting blind or visually impaired consumers to installation processes that were more cumbersome than those imposed on other consumers for navigation devices, or require blind or visually impaired consumers to install a separate solution without technical or logistical support, if it provided such support to other consumers.<sup>373</sup>

97. We also find, consistent with our tentative conclusion in the *NPRM*, that if a non-compliant navigation device has any functions that are required to be made accessible pursuant to the rules we adopt in this *Report and Order*, any separate solution relied upon to achieve accessibility must make all of those functions accessible or enable the accessibility of those functions.<sup>374</sup> Consistent with the text of Section 205(b)(4)(B), we conclude that regardless of whether an entity chooses to satisfy its accessibility obligations through a built-in solution or separate equipment or software, any solution chosen must ensure accessibility as required by Section 303(bb)(1) of the Act and our implementing rules, if achievable.<sup>375</sup> To achieve Congress's intended goals in Section 205, it is irrelevant whether an entity provides accessibility through the use of a built-in or separate solution; any solution chosen must ensure that all of the functions required to be made accessible are, in fact, accessible. There is no support in the record for the suggestion that this requirement will inhibit innovation or hamper the provision of interim solutions as suggested by two commenters.<sup>376</sup> Moreover, a separate solution that does not make the covered functionality accessible (or enable the accessibility of the functions) would not comply with Section 205(b)(4)'s requirement that "the entity providing the navigation device to the requesting blind or visually impaired individual . . . ensure that [a separate solution] provides the access required by [the Commission's] regulations [implementing Section 205(a) of the CVAA]."<sup>377</sup>

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<sup>370</sup> See, e.g., DIRECTV Comments at 7; AT&T Comments at 13; Rovi Comments at 9; Montgomery County Comments at 7.

<sup>371</sup> See Pub. L. No. 111-260, § 205(b)(1).

<sup>372</sup> A manufacturer could meet its obligation by ensuring that a separate solution was made available to requesting blind or visually impaired consumers at the point of sale.

<sup>373</sup> However, when a covered entity relies on separate software to achieve accessibility, the obligation to provide the separate solution under Section 205(b)(4) requires the covered entity to assist blind or visually impaired consumers in downloading the software or to ensure that instructions for downloading software themselves are accessible.

<sup>374</sup> See *supra* ¶ 66. See also Rovi Comments at 9 ("[P]arties electing to comply with Section 205 by supplying software, peripheral devices, or other separate, additional technology should be required to provide the same functions as a built-in accessibility solution"); Montgomery County Comments at 7 (arguing that a separate solution must have the same functionality as a built-in solution because "it is consistent with the principle. . . that all means of accessing the video services should be treated the same in terms of accessibility"); DISH/EchoStar Comments at 10 (asserting that "[t]he Commission should adopt its tentative conclusion that this provision requires any separate solution to 'achieve the same functions' as a built-in accessibility solution, but should also permit a covered entity to pass through wholesale costs of obtaining the separate solution").

<sup>375</sup> See *supra* ¶¶ 77-78.

<sup>376</sup> See NCTA Comments at 5; Verizon Comments at 9-10.

<sup>377</sup> See Pub. L. No. 111-260, § 205(b)(4)(B).



## 2. Provision of Separate Equipment or Software “Within a Reasonable Time”

98. Rather than specify a time frame in which a covered entity providing a separate accessibility solution under Section 205(b)(4) must make that separate solution available, we require it to do so within a time that is comparable to the time it provides navigation devices to consumers who are not blind or visually impaired. Section 205(b)(4)(B) of the CVAA expressly requires that an entity that complies with Section 303(bb)(1) of the Act through the use of separate equipment or software must provide such equipment or software “within a reasonable time.”<sup>378</sup> We interpret this provision in the same manner that we implement the Section 303(bb)(1) obligation of covered entities to provide compliant navigation devices “upon request.”<sup>379</sup> In particular, we conclude that a “reasonable time” is comparable to the time that a covered entity provides navigation devices generally to consumers who are not blind or visually impaired.

## 3. Provision of Separate Equipment or Software “At No Additional Charge”

99. We find that the phrase “no additional charge” means that a covered entity that provides separate equipment or software under Section 205(b)(4)(B) may not impose on a requesting blind or visually impaired individual any charges beyond those it has imposed for a non-compliant navigation device. Section 205(b)(4)(B) of the CVAA provides that an entity complying with Section 303(bb)(1) of the Act through the use of separate equipment or software must provide such equipment or software “at no additional charge.”<sup>380</sup> In the *NPRM*, the Commission tentatively concluded that this requirement was self-implementing, and sought comment on that tentative conclusion.<sup>381</sup>

100. DISH/EchoStar suggests that the Commission has discretion to interpret the phrase “no additional charge” to permit a covered entity “to pass through any wholesale costs associated with procuring such equipment.”<sup>382</sup> We disagree with DISH/EchoStar and conclude that a covered entity may not impose on a requesting blind or visually impaired consumer the wholesale cost of providing separate equipment or software that is relied upon to achieve accessibility.<sup>383</sup> We note that the language in Section 205(b)(4)(B) is different from analogous provisions in Section 716 of the Act, which state that entities covered by Section 716 may satisfy their accessibility obligations through the use of “third party applications, peripheral devices, software, hardware or customer premises equipment that is available to

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<sup>378</sup> *Id.* The Commission sought comment in the *NPRM* on what constitutes a “reasonable time” in which to give a requesting subscriber an accessible separate solution. *See NPRM*, 28 FCC Rcd at 8523, ¶ 40.

<sup>379</sup> *See supra* ¶¶ 89, 90, 93.

<sup>380</sup> Pub. L. No. 111-260, § 205(b)(4)(B).

<sup>381</sup> *See NPRM*, 28 FCC Rcd at 8523, ¶ 40 (“We tentatively conclude that the other requirements in this provision [including the “no additional charge” requirement] are self-implementing.”).

<sup>382</sup> *See* DISH/EchoStar Comments at 10-11 (“[A]llowing a covered entity to recoup the wholesale cost of procuring necessary equipment or software, but prohibiting any retail mark-up or ongoing monthly fee, is a fair approach to all parties that is consistent with the statute.”).

<sup>383</sup> Further, to the extent that the sole solution a covered entity chooses to make available for a given non-compliant device provides accessibility beyond the requirements of Section 303(bb)(1) of the Act, the covered entity may not impose any additional charge for that enhanced accessibility. If, however, a covered entity makes more than one separate solution available to consumers, we agree with DISH/EchoStar that the entity may impose reasonable charges if the consumer requests a solution with enhanced functionality. *See* DISH/EchoStar Comments at 10; DISH/EchoStar Aug. 21 *Ex Parte* Letter at 5 (asserting that “where a built-in solution is available under the cost structure set forth in the statute, but a covered entity develops a separate solution that does not just ‘achieve the same functions’ as the built-in solution but actually improves upon it (*e.g.*, by providing additional mechanisms for user input and/or feedback beyond that provided by the built-in solution), the Commission should not prohibit providers or manufacturers from imposing a reasonable charge for such a solution. Imposing such a ban would hinder innovation and delay or deter developments that could ultimately benefit blind and visually impaired individuals.”).

the consumer *at nominal cost* and that individuals with disabilities can access.<sup>384</sup> Given the differing language of Section 205(b)(4)(B) of the CVAA and Sections 716(a)(1)(B) and 716(b)(2)(B) of the Act, we conclude that, although in other CVAA contexts it intended to allow entities to recover “nominal costs,” Congress expressly declared that entities opting to comply with Section 303(bb)(1) of the Act by means of separate equipment or software must provide such equipment or software to requesting blind or visually impaired individuals “at no additional charge.”<sup>385</sup> Accordingly, we implement Section 205(b)(4)(B) to give effect to that express declaration. We note that our interpretation of Section 205(b)(4)(B) would not prevent a covered entity from recovering the costs of providing separate solutions by passing such costs through to its entire subscriber base.<sup>386</sup>

101. Section 205(b)(4)(A) permits covered entities “maximum flexibility” to select the manner in which they intend to comply with their obligation to make on-screen text menus and guides audibly accessible.<sup>387</sup> In addition, under Section 205(b)(3), a covered entity is only responsible for compliance with this requirement with respect to navigation devices “that it provides to a requesting blind or visually impaired individual.”<sup>388</sup> We interpret these provisions, taken together, to mean that a covered entity may choose to satisfy its accessibility obligations by making all of its navigation devices, subject to the achievability defense, accessible and available to requesting blind or visually impaired individuals,<sup>389</sup> or instead may choose to provide these individuals with “software, a peripheral device, specialized consumer premises equipment, a network-based service or other solution” at no additional charge.<sup>390</sup> One permissible “other solution” available to covered entities would be to make accessible only high-end navigation devices (*e.g.*, those with sophisticated features), but to make these devices available to requesting individuals who are blind or visually impaired without requiring them to pay an additional charge simply to obtain the accessibility features. This is consistent with Section 205(b)(4)(B), which precludes the entity from imposing any additional charges for an “other solution” on an individual requesting accessibility under Section 205.<sup>391</sup> That is, if the only accessible devices a covered entity

<sup>384</sup> See 47 U.S.C. § 617(a)(1)(B) (applicable to equipment manufacturers), § 617(b)(2)(B) (applicable to providers of advanced communications services) (emphasis added).

<sup>385</sup> Pub. L. No. 111-260, § 205(b)(4)(B).

<sup>386</sup> See DISH/EchoStar Aug. 21 *Ex Parte* Letter at 4 (“If the Commission requires covered entities to provide accessible versions of all of the classes of devices they make available, and if it narrowly interprets the term ‘no additional cost’ to preclude providers from recouping the costs of incorporating accessibility functionality in accessible devices, it should affirmatively permit providers to apply a per-user charge to all customers that will help fund the research and development necessary to fund accessible solutions.”).

<sup>387</sup> Pub. L. No. 111-260, § 205(b)(4)(A). See DISH/EchoStar Aug. 21 *Ex Parte* Letter at 4 (“[P]ursuant to Section 205, the Commission should afford covered entities ‘maximum flexibility’ to determine in a commercially reasonable manner how to ensure that an appropriate selection of accessible navigation devices is available to blind and visually impaired individuals.”).

<sup>388</sup> Pub. L. No. 111-260, § 205(b)(3).

<sup>389</sup> Given the fact that under Section 205 covered entities need only provide navigation devices with audibly accessible on-screen text menus and guides to requesting blind or visually impaired individuals, *see id.*, they will be free to provide non-compliant devices to other customers. This provision does not relieve them, however, of the obligation to make accessible devices with “varying degrees of functionality and features, and offered at differing price points,” *see supra* ¶¶ 77-78, available to requesting blind or visually impaired individuals, unless, as discussed below, they opt for a separate solution under Section 205(b)(4).

<sup>390</sup> Pub. L. No. 111-260, § 205(b)(4)(A), (B).

<sup>391</sup> *Id.* § 205(b)(4). See also AFB Sept. 3 *Ex Parte* Letter at 1 (“A cable or satellite provider may . . . give the consumer . . . some alternative device that is accessible, provided that the consumer will not be required to pay any additional money for accessible equipment. This means that a consumer asking for the accessible set-top box or other device cannot be required to lease such equipment at a higher rate than would otherwise be required for an inaccessible but less feature rich set-top box.”).

makes available are among the more expensive devices being offered by that entity because of their sophisticated features, and a blind consumer requests an accessible lower-end device, then the entity must provide the accessible device at the lower price.<sup>392</sup>

102. For example, suppose an MVPD offers two models of set-top boxes for lease at \$5 and \$10 a month, but chooses to make only the \$10 box accessible as it is permitted to do under the analysis set out above. If a blind or visually impaired subscriber requests an accessible version of the lower end box, the MVPD would have to lease that subscriber the \$10 box at no more than the \$5 rate. Similarly, if a retail navigation device manufacturer makes navigation devices that cost \$200 and \$300, and elects not to make the \$200 device accessible but rather to designate the more sophisticated \$300 device as the accessibility solution for that less sophisticated device, the manufacturer cannot charge a requesting blind or visually impaired individual more than \$200 for that device.<sup>393</sup> In either case, this outcome is reasonable because the covered entity has chosen to comply with its obligations by providing accessibility through only one expensive, feature-rich device when it could have avoided providing a higher-end box at no additional charge by offering a range of accessible devices at differing price points.<sup>394</sup>

103. We agree with parties asserting that, if a covered entity's compliance solution depends upon software that can only be operated by means of a third-party device such as a laptop, tablet, or smart phone, the covered entity cannot rely on the consumer to own or acquire such a device or the services needed to download or use the additional software (such as Internet access service).<sup>395</sup> Although Section 205(b)(4)(A) affords covered entities "maximum flexibility" to select the manner of compliance with regard to separate solutions,<sup>396</sup> Section 205(b)(4)(B) also requires that such entities provide that manner of compliance "at no additional charge."<sup>397</sup> Accordingly, if a covered entity's chosen manner of compliance involves a software solution that must be operated on a third-party device (*e.g.*, a laptop, tablet, smart phone) or if additional services are required to make use of the device, we find that this manner of compliance constitutes an "other solution" under Section 205(b)(4)(B); thus, the covered entity must provide that solution – *i.e.*, both the software and the third-party device, as well as the service to use the accessible navigation features – to the requesting individual at no additional charge.<sup>398</sup>

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<sup>392</sup> As discussed below, covered entities choosing this approach to compliance may require reasonable verification of disability. *See infra* ¶ 132.

<sup>393</sup> Although some MVPDs could take the approach of providing subscribers more expensive set-top boxes at no additional charge, no retail manufacturers have suggested on the record that they intend to take this approach to complying with the statute. Given that retail device manufacturers often sell to consumers through intermediary retail partners, we recognize that if they opt for this compliance solution they may face challenges in ensuring that requesting blind or visually impaired consumers receive a compliant solution at no additional charge. We expect manufacturers opting for this approach to devise a mechanism for such consumers to request and receive such solutions at no additional charge.

<sup>394</sup> In cases in which a consumer files a complaint with the Commission alleging that a covered entity has violated the "no additional charge" requirement in Section 205(b)(4)(B), such entity will bear the burden of demonstrating that it has imposed no charges beyond the cost of the non-compliant navigation device being replaced.

<sup>395</sup> *See* ACB Comments at 13; AFB Sept. 3 *Ex Parte* Letter at 2 (arguing that device manufacturers should not be permitted to presume that a consumer already possesses mainstream devices, such as smart phones, on which the manufacturer relies to achieve accessibility).

<sup>396</sup> Pub. L. No. 111-260, § 205(b)(4)(A).

<sup>397</sup> *Id.* § 205(b)(4)(B).

<sup>398</sup> *See* Comments of Comcast Corporation at 3-4 (referencing the potential use of "device-based assistive voice technologies" in which "an MVPD app running on a tablet or smartphone would rely on the platform-specific access technology embedded in the device" to provide accessibility); NCTA Reply at 3-4 (stating that in some situations, an MVPD might rely on device-assistive voice technology to ensure accessibility).

### C. Activation Mechanisms for Closed Captioning Under Section 205

104. Based on the language and design of Section 205, we agree with parties asserting that a covered entity must provide a compliant mechanism to activate closed captioning pursuant to Section 303(bb)(2) of the Act irrespective of whether such entity has received a “request” for such mechanism from a “blind or visually impaired individual.”<sup>399</sup> That is, covered entities must ensure that all of their navigation devices with built-in closed captioning capability provide a mechanism reasonably comparable to a button, key or icon to activate closed captioning. Although there is an ambiguity in the statute resulting from the uncertain relationship between new Section 303(bb)(2) of the Act and Section 205(b)(3) of the CVAA, we conclude that this is the most reasonable interpretation of Section 205. Section 303(bb)(2) of the Act requires “for navigation devices with built-in closed captioning capability,” access to that capability must be provided “through a mechanism that is reasonably comparable to a button, key or icon designated for activating the closed captioning, or accessibility features . . . .”<sup>400</sup> Section 205(b)(3) of the CVAA states that an “entity shall only be responsible for compliance with the requirements added by this section with respect to navigation devices that it provides to a requesting blind or visually impaired individual.”<sup>401</sup> It is unclear whether Section 205(b)(3) applies only to the requirements of Section 205 designed to afford accessibility of devices to individuals who are blind or visually impaired, *i.e.*, those required by Section 303(bb)(1) of the Act, or also to the closed captioning requirements in Section 303(bb)(2) of the Act. If Section 205(b)(3) of the CVAA were read as applying to the closed captioning requirements, that would mean the closed captioning activation mechanism would be provided only at the request of blind or visually impaired individuals, a group of consumers who would generally have far less need for a closed captioning feature (closed captioning being useless to someone who is blind), and not at the request of deaf or hard of hearing consumers for whom closed captioning is essential for understanding a program’s content. We do not believe that Congress intended such an absurd result.<sup>402</sup> When “charged with understanding the relationship between two different provisions within the same statute, we must analyze the language of each to make sense of the whole.”<sup>403</sup> Attempting to make sense of these provisions, the Commission sought comment in the *NPRM* on how Section 205(b)(3) of the CVAA should be read in conjunction with Section 303(bb)(2) of the Act.<sup>404</sup> The Commission also inquired whether the fact that Section 303(bb)(1) of the Act and Section 205(b)(4)(B) of the CVAA focus on making navigation devices accessible to people with vision disabilities, and do not reference people who are deaf or hard of hearing, means that requests were not meant to be a pre-requisite to providing accessible activation mechanisms for closed captioning under Section 303(bb)(2) of the Act.<sup>405</sup> The Commission asked whether it was Congress’s intent that covered entities include the mechanism to make closed captioning easily accessible on all devices with built-in closed captioning.<sup>406</sup>

105. We find that the statutory text and purpose support the interpretation that covered entities must ensure that all of their navigation devices with built-in closed captioning capability provide a

<sup>399</sup> See NAD/Consumer Groups Comments at 12.

<sup>400</sup> 47 U.S.C. § 303(bb)(2).

<sup>401</sup> Pub. L. No. 111-260, § 205(b)(3).

<sup>402</sup> *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066, 1068-69 (D.C. Cir. 1997) (“When the purported ‘plain meaning’ of a statute’s word or phrase happens to render the statute senseless, we are encountering ambiguity rather than clarity.”).

<sup>403</sup> *Id.* at 1047.

<sup>404</sup> 47 U.S.C. § 303(bb)(2). Section 205(b)(3) of the CVAA provides that “[a]n entity shall only be responsible for compliance with the requirements added by this section with respect to navigation devices that it provides to a requesting blind or visually impaired individual.” Pub. L. No. 111-260, § 205(b)(3).

<sup>405</sup> See *NPRM*, 28 FCC Rcd at 8527, ¶ 51.

<sup>406</sup> See *id.*

mechanism to activate closed captioning that is reasonably comparable to a button, key, or icon. Section 303(bb)(2) of the Act requires a compliant activation mechanism for navigation devices with built-in closed captioning.<sup>407</sup> The “upon request” language does not appear anywhere in that section. As discussed above, the terms “request” and “requesting” are used in Section 205 of the CVAA only in connection with individuals who are blind or visually impaired.<sup>408</sup> We believe the absence of the “upon request” language in Section 303(bb)(2) of the Act, and the inclusion of such language in Section 303(bb)(1) of the Act, is most reasonably read as indicating that Congress intended the closed captioning activation mechanism to be included on all devices with built-in closed captioning capability, and not just provided to individuals who request them, as Congress provided with respect to audibly accessible on-screen text menus and guides.

106. Our interpretation of the obligations imposed by Section 303(bb)(2) of the Act is further supported by the language and structure of Section 205(b)(4) of the CVAA, which governs compliance with Section 303(bb)(1) of the Act through “separate equipment or software,”<sup>409</sup> and Section 205(b)(5) of the CVAA, which governs the provision of devices with closed captioning pursuant to Section 303(bb)(2) of the Act.<sup>410</sup> Sections 205(b)(4)(A) and (B) of the CVAA give a covered entity flexibility in complying with the requirements of Section 303(bb)(1) of the Act by allowing the entity to provide audibly accessible on-screen text menus and guides to “requesting blind or visually impaired” individuals through separate equipment or software.<sup>411</sup> By contrast, Section 205(b)(5) of the CVAA, which relates to compliance with the requirements of Section 303(bb)(2) of the Act (closed captioning activation mechanism), references neither a “request” nor any limitation on the kinds of individuals entitled to receive accessible activation mechanisms for closed captioning.<sup>412</sup> Moreover, Section 205(b) of the CVAA does not permit entities to provide the closed captioning mechanism through separate equipment or software. We find that the inclusion of the “requesting” language in 303(bb)(1) of the Act and 205(b)(4) of the CVAA, and the omission of such language in 303(bb)(2) of the Act and 205(b)(5) of the CVAA, and the flexibility afforded to entities to provide on-screen menus and guides but not closed captioning activation mechanisms through separate equipment or software, further supports our conclusion that Congress did not intend to limit the provision of the closed captioning activation mechanism to individuals who request them, as it did with audibly accessible on-screen text menus and guides. Rather, it intended that the closed captioning mechanism be universally available.

107. The absence in Section 303(bb)(2) of the Act of the phrase “if achievable” (which is included in Section 303(bb)(1) of the Act) further confirms our conclusion that Congress intended to impose on covered entities an unqualified obligation to ensure that all navigation devices with built-in closed captioning capability provide access to such capability through a mechanism “reasonably comparable to a button, key or icon.” That is, in contrast to the conditional requirements of Section 303(bb)(1) of the Act – entities must provide audibly accessible on-screen menus and guides to requesting blind or visually impaired individuals only “if achievable” -- Congress made the requirements of Section 303(bb)(2) of the Act unconditional. Thus, the closed captioning activation mechanism must be provided without regard to an “achievability” condition and cannot be provided through separate equipment or

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<sup>407</sup> 47 U.S.C. § 303(bb)(2).

<sup>408</sup> See *supra* ¶ 87.

<sup>409</sup> Pub. L. No. 111-260, § 205(b)(4).

<sup>410</sup> *Id.* § 205(b)(5).

<sup>411</sup> *Id.* §§ 205(b)(4)(A) (providing that the regulations implementing Section 205(a) “shall permit but not require the entity providing the navigation device to the requesting blind or visually impaired individual” to comply with Section 303(bb)(1) through the use of a separate solution), 205(b)(4)(B) (stating that the entity “providing the navigation device to the requesting blind or visually impaired individual” shall provide a separate solution at no additional charge and within a reasonable time).

<sup>412</sup> *Id.* § 205(b)(5).



software. We believe requiring activation mechanisms for closed captioning to be universally provided makes sense from a practical standpoint as well. Because both the CVAA and other statutes have made closed captioning a universal design feature, we find it reasonable to interpret Section 303(bb)(2) of the Act as ensuring that compliant activation mechanisms for built-in closed captioning be universally available as well.

108. We observe that Section 205(b)(3) of the CVAA provides that “[a]n entity shall only be responsible for compliance with the requirements added by this section with respect to navigation devices that it provides to a requesting blind or visually impaired individual.”<sup>413</sup> Some commenters have argued that under this provision, a covered entity is responsible for providing a closed captioning activation mechanism only to requesting individuals who are blind or visually impaired.<sup>414</sup> We reject this argument. Commenters’ proffered interpretation is based on an overly broad reading of the phrase “the requirements added by this section;” they contend that “this section” references Section 205 of the CVAA in its entirety. This reading, however, ignores the qualifier “with respect to navigation devices that it provides to a requesting blind or visually impaired individual.” That is, by its terms, Section 205(b)(3) of the CVAA limits an entity’s compliance responsibility to devices provided to requesting individuals, but only “with respect to navigation devices that it provides to a requesting blind or visually impaired individual.” In other words, Section 205(b)(3) of the CVAA applies only with regard to those devices provided pursuant to Section 303(bb)(1) of the Act (audibly accessible on-screen text menus and guides provided on navigation devices “upon request by individuals who are blind or visually impaired”).<sup>415</sup> It does not apply to the closed captioning activation mechanism covered under Section 303(bb)(2) of the Act, which says nothing about requesting blind or visually impaired individuals. We believe our interpretation is the most sensible reading of Section 205(b)(3) of the CVAA in context. If we were to construe that provision as limiting a covered entity’s obligation to comply with Section 303(bb)(2) of the Act to only those cases in which a blind or visually impaired individual requests the closed captioning activation device, such a reading would deny improvements in closed captioning accessibility to those consumers who need and utilize it most, *i.e.*, individuals who are deaf and hard of hearing, and make this feature accessible *only* to individuals who generally have far less of a need for it. We do not believe Congress intended such a nonsensical result, and we believe that the foregoing analysis of the language of the various provisions of Section 205 of the CVAA and how they fit together in context confirms that. For the reasons discussed above, we interpret Section 303(bb)(2) of the Act as requiring covered entities to include compliant closed captioning activation mechanisms on all navigation devices with built-in closed captioning capability.<sup>416</sup>

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<sup>413</sup> *Id.* § 205(b)(3).

<sup>414</sup> See CEA Comments at 17-18 (asserting that under Section 205(b)(3) of the CVAA, a covered entity is responsible for compliance with Section 303(bb)(2) of the Act only with respect to devices that it provides to requesting blind or visually impaired individuals); NCTA Comments at 16-17 (arguing that the language of Section 205(b)(3) limits responsibility for compliance to entities providing navigation devices to requesting consumers); NCTA Sept. 3 *Ex Parte* Letter at 2 (same).

<sup>415</sup> For example, under Section 205(b)(3), an MVPD would be responsible for compliance with the audibly accessible requirement in Section 303(bb)(1) only with regard to devices it supplies to the requesting individual; it would not be responsible for compliance with regard to a device an individual purchased at retail.

<sup>416</sup> Our decision is consistent with the requirement in Section 205(b)(5) of the CVAA that our rules “permit the entity providing the navigation device maximum flexibility in the selection of means for compliance with Section 303(bb)(2). . . .” Pub. L. No. 111-260, § 205(b)(5). We interpret the phrase “selection of means for compliance” to refer to the selection of the mechanism that is “reasonably comparable to a button, key, or icon.” Our decision thus does not restrict a covered entity’s flexibility to choose the mechanism by which it will meet this requirement.

**VI. OTHER ISSUES****A. Alternate Means of Compliance**

109. Section 204 of the CVAA states that an entity may meet the requirements of Section 303(aa) of the Act “through alternate means than those prescribed by” the regulations that we adopt herein if the requirements of Section 303(aa) of the Act are met, as determined by the Commission.<sup>417</sup> We adopt our proposal in the *NPRM* to implement the same approach to alternate means of compliance that the Commission adopted in the *IP Closed Captioning Order*, which implemented a similar provision in Section 203 of the CVAA.<sup>418</sup> We note that the commenters on this issue generally support our proposal.<sup>419</sup> Under our approach, rather than specifying what may constitute a permissible alternate means of compliance, we will address any specific requests from parties subject to the new rules on a case-by-case basis when they are presented to us.<sup>420</sup> Should an entity seek to use an “alternate means” to comply with the applicable requirements, that entity may either: (i) request a Commission determination that the proposed alternate means of compliance satisfies the statutory requirements pursuant to Section 1.41 of our rules;<sup>421</sup> or (ii) claim in defense to a complaint or enforcement action that the Commission should determine that the party’s actions were permissible alternate means of compliance.<sup>422</sup> We note that covered entities that claim in defense to a complaint or enforcement action that their actions were a permissible alternate means of compliance bear the burden of proof on this defense. We delegate authority to the Media Bureau and the Consumer and Governmental Affairs Bureau, as we did in the *IP Closed Captioning Order* and other contexts, to consider all requests for a declaratory ruling regarding an alternate means of compliance.<sup>423</sup>

110. We reject DISH/EchoStar’s proposal to set a 90-day time limit for Bureau action on requests for a declaratory ruling that a proposed alternate means of compliance satisfies the statutory requirements.<sup>424</sup> While we believe the Bureaus can act expeditiously on such requests, we conclude that the potentially complex nature of proposals for alternate means of compliance that may need to be evaluated makes it inadvisable to adopt binding time frames.

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<sup>417</sup> Pub. L. No. 111-260, § 204(c).

<sup>418</sup> *NPRM*, 28 FCC Rcd at 8528, ¶ 54. See *IP Closed Captioning Order*, 27 FCC Rcd at 858-59, ¶ 121.

<sup>419</sup> See DISH/EchoStar Comments at 11; Panasonic Comments at 12-13; ITIC Comments at 8; Rovi Comments at 10.

<sup>420</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 859, ¶ 121.

<sup>421</sup> 47 C.F.R. § 1.41 (setting forth procedures for filing informal requests for Commission action).

<sup>422</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 858-59, ¶ 121. We note that this approach slightly differs from the approach recently adopted in the *Emergency Information/Video Description Order*, 28 FCC Rcd at 4923, ¶ 75. Under that approach, a covered entity that seeks to use an “alternate means” to comply with the Section 203 emergency information and video description apparatus requirements must request and receive a Commission determination that the proposed alternate means satisfies the statutory requirements through a request pursuant to Section 1.41 of our rules before using such alternate means of compliance. The covered entity is not permitted to claim in defense to a complaint or enforcement action that the Commission should determine that the party’s actions were a permissible alternate means of compliance. *Id.* The Commission explained that it was deviating from the approach implemented in the *IP Closed Captioning Order* because of the uniquely heightened public interest in emergency information and the importance of ensuring that consumers know how they can use their apparatus to obtain emergency information provided via the secondary audio stream. *Id.*

<sup>423</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 864, ¶ 133.

<sup>424</sup> DISH/EchoStar Comments at 11.

## B. Compliance Deadlines

111. We set a compliance deadline of three (3) years from the date the *Report and Order* is published in the Federal Register by which covered entities must comply with the requirements of Sections 204 and 205.<sup>425</sup> Section 204 does not specify the time frame by which digital apparatus must comply with the requirements for accessible user interfaces and programming guides.<sup>426</sup> However, Section 204(d) states that “[a] digital apparatus designed and manufactured to receive or play back the Advanced Television Systems Committee’s Mobile DTV Standards A/153 shall not be required to meet the requirements of the regulations [adopted under Section 204] for a period of not less than 24 months after the date on which the final regulations are published in the Federal Register.”<sup>427</sup> Section 205 sets forth a phase-in period of not less than two years from the date of adoption of rules by which navigation devices must comply with the requirements for a mechanism reasonably comparable to a button, key, or icon for closed captioning or accessibility features,<sup>428</sup> and not less than three years by which navigation devices must comply with the requirements for accessible on-screen text menus and guides for the display or selection of video programming.<sup>429</sup> With respect to Section 204, the VPAAC recommends that the industry be given not less than two years after publication of the regulations in the Federal Register to come into compliance, consistent with the time frame adopted in both the *ACS Order* and the *IP Closed Captioning Order*.<sup>430</sup> With respect to Section 205, the VPAAC recommends that we adopt the minimum phase-in periods described in the statute,<sup>431</sup> but suggests that they should run from the date of publication of the rules in the Federal Register, rather than from the date of adoption, consistent with its recommendation in the Section 204 context.<sup>432</sup> The *NPRM* tentatively concluded to adopt the VPAAC’s recommendations.<sup>433</sup> Some commenters support the *NPRM*’s proposal,<sup>434</sup> while others advocate a “uniform” three-year compliance deadline for implementing all new rules under Sections 204 and 205.<sup>435</sup>

112. We are persuaded by industry commenters that a uniform three-year phase-in period for compliance with Sections 204 and 205 will simplify implementation and enforcement of these

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<sup>425</sup> See Appendix B final rules 47 C.F.R. §§ 79.107(b), 79.108(b), 79.109(c).

<sup>426</sup> Pub. L. No. 111-260, § 204(d).

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* § 205(b)(6)(A)(i). Section 205 provides that “[t]he Commission shall provide affected entities with not less than 2 years after the adoption of such regulations to begin placing in service devices that comply with the requirements of Section 303(bb)(2) of the Communications Act.”

<sup>429</sup> *Id.* § 205(b)(6)(A)(ii). Section 205 provides that “[t]he Commission shall provide affected entities with not less than 3 years after the adoption of such regulations to begin placing in service devices that comply with the requirements of Section 303(bb)(1) of the Communications Act.”

<sup>430</sup> *VPAAC Second Report: User Interfaces* at 15.

<sup>431</sup> *Id.* (recommending that “devices covered under Section 205 be required to comply with Section 205 regulations under the ‘Phase-In’ schedule described in the CVAA,” *i.e.*, a phase in period of not less than two years to require a mechanism reasonably comparable to a button, key, or icon for closed captioning or accessibility features and not less than three years to require accessible on-screen text menus and guides for the display or selection of video programming). See Pub. L. No. 111-260, § 205(b)(6)(A)(i)-(ii).

<sup>432</sup> *VPAAC Second Report: User Interfaces* at 15.

<sup>433</sup> *NPRM*, 28 FCC Rcd at 8529-30, ¶¶ 57-58.

<sup>434</sup> See NAD/Consumer Groups Comments at 14; DIRECTV Comments at 10; Verizon Comments at 14.

<sup>435</sup> See CEA Comments at 23-24; CEA Reply at 17-18; DISH/EchoStar Comments at 14; TIA Comments at 11-12; ESA Comments at 8-9; Rovi Comments at 10-11; AT&T Comments at 18-19; ITIC Comments at 8-9; CenturyLink Reply at 4; CTIA Comments at 13-14.

provisions.<sup>436</sup> We recognize that the Commission has generally afforded manufacturers two years to comply with accessibility requirements under the CVAA.<sup>437</sup> However, we agree with industry commenters that a common deadline will afford covered entities the flexibility to adopt similar accessibility solutions for Sections 204 and 205 equipment.<sup>438</sup> CEA explains that “covered digital apparatus and navigation devices may rely on the same third-party solutions to meet the applicable accessibility requirements” and that such “solutions would likely become available for both digital apparatus and navigation devices around the same time.”<sup>439</sup> Industry commenters also explain that a common deadline would avoid uncertainty as to “when particular video programming features of a new, multipurpose or hybrid product” must comply.<sup>440</sup> Finally, CEA asserts that, “due to the timing of the product development cycle, especially for TVs,” a uniform deadline “will greatly simplify the development of accessible solutions for apparatus covered by Section 204 without significantly delaying the introduction of accessible devices.”<sup>441</sup> In addition, we believe more time is appropriate for covered entities to provide an accessible activation mechanism for built-in closed captioning because of our decision herein that this requirement applies to all navigation devices (irrespective of whether it has received a request from a consumer) and is not subject to the “achievability” limitation.<sup>442</sup> We also expect that having a common deadline for an accessible activation mechanism for built-in closed captioning and audibly accessible on-screen text menus and guides will allow covered entities to design devices that incorporate all of these required accessibility features, which should reduce consumer confusion about the accessibility of device features. We note that, while NAD/Consumer Groups endorsed the VPAAC timing recommendations,<sup>443</sup> they did not otherwise respond to industry’s request for a uniform three-year phase-in period. We agree with industry commenters that the benefits of a simplified, uniform compliance deadline outweigh any inconvenience that may be caused to consumers. Although the compliance deadline is three years away, we expect manufacturers to take accessibility into

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<sup>436</sup> See, e.g., AT&T Comments at 18 (“[A] uniform date will allow for a clear, smooth transition to the new requirements and eliminate confusion that might occur with multiple compliance dates.”); CEA Reply at 17 (“A uniform three-year phase-in period for compliance with Sections 204 and 205 will allow for a smooth transition to full implementation and enforcement of Sections 204 and 205. Industry’s experience has demonstrated the need for a phase-in period that will allow manufacturers to comply with the new regulatory requirements in a coherent, coordinated, and efficient manner.”); CTIA Reply at 13-14 (“[A] uniform phase-in period of three years for all aspects of Sections 204 and 205 will offer a bright-line standard for consumers and covered entities, and permit a smooth transition to full implementation and enforcement of the new rules.”).

<sup>437</sup> See, e.g., *IP Closed Captioning Order*, 27 FCC Rcd at 859, ¶ 122 (setting a two-year deadline by which devices must comply with the requirements of Section 203). The Commission has repeatedly determined that manufacturers generally require approximately two years to design, develop, test, manufacture, and make available for sale new products. *Id.*

<sup>438</sup> ESA Comments at 8 (adding that this would mean consumers may not have to repeatedly adapt to different accessibility solutions).

<sup>439</sup> CEA Comments at 24.

<sup>440</sup> ESA Comments at 8. See also TIA Comments at 11-12 (multi-functional devices may present complex technical and operational issues).

<sup>441</sup> CEA Reply at 17. CEA explains that new TV models are usually introduced in the spring, meaning that adoption of a 3-year compliance deadline that will go into effect in the fourth quarter of 2016 will lead to devices being introduced the previous spring, and thus amount to “an effective phase-in period of only about two and a half years.” *Id.* ESA states that the extra time may allow manufacturers “to roll out accessibility solutions across product lines contemporaneously, which in turn may foster investment and innovation in improved accessibility technologies.” ESA Comments at 8-9.

<sup>442</sup> See *supra* Section V.C.

<sup>443</sup> NAD/Consumer Groups Comments at 14.

consideration as early as possible during the design process for new and existing equipment and to begin taking steps to bring accessible equipment to consumers as required by our rules.<sup>444</sup>

113. We clarify that the compliance deadlines adopted herein refer only to the date of manufacture, consistent with the *IP Closed Captioning Reconsideration Order* and the *Emergency Information/Video Description Order*.<sup>445</sup> As explained in those orders, this approach is consistent with the Commission's past practices regarding similar equipment deadlines,<sup>446</sup> and a compliance deadline based on the date of importation or the date of sale would be unworkable in most circumstances, given that the manufacturer often does not control the date of importation or sale.<sup>447</sup>

114. Delayed Compliance for Mid-sized and Smaller MVPDs. We set a later compliance deadline of five (5) years from the date the *Report and Order* is published in the Federal Register by which certain mid-sized and smaller MVPD operators and small MVPD systems must comply with the requirements of Section 205.<sup>448</sup> Specifically, this later deadline will apply to:

- MVPD operators with 400,000 or fewer subscribers (*i.e.*, MVPD operators other than the top 14);<sup>449</sup> and
- MVPD systems with 20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers (*i.e.*, 10.1 million<sup>450</sup>).

In addition, we will review the marketplace after the three-year compliance deadline for larger MVPDs to determine whether this five-year delayed compliance deadline should be retained or extended (in whole or in part). Once we reach the three-year compliance deadline for larger operators, we believe we will be better positioned to assess whether mid-sized and/or smaller operators will be able to comply within another two years.<sup>451</sup> We delegate authority to the Media Bureau to initiate this review.

115. As discussed above, Section 205 sets forth minimum compliance phase-in periods (*i.e.*, “not less than” two/three years). Therefore, Section 205 provides the Commission with the discretion to

<sup>444</sup> See, *e.g.*, *IP Closed Captioning Order*, 27 FCC Rcd at 859, ¶ 122; *ACS Order*, 26 FCC Rcd at 14602, ¶ 108.

<sup>445</sup> See CEA Reply at 18-19 (seeking clarification that the new rules for Sections 204 and 205 will not restrict the import, shipping or sale of apparatus and/or navigation devices, as applicable, that were manufactured before the compliance deadline).

<sup>446</sup> See, *e.g.*, Notes to 47 C.F.R. §§ 15.120(a), 79.101(a)(1), 79.102(a)(1), (2), 79.105(a), 79.106(a).

<sup>447</sup> See *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8798, ¶ 23 (finding that “manufacturers can identify and control the date of manufacture, but the date of importation is affected by variables outside of the manufacturer’s control, and thus a deadline triggered by the date of importation may be unworkable in many situations for manufacturers”); *Emergency Information/Video Description Order*, 28 FCC Rcd at 4924-25, ¶ 77. See CEA Reply at 18-19.

<sup>448</sup> See Appendix B final rules 47 C.F.R. §§ 79.108(b), 79.109(c).

<sup>449</sup> See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 28, 2013) (showing the number of subscribers for each of the top 25 MVPDs, based on 2012 data). We will rely on this data for our purposes here.

<sup>450</sup> At the end of 2011, there were approximately 101.0 million MVPD subscribers. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10507, ¶ 26, n. 43 (2013) (“15<sup>th</sup> Annual Competition Report”). We will use this 101.0 million total MVPD subscribers approximation for our purposes here, although we recognize that the total may now be slightly less. See NCTA, Industry Data (2012), <http://www.ncta.com/industry-data> (visited Aug. 28, 2013). In any case, our definition of a small MVPD system will exclude systems affiliated with one of the top four MVPDs – Comcast, DIRECTV, DISH Network, and Time Warner Cable, all of which have more than 10.1 million subscribers. *Id.*

<sup>451</sup> See NCTA Comments at 19 (“the Commission should review the marketplace after the three-year phase-in to determine whether audible accessibility is ‘achievable’ for smaller operators”).



set later deadlines if deemed appropriate.<sup>452</sup> MVPD commenters ask that we use this discretion to afford mid-sized and smaller MVPD operators and small MVPD systems with more time to comply with Section 205.<sup>453</sup> We agree with MVPD commenters that a longer phase-in is appropriate for certain mid-sized and smaller MVPD operators and small MVPD systems.<sup>454</sup> We recognize that smaller operators generally lack the market power and resources to drive independently the development of MVPD headend or customer premises equipment.<sup>455</sup> NCTA explains that smaller operators “typically rely on the research and development efforts of the larger operators prior to deploying new equipment and services to their customers.”<sup>456</sup> Thus, it is the large cable operators that generally dictate equipment features to manufacturers and commonly get priority in the delivery of that equipment.<sup>457</sup> We also agree with NCTA that “small systems have a smaller customer base across which to spread costs.”<sup>458</sup> We recognize that delayed compliance may mean fewer accessibility choices for subscribers to smaller systems with disabilities in the near term, particularly in rural areas.<sup>459</sup> However, we agree with NCTA that this concern will be mitigated by the presence of other accessibility options available in the marketplace when the rules take effect. As NCTA notes, most consumers should have access to satellite service, and subscribers to cable systems that are eligible for delayed compliance will be able to obtain navigation devices at retail that will be subject to the Section 205 audible accessibility requirement.<sup>460</sup> Therefore, we believe providing some relief to mid-sized and smaller operators is reasonable and consistent with congressional intent to allow the Commission to establish reasonable compliance deadlines.

116. However, cognizant of Congress’s desire that consumers with disabilities gain better access to video programming without undue delay,<sup>461</sup> we limit the delay in compliance for mid-sized and

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<sup>452</sup> Pub. L. No. 111-260, §§ 205(b)(6)(A)(i)-(ii). *See also* NCTA Comments at 18 (Section 205 “grants the Commission flexibility to extend the time frame for compliance by other entities.”).

<sup>453</sup> *See* NCTA Comments at 17-19; ACA Comments 6-9; Reply Comments of NTCA—The Rural Broadband Association at 5-6 (“NTCA Reply”). *See also* Letter from Winslow L. Sargeant, Chief Council, Small Business Administration Office of Advocacy, to Marlene H. Dortch, Secretary, FCC, at 2 (Aug. 15, 2013).

<sup>454</sup> *Id.*

<sup>455</sup> *See TiVo Inc.’s Request for Clarification and Waiver of the Audiovisual Output Requirement of Section 76.640(b)(4)(iii), etc.*, MB Docket No. 12-230, etc., Memorandum Opinion and Order, 27 FCC Rcd 14875, 14884, ¶ 17 (“small cable operators have, in the past, experienced difficulty obtaining compliant devices in the same time frame as larger operators”) (2012) (“*TiVo Waiver Order*”).

<sup>456</sup> NCTA Comments at 18.

<sup>457</sup> *Basic Service Tier Encryption; Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, 27 FCC Rcd 12786, 12802, ¶ 21 (2012) (“*BST Encryption Order*”).

<sup>458</sup> NCTA Comments at 17-19. However, as discussed below, we recognize that small systems that are part of a larger, multiple-cable-system network are able to spread even very high costs over large numbers of subscribers, easing the upgrade cost burden even in systems with small numbers of subscribers. Therefore, we exclude from our later compliance deadline any system affiliated with an operator serving more than 10.1 million subscribers. *See supra* ¶ 114 and note 450.

<sup>459</sup> NAD/Consumer Groups Comments at 13 (Consumers “living in rural areas often have fewer choices of video programming providers and for some, a small cable provider may be their only choice.”).

<sup>460</sup> NCTA Reply at 13, n. 60 (“According to the Commission, cable operators compete with at least two other MVPDs, if not more. . . . This being the case, it is likely that there will be accessible options available in a particular market. Moreover, unless the Commission interprets Section 205 to be limited to MVPD-provided navigation devices, customers to these cable systems would still be able to obtain navigation devices at retail that would be subject to the audible accessibility requirement.”). *See also 15<sup>th</sup> Annual Competition Report*, 28 FCC Rcd at 10505, ¶ 23.

<sup>461</sup> *See* Senate Committee Report at 1 (stating that the purpose of the law is to “ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming”).

smaller operators to two years. In addition to seeking a permanent exemption for all small cable systems serving 20,000 or fewer subscribers, industry commenters ask us to provide an indefinite extension to all but the largest operators and to review the marketplace after the three-year phase-in to determine whether accessibility is “achievable” for smaller operators.<sup>462</sup> We decline to provide an indefinite extension, and agree with the Consumer Groups that there is no reason to assume that smaller operators or small systems will never be able to achieve compliance.<sup>463</sup> Therefore, first, we limit our extension to two additional years, rather than providing an indefinite extension of time. We believe that an open-ended extension of time is unnecessary and would undermine the goals of the statute.<sup>464</sup> Nevertheless, as noted above, we will review the marketplace in three years to consider whether the five-year delayed compliance deadline should be retained or extended (in whole or in part).<sup>465</sup>

117. Second, we decline to extend the compliance deadline for any operator smaller than the six largest incumbent cable operators, as requested by NCTA,<sup>466</sup> or to extend the compliance deadline for any small system affiliated with an operator serving more than 10 percent of all MVPD subscribers.<sup>467</sup> Under NCTA’s approach, all MVPDs except Comcast, DIRECTV, DISH Network, Time Warner Cable, Verizon, Cox, AT&T, Charter, Cablevision, and Bright House would receive an extension of time to comply, and small systems owned by the two largest operators would never have to comply.<sup>468</sup> NCTA has provided no evidence to suggest that it would be too burdensome for all MVPDs included within this broad category to comply.<sup>469</sup> Instead, we provide relief to MVPD operators with 400,000 or fewer

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<sup>462</sup> NCTA Comments at 19. As explained below, we decline this request, but consider it for purposes of affording a delayed compliance deadline to most small systems.

<sup>463</sup> NAD/Consumer Groups Comments at 14 (“No evidence shows that small cable providers are any less able to provide access to digital apparatus and navigation devices.”).

<sup>464</sup> Moreover, to the extent MVPDs can demonstrate that compliance is not “achievable,” they have recourse under the statute. *See supra* Section IV.A.4. We remind covered entities that do not make their products or services accessible and claim as a defense that it is not achievable for them to do so, that they bear the burden of proof on this defense. *See ACS Order*, 26 FCC Rcd at 14567, 14651-52, ¶¶ 24, 220-22.

<sup>465</sup> *See* NCTA Comments at 19.

<sup>466</sup> NCTA points to the *BST Encryption Order* to support this size standard. NCTA Comments at 19, nn. 64-65. In the *BST Encryption Order*, the Commission required only the six largest incumbent cable operators to adopt a solution that would make basic service tier channels available to consumers on third-party provided IP-enabled clear QAM devices. *BST Encryption Order*, 27 FCC Rcd at 12801, ¶ 20. Notably, the Commission found it unnecessary to extend the additional equipment requirement to smaller cable operators because “only a small number of consumers rely on IP-enabled devices to access the basic tier” and therefore the Commission expected “this particular compatibility problem to be extremely limited in scope.” *Id.* at 12802, ¶ 21. In the instant accessibility context, however, the need for accessibility solutions is far greater and much more certain, as evidenced by the CVAA’s enactment. *Compare id.* at 12788, 12802, ¶ 21, n. 11 (explaining that encryption will effect an “extremely limited” number of cable subscribers, and noting the possibility of the market to “not develop as expected”) *with* Senate Committee Report at 1-2 (noting the importance of accessible communications technology and predicting that the number of disabled Americans will rise).

<sup>467</sup> *See* NCTA Comments at 17-19.

<sup>468</sup> *Id.*

<sup>469</sup> Three cable operators with more than 400,000 subscribers and fewer than 2 million subscribers argue that each would have difficulty complying in a timely manner because larger operators get priority in the delivery of equipment. Letter from Diane B. Burstein, Vice President & Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Sept. 12, 2013) (“NCTA/Suddenlink Sept. 12 *Ex Parte* Letter”); Letter from Stephen A. Fox, Senior Vice President, Chief Technology Officer, Cable One, Inc., to Marlene H. Dortch, Secretary, FCC, at 1-2 (Sept. 25, 2013) (“Cable One Sept. 25 *Ex Parte* Letter”); Letter from Cash Hagen, Chief Technology Officer, WideOpenWest Finance, LLC (“WOW!”), to Marlene H. Dortch, Secretary, FCC, at 1-2 (Sept. 30, 2013) (“WOW! Sept. 30 *Ex Parte* Letter”). We note that Suddenlink has a partnership with TiVo, which is independently

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subscribers (*i.e.*, MVPD operators other than the top 14) and MVPD systems with 20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers. We base our decision allowing a deferred compliance deadline for MVPDs with 400,000 or fewer subscribers on the Commission's definition of "small" cable company in 47 C.F.R. § 76.901(e).<sup>470</sup> In addition, the Commission has recognized that small systems may be part of larger, multiple-cable-system, networks, potentially allowing even very high costs to be spread over large numbers of subscribers.<sup>471</sup> Therefore, while we generally provide relief to MVPD systems with 20,000 or fewer subscribers, we exclude from this relief those systems that are affiliated with an operator serving more than 10 percent of all MVPD subscribers.<sup>472</sup> Accordingly, we find that affording an extra two years for covered entities

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subject to these accessibility requirements as a manufacturer of navigation devices sold at retail. See Suddenlink Communications, "Suddenlink & TiVo Announce Strategic Distribution Agreement" (press release), July 8, 2010, available at [http://static.suddenlink.synacor.com/ul/pdf/pr/pr\\_07\\_08\\_10.pdf](http://static.suddenlink.synacor.com/ul/pdf/pr/pr_07_08_10.pdf). We also note that Suddenlink and Cable One each primarily rely on user interfaces provided by Rovi, and WOW! primarily relies on user interfaces provided by Cisco. See Rovi Corporation, "Rovi Announces New Guide Agreement with Suddenlink" (press release), June 15, 2011, available at [http://www.rovicorp.com/company/newscenter/pressreleases/1434\\_15354.htm](http://www.rovicorp.com/company/newscenter/pressreleases/1434_15354.htm). See also Cable One Sept. 25 *Ex Parte* Letter; WOW! Sept. 30 *Ex Parte* Letter. To the extent Rovi and Cisco will continue to supply electronic program guides also to larger operators, they will have to undertake the research and development to make these guides accessible by the compliance deadline for larger operators. At this time, therefore, it is premature for us to conclude that these operators will be unable to meet the requirements of Section 205 in three years. Nevertheless, Suddenlink, Cable One and WOW!, like other covered entities, may seek an extension of the compliance deadline if they determine they need additional time to comply and can provide evidence to support that request. We will entertain individual requests for a limited extension of time to comply for operators with more than 400,000 subscribers and fewer than 2 million subscribers, if a requesting operator can demonstrate that it attempted in good faith to obtain a compliant accessible solution by the three-year deadline, but that it could not feasibly procure such a solution by the deadline. *Cf.* Letter from Barbara S. Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, at 4 (Oct. 23, 2013). Such a showing must include a detailed factual statement describing the steps the operator has taken to comply with the requirements of Section 205, an estimate of how long it will take the operator to comply, supported by appropriate documentation (*e.g.*, letters to and from equipment suppliers), and a corroborating affidavit by an officer or director of the operator, pursuant to Section 1.16 of the rules, 47 C.F.R. § 1.16. We delegate authority to the Media Bureau to consider such requests.

<sup>470</sup> 47 C.F.R. § 76.901(e). In addition, in the *CALM Act Report and Order*, we used the 400,000 subscriber threshold to define a smaller operator, excusing such operators with 400,000 or fewer subscribers from having to perform annual spot checks. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) ("*CALM Act Report and Order*") (defining a "Large MVPD" as one serving more than 400,000 subscribers nationwide but fewer than 10 million, as of December 31, 2011, *i.e.*, the 5th through 15th largest MVPDs at the time the rules took effect). See also ACA Comments at 10-11 ("[s]everal previous Commission orders can serve as a guide for crafting compliance solutions depending on an MVPDs size and capabilities" and noting, among other orders, that "in the TiVo Waiver Order proceeding, where new technologies would have to be developed to satisfy navigation device requirements placed on cable operators, the Commission extended by 18 months the deadline for cable operators to deploy two-way HD set top boxes that support home networking functionalities, and for cable operators with 400,000 or fewer subscribers extended the deadline by 21 months – an additional 3 months").

<sup>471</sup> See *CALM Act Report and Order*, 26 FCC Rcd 17254, ¶ 54 (defining a "small MVPD system" for purposes of the streamlined waiver process and excluding systems affiliated with an operator serving more than 10 percent of all MVPD subscribers); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fourth Report and Order, 23 FCC Rcd 13618, 13622, ¶ 2, ¶ 9 (2008) (defining "a small cable operator" in the context of broadcast carriage requirements and excluding cable systems affiliated with a cable operator serving more than 10 percent of all MVPD subscribers).

<sup>472</sup> Under this approach, systems affiliated with Comcast, DIRECTV, DISH Network, and Time Warner Cable would be excluded from the definition of a small system.

meeting these size standards to comply with the requirements of Section 205 will ease burdens on smaller operators, while minimizing any adverse impact on consumers.<sup>473</sup>

118. Section 205 states that the Commission “may provide an exemption from the regulations for cable systems serving 20,000 or fewer subscribers.”<sup>474</sup> As noted in the *NPRM*, use of the word “may” in this provision suggests that adoption of such an exemption is in the Commission’s discretion.<sup>475</sup> MVPD commenters advocate that we afford this exemption,<sup>476</sup> while consumer groups oppose it.<sup>477</sup> We decline at this time to adopt a permanent exemption for small cable systems with 20,000 or fewer subscribers, as permitted by Section 205(b)(2). However, all small cable systems other than those affiliated with an operator serving more than 10.1 million subscribers<sup>478</sup> will benefit from the longer phase-in deadline described above.

119. We find that the record does not support a permanent exemption. We agree with the Consumer Groups that MVPDs, regardless of size, should provide access to accessible equipment if doing so is achievable.<sup>479</sup> Whereas the uncertainty surrounding how covered small entities will comply makes it reasonable to afford a later compliance deadline, it also means it would be premature to assume that small cable systems will never be able to comply with the requirements of Section 205.<sup>480</sup>

### C. Complaint Procedures

120. We adopt the *NPRM*’s proposal to use the same procedures for the filing of consumer complaints alleging violations of the Commission’s rules requiring accessibility of user interfaces and video programming guides and menus that the Commission adopted in the IP-closed captioning context.<sup>481</sup> Commenters on this issue generally support our proposal; however, NCTA seeks certain modifications to these procedures.<sup>482</sup> As explained below, we reject NCTA’s proposed modifications. Accordingly, we establish the following procedures for the filing of consumer complaints alleging

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<sup>473</sup> We estimate that our longer phase-in period for smaller operators and small systems would apply to approximately 7 percent (or 7 million) of all MVPD subscribers. Of course, subscribers seeking an accessibility solution would account for an even smaller subset of these MVPD subscribers. See NCTA Reply at 13. Our estimate is based on industry data indicating that the 14 largest MVPD operators (*i.e.*, those operators serving more than 400,000 subscribers) accounted for approximately 95 million of the approximately 101 million MVPD subscribers, meaning approximately 6 million subscribers may potentially be affected. See NCTA, Industry Data (2012), <http://www.ncta.com/industry-data> (visited Aug. 28, 2013). Based on our Form 325 data, we estimate that MVPD systems with 20,000 or fewer subscribers which are not affiliated with an operator serving more than 10 percent of all MVPD subscribers account for less than 1 million subscribers, thus adding an additional 1 million subscribers to our estimate of the pool of potential subscribers that may be affected.

<sup>474</sup> Pub. L. No. 111-260, § 205(b)(2).

<sup>475</sup> See *NPRM*, 28 FCC Rcd at 8529, ¶ 56.

<sup>476</sup> NCTA Comments at 17; ACA Comments at 6-10; Rovi Comments at 10; CenturyLink Reply at 7-8; NTCA Reply at 2-5.

<sup>477</sup> NAD/Consumer Groups Comments at 13-14.

<sup>478</sup> Since few systems with 20,000 or fewer subscribers are affiliated with an operator serving more than 10.1 million subscribers, almost all of these small systems will be able to take advantage of the deferred compliance deadline.

<sup>479</sup> NAD/Consumer Groups Comments at 14.

<sup>480</sup> See, *e.g.*, NCTA Comments at 17; ACA Comments at 6-7. If the delayed compliance deadline proves insufficient to allow small systems to implement an affordable solution, we may consider requests for a further extension on an individual or industry-wide basis. We delegate authority to the Media Bureau to consider such requests.

<sup>481</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 831-38, ¶¶ 75-91.

<sup>482</sup> NAD/Consumer Groups Comments at 13; DISH/EchoStar Comments at 13; NCTA Comments at 20-21.

violations of the Commission's rules requiring accessibility of user interfaces and video programming guides and menus: (i) require complainants to file within 60 days after experiencing a problem; (ii) allow complainants to file their complaints either with the Commission or with the covered entity responsible for the problem; (iii) provide the entity 30 days to respond to the complaint; (iv) do not specify a time frame within which the Commission must act on complaints; (v) follow the Commission's flexible, case-by-case forfeiture approach governed by Section 1.80(b)(6) of our rules; (vi) specify the information that the complaints must include; and (vii) require covered entities to make contact information available to end users for the receipt and handling of written complaints.<sup>483</sup>

121. Timing of Complaints. We adopt the *NPRM's* proposal to require complainants to file within 60 days after experiencing a problem.<sup>484</sup> The Commission will accept a consumer's allegations as to the timeliness of a complaint as true, unless a covered entity demonstrates otherwise.

122. Option to File Complaints with the Commission or with the Covered Entity. We adopt the *NPRM's* proposal to allow complainants to file their complaints either with the Commission or with the covered entity (e.g., manufacturer or MVPD) responsible for the problem.<sup>485</sup> We disagree with NCTA that consumers should be required to first attempt to resolve disputes with covered entities before filing a complaint with the Commission.<sup>486</sup> We previously had such a requirement for television closed captioning complaints, but that process proved problematic for many consumers who often were not sure whom to contact with their complaint.<sup>487</sup> As a result, we revised our television closed captioning complaint procedures to allow complaints to be first filed with the Commission and have adopted this revised procedure in subsequent contexts, such as the IP-closed captioning rules.<sup>488</sup> Accordingly, as the

<sup>483</sup> See Appendix B final rule 47 C.F.R. § 79.110. See also *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 831-38, ¶¶ 75-91; *Emergency Information/Video Description Order*, 28 FCC Rcd at 4925-26, ¶ 78-79.

<sup>484</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 832, ¶ 77. DISH/EchoStar supports this proposal. DISH/EchoStar Comments at 13 (explaining that "this length of time affords sufficient time for a consumer to complain while also ensuring that providers will not receive complaints months or even years after the situation that prompted them").

<sup>485</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 833, ¶ 79. DISH/EchoStar supports this proposal. DISH/EchoStar Comments at 13-14 (stating it would be "useful to allow complainants to file either with the Commission or with the responsible entity").

<sup>486</sup> NCTA Comments at 20. NCTA points to our video description rules, 47 C.F.R. § 79.3(e)(vi), which require consumers to certify that they "attempted in good faith to resolve the dispute" with the covered entity before filing a complaint with the Commission. The CVAA, however, required the Commission to reinstate the video description rules previously adopted in 2000. See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Report and Order, 26 FCC Rcd 11847 (2011) ("*Video Description Order*"). Our rule permitting a complainant to file either with the Commission or the covered entity is consistent with our rules in the other video programming accessibility contexts, such as closed captioning and emergency information. See, e.g., 47 C.F.R. §§ 79.1(g) (TV closed captioning rule), 79.4(e) (IP closed captioning rule); *Emergency Information/Video Description Order*, 28 FCC Rcd at 4925, ¶ 78, n. 334.

<sup>487</sup> See *Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers*, CG Docket No. 05-231, ET Docket No. 99-254, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, 23 FCC Rcd 16674, 16681-82, ¶ 20 (2008) ("*2008 Television Closed Captioning Order*") (explaining that "consumers often have difficulty determining where to file complaints").

<sup>488</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 833-35, ¶¶ 79-82; *Emergency Information/Video Description Order*, 28 FCC Rcd at 4925, ¶ 78, n. 334. We did not require that consumers file first with covered entities in the *IP Closed Captioning Order* and we see no need to do so here, where consumers may have difficulty identifying the apparatus or navigation device manufacturer or provider. We are not persuaded by NCTA's assertion that "there is no such difficulty in the instant proceeding." NCTA Comments at 20, n. 69. There may still be confusion about who is the responsible apparatus or navigation device manufacturer or provider in some situations, and allowing consumers to file directly with the Commission will provide a more expedient solution. Moreover, because there

(continued....)



Commission did in the IP-closed captioning rules, we will create a process for complainants to file their complaints either with the Commission or with the covered entity responsible for the problem.

123. Consumers who file their complaints first with the Commission may name a covered entity in their complaints. The Commission will forward such complaints, as appropriate, to the named covered entity for its response, as well as to any other entity that Commission staff determines may be involved, and the Commission may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violations of Commission rules.

124. If a complaint is filed first with a covered entity, our rules will require the covered entity to respond in writing to the complainant within thirty (30) days after receipt of a complaint. If a covered entity fails to respond to the complainant within thirty (30) days, or the response does not satisfy the consumer, the complainant may file the complaint with the Commission within thirty (30) days after the time allotted for the covered entity to respond. If the consumer files the complaint with the Commission (after filing with the covered entity), the Commission will forward the complaint to the named covered entity, as well as to any other covered entity that Commission staff determines may be involved. If the Commission is aware that a complaint has been filed simultaneously with the Commission and the covered entity, the Commission may allow the process involving the covered entity and the consumer to reach its conclusion before moving forward with its complaint procedures, in the interest of efficiency.

125. If a consumer names a covered entity in its complaint, but the Commission determines that its investigation should be directed against another covered entity, the Commission will forward the complaint to that covered entity without requiring any further action by the consumer. In addition, if a covered entity receives a complaint from the Commission that it believes the Commission should have directed to a different covered entity, the covered entity may say so in its response to the complaint. In such instances, however, the covered entity's response should also indicate the identity and contact information of the covered entity to which the complaint should be directed, if known.

126. Complaint Response Time. We adopt the *NPRM's* proposal to require covered entities to respond in writing to the Commission and the complainant within 30 days after receipt of a complaint from the Commission.<sup>489</sup> In response to a complaint, a covered entity must file with the Commission sufficient records and documentation to prove that it was (and remains) in compliance with the Commission's rules. Conclusory or insufficiently supported assertions of compliance will not meet a covered entity's burden of proof.<sup>490</sup> If the covered entity admits that it was not, or is not, in compliance with the Commission's rules, it must file with the Commission sufficient records and documentation to explain the reasons for its noncompliance, show what remedial steps it has taken or will take, and show why such steps have been or will be sufficient to remediate the problem.

127. Resolution of Complaints. We adopt the *NPRM's* proposal not to specify a time frame within which the Commission must act on complaints.<sup>491</sup> No such time frame exists for IP closed captioning complaints.<sup>492</sup> In evaluating a complaint, the Commission will review all relevant information provided by the complainant and the subject entity, as well as any additional information the Commission deems relevant from its files or public sources. When the Commission requests additional information,

(Continued from previous page)—————

may be situations where consumers will know their MVPD service provider is responsible, our approach permits the filing of complaints directly with the MVPD service provider.

<sup>489</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 835, ¶¶ 83-84.

<sup>490</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 835, ¶ 84.

<sup>491</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 835-36, ¶ 85.

<sup>492</sup> See *IP Closed Captioning Order*, 27 FCC Rcd at 835-36, ¶ 85.

parties to which such requests are addressed must provide the requested information in the manner and within the time period the Commission specifies.

128. Sanctions or Remedies. We adopt the *NPRM's* proposal to follow the Commission's flexible, case-by-case approach to fashioning sanctions and remedies governed by Section 1.80 of our rules.<sup>493</sup> We will adjudicate complaints on the merits and may employ the full range of sanctions and remedies available to the Commission under the Act.

129. Content of Complaints. We adopt the *NPRM's* proposal to specify the information that the complaints should include.<sup>494</sup> Consistent with the Commission's approach in the IP closed captioning context, complaints should include the following information: (a) the complainant's name, address, and other contact information, such as telephone number and email address; (b) the name and contact information of the covered entity; (c) information sufficient to identify the software or device used; (d) the date or dates on which the complainant purchased, acquired, or used, or tried to purchase, acquire, or use the apparatus or navigation device; (e) a statement of facts sufficient to show that the manufacturer or provider has violated or is violating the Commission's rules; (f) the specific relief or satisfaction sought by the complainant; (g) the complainant's preferred format or method of response to the complaint; and (h) if a Section 205 complaint, the date that the complainant requested an accessible navigation device and the person or entity to whom that request was directed. Complaints alleging a violation of the apparatus or navigation device rules that we adopt in this proceeding may be transmitted to the Consumer and Governmental Affairs Bureau<sup>495</sup> by any reasonable means, such as the Commission's online informal complaint filing system, letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that would best accommodate the complainant's disability. Because some of the rules we are adopting are intended to make apparatus or navigation devices accessible to individuals who are blind or visually impaired, and therefore complainants may themselves be blind or visually impaired, if a complainant calls the Commission for assistance in preparing a complaint, Commission staff will document the complaint in writing for the consumer.

130. Contact Information. We adopt the *NPRM's* proposal to require covered entities to make contact information available to consumers for the receipt and handling of complaints.<sup>496</sup> We disagree with NCTA that the Commission should not require the availability of specific contact information. Given that we will permit consumers to file their complaints directly with a covered entity, we think it is important that consumers have the information necessary to contact the covered entity. Although we do not specify how covered entities must provide contact information for the receipt and handling of consumer complaints, we encourage them to include this information with the other accessibility information they must post on their official website.<sup>497</sup> We expect that covered entities will prominently display their contact information in a way that makes it available and accessible to all consumers of their products and services. We emphasize that such notice should be provided in a location that is conspicuous to consumers and accessible to those who are blind or visually impaired. Consistent with the IP closed captioning rules, we will require covered entities to make available and accessible the contact information of a person with primary responsibility for accessibility compliance issues. Covered entities must provide that person's name and title or office, telephone number, fax number, postal mailing

<sup>493</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 836, ¶ 86; 47 C.F.R. § 1.80.

<sup>494</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 836-37, ¶ 87.

<sup>495</sup> The Consumer and Governmental Affairs Bureau reserves the discretion to refer complaints that reveal a pattern of noncompliance to the Commission's Enforcement Bureau.

<sup>496</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55; *IP Closed Captioning Order*, 27 FCC Rcd at 837-38, ¶ 90.

<sup>497</sup> As discussed below, we require MVPDs to notify their subscribers about the availability of accessible devices through notice on their official websites, *see infra* ¶ 134, and encourage manufacturers to do the same, *see infra* ¶ 135.

address, and email address. Covered entities must keep this information current and update it within 10 business days of any change.

131. Revisions to Form 2000C. We direct the Consumer and Governmental Affairs Bureau to revise the existing complaint form for disability access complaints (Form 2000C) in accordance with this *Report and Order*, to facilitate the filing of complaints. In the *NPRM*, the Commission asked if it should revise the existing complaint form for disability access complaints (Form 2000C) and, if so, what changes should be made.<sup>498</sup> Consumer groups state that the form needs to be updated to accommodate complaints related to the accessibility of user interfaces, and video programming guides and menus.<sup>499</sup> We agree, and direct the Bureau to make any changes necessary to facilitate the filing of complaints pursuant to the rules we adopt herein.<sup>500</sup>

#### D. Verification of Eligibility

132. As a general matter, we will not allow covered entities to require consumer verification of eligibility as an individual who is blind or visually impaired prior to the provision of accessible equipment.<sup>501</sup> There is consensus in the record, however, that verification of eligibility should be permitted in certain limited situations.<sup>502</sup> We will allow covered entities to verify that a consumer requesting an accessible navigation device or accessibility solution pursuant to Section 205 is eligible for such equipment when the covered entity chooses to rely on an accessibility solution that involves providing the consumer with sophisticated equipment and/or services at a price that is lower than that offered to the general public because the entity is relying on this solution to meet its accessibility obligations under Section 205.<sup>503</sup> NCTA, AFB, and ACB agree that MVPDs may establish reasonable verification eligibility procedures “only . . . in situations where an MVPD is providing the customer with an accessible solution that he or she would otherwise not be entitled to receive under his or her existing level of service and associated equipment.”<sup>504</sup> For example, NCTA, AFB, and ACB state that “an MVPD might seek proof of eligibility in situations where it is providing an accessible on-screen text menu or guide via a set-top box different from (and more advanced than) the equipment that the customer is currently using to access MVPD service, or where an MVPD offers a separate accessibility solution, such

<sup>498</sup> See *NPRM*, 28 FCC Rcd at 8528-29, ¶ 55.

<sup>499</sup> See NAD/Consumer Groups Comments at 13.

<sup>500</sup> Should the complaint filing rules adopted in this *Report and Order* become effective before the revised Form 2000C is available to consumers, complaints may be filed in the interim by fax, mail, or e-mail.

<sup>501</sup> We note that verification of eligibility is not at issue for consumers who are deaf or hard of hearing seeking an accessible closed captioning mechanism because, as discussed above, covered entities must ensure that all of their navigation devices with built-in closed captioning capability provide a mechanism to activate closed captioning. See *supra* ¶ 101.

<sup>502</sup> NCTA/AFB/ACB Sept. 12 *Ex Parte* Letter at 1-2. Consumer groups had previously opposed industry’s requests to require verification of disabilities. See AFB Reply at 8 (“[T]he request for accessible equipment must be accepted by an entity as prima facie evidence of the need and eligibility for accessible equipment”). MVPDs favored permitting verification procedures. See NCTA Comments at 12 (citing the National Deaf-Blind Equipment Distribution Program and DIRECTV’s waiver with respect to the *Emergency Information/Video Description Order*); DISH/EchoStar Comments at 12 (stating the Commission should permit covered entities to require information to demonstrate that the subscriber qualifies for a federal income tax deduction based on blindness); DIRECTV Comments at 8 (stating the Commission should allow MVPDs to require reasonable documentation of disability); ACA Reply at 1-5 (stating the Commission should establish objective and quantifiable eligibility criteria and identify with specificity the documentation needed to demonstrate eligibility).

<sup>503</sup> Pub. L. No. 111-260, § 205(b)(4)(B). See Appendix B final rule 47 C.F.R. § 79.108(e). See also *supra* ¶¶ 99-103.

<sup>504</sup> NCTA/AFB/ACB Sept. 12 *Ex Parte* Letter at 1.

as a tablet with an accessible app.”<sup>505</sup> We understand that in these situations there may be sufficient risk of fraud or abuse by individuals who are not blind or visually impaired to warrant allowing verification of eligibility.<sup>506</sup> With respect to proof of eligibility, covered entities must allow a consumer to provide a wide array of documentation to verify eligibility for the accessibility solution provided.<sup>507</sup> In addition, they must protect personal information gathered from consumers through their verification procedures. We note that MVPDs have a statutory obligation pursuant to Sections 338(i)(4)(A) and 631(c)(1) of the Act to protect personal information gathered from subscribers.<sup>508</sup> We believe the privacy protections required by these provisions will adequately address our concerns about consumer privacy, because they generally forbid disclosure of personally identifiable information regarding subscribers without prior consent and require necessary actions to prevent unauthorized access to information by a person other than the subscriber.<sup>509</sup> We therefore find it appropriate for manufacturers that choose to require consumer verification of eligibility to also comply with the requirements of Sections 338(i)(4)(A) and 631(c)(1) of the Act to protect personal information gathered from consumers through their verification procedures.<sup>510</sup> We find that it is equally important that manufacturers protect the privacy of consumers to the same extent as MVPDs, given the personal nature of the eligibility information required and that the same confidentiality concerns are at issue. We also believe that establishing verification and privacy requirements for manufacturers consistent with those that apply to MVPD’s will benefit consumers by creating one uniform standard with which regulated entities must comply. In determining which

<sup>505</sup> *Id.* A manufacturer could impose a verification requirement in the analogous situation in which, in fulfillment of its Section 205 obligations, it provides an accessible retail navigation device different from (and more advanced than) a less sophisticated, non-compliant navigation device that the customer preferred to purchase, but at the same price as the less sophisticated device. *See supra* ¶¶ 99-103.

<sup>506</sup> *See* NCTA/AFB/ACB Sept. 12 *Ex Parte* Letter at 1 (expressing industry concern that “some individuals may misrepresent themselves in order to obtain from MVPDs, at no additional cost, equipment or services that they would not be eligible to receive or would otherwise be required to pay for”). *See supra* ¶¶ 99-103. This is consistent with other accessibility contexts in which we permitted reasonable verification eligibility procedures because of a significant risk of fraud or abuse. *See Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals*, CG Docket No. 10-210, Report and Order, 26 FCC Rcd 5640, 5653-54, ¶¶ 31-32 (2011) (“*NDBEDP Report and Order*”) (“implementing measures to prevent potential fraud or abuse of this program”); *Emergency Information/Video Description Order*, 28 FCC Rcd at 4905, ¶ 44 (requiring DIRECTV to offer set-top boxes with emergency information functionality “upon request and at no additional cost to customers who are blind or visually impaired” but allowing DIRECTV to “require reasonable documentation of disability as a condition to providing the box at no additional cost”). *See also* NCTA Comments at 12 (citing the aforementioned orders).

<sup>507</sup> For example, we would consider as reasonable eligibility requirements that accommodate a wide array of methods for consumers to document eligibility, including, but not limited to: proof of participation in a nationally-established program for individuals who are blind or visually impaired, such as the Commission’s National Deaf-Blind Equipment Distribution Program or the National Library Service’s talking books program; or documentation from any professional or service provider with direct knowledge of the individual’s disability, such as a social worker, case worker, counselor, teacher, school superintendent, professional librarian, doctor, ophthalmologist, optometrist, or registered nurse. *See* NCTA/AFB/ACB Sept. 12 *Ex Parte* Letter at 2. *See also NDBEDP Report and Order*, 26 FCC Rcd at 5653-54, ¶¶ 31-32 (“requiring individuals seeking equipment under the NDBEDP to provide verification from any practicing professional that has direct knowledge of the individual’s disability,” who “must be able to attest to the individual’s disability”).

<sup>508</sup> *See* 47 U.S.C. §§ 338(i)(4)(A), 551(c)(1) (both sections requiring that satellite carriers and cable operators “shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned” and “shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or satellite carrier”).

<sup>509</sup> *See id.*

<sup>510</sup> We note that the requirements in Sections 338(i) and 631 of the Act to protect personal information are identical so manufacturers need only refer to one of these provisions for their requirements.

verification procedures to adopt to verify the consumers' eligibility to receive the device, we strongly encourage covered entities to consult with people who are blind and visually impaired to ensure that whatever processes they adopt are not burdensome on consumers. Similarly, while we do not require it, we encourage a covered entity to seek a determination from the Commission as to whether its proposed verification procedures would be burdensome to consumers *before* implementing such procedures.<sup>511</sup> Except in the limited situations in which verification is permitted (as discussed above), we require that covered entities accept all requests for an accessible navigation device or accessibility solution from consumers who self-identify (disclose) that they are blind or visually impaired for the purpose of obtaining an accessible navigation device or accessibility solution "upon request" pursuant to Section 205.<sup>512</sup>

#### E. Notification to Consumers

133. We conclude that MVPDs must notify consumers that navigation devices with the required accessibility features are available to consumers who are blind or visually impaired "upon request" to the extent discussed below.<sup>513</sup> Section 205(b)(1) gives the Commission authority to "prescribe such regulations as are necessary to implement" the requirements that "on-screen text menus and guides provided by navigation devices ... for the display or selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired."<sup>514</sup> In the *NPRM*, we sought comment on whether to require MVPDs to notify their subscribers, in an accessible format, that accessible devices are available upon request.<sup>515</sup> Consumer groups favor notice requirements,<sup>516</sup> while industry commenters oppose such requirements.<sup>517</sup>

<sup>511</sup> Any such requests should follow the procedures for an informal request for Commission action pursuant to section 1.41 of our rules. 47 C.F.R. § 1.41. *Cf. IP Closed Captioning Order*, 27 FCC Rcd at 848-49, ¶ 105 and n. 418 (providing for a Commission determination of whether compliance is not achievable). We delegate authority to the Chief of the Consumer and Governmental Affairs Bureau to make these determinations.

<sup>512</sup> See AFB Reply at 8 ("[T]he request for accessible equipment must be accepted by an entity as prima facie evidence of the need and eligibility for accessible equipment"). This is consistent with other accessibility contexts, such as implementation of Sections 255, 716, and 718 of the Communications Act, in which the potential for fraud or abuse was not raised as an issue. See, e.g., *ACS Order*, 26 FCC Rcd at 14557 (requiring accessible advanced communications services and equipment and establishing recordkeeping and enforcement requirements for entities covered under Sections 255, 716, and 718 of the Communications Act); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999) ("*Section 255 Order*").

<sup>513</sup> See Appendix B final rule 47 C.F.R. § 79.108(d).

<sup>514</sup> Pub. L. No. 111-260, § 205(b)(1).

<sup>515</sup> *NPRM*, 28 FCC Rcd at 8528, ¶ 53 ("We ... seek comment on whether we should require MVPDs to notify their subscribers in braille or other accessible format that accessible devices are available upon request, and if so, how MVPDs should notify their subscribers (e.g., bill inserts). In addition to, or instead of, requiring MVPDs to notify subscribers, what other procedures could we adopt to ensure that individuals who are blind or visually impaired know that they can request an accessible navigation device?").

<sup>516</sup> See AFB Reply at 8 (saying the Commission should require covered entities "to publically, frequently, widely and obviously make known to all customers with and without disabilities the means for making requests for accessible equipment and the specific person, office or entity to whom such requests are to be made"); Montgomery County Comments at 20 ("The County submits that MVPDs should be required to notify subscribers of the option of obtaining the accessible equipment at the time of subscription, and annually thereafter."). Montgomery County is a local franchise authority.

<sup>517</sup> Verizon Comments at 14 ("There is no provision in Section 205 that requires such notices, and the competitive market will ensure that all features and functions available to consumers will be advertised in some format.");

(continued....)



134. We believe consumer notification is an essential part of a covered entity's obligation to make audibly accessible devices (or separate solutions, such as software, peripheral devices, specialized consumer premises equipment, a network-based service, or other solution) available to consumers who are blind or visually impaired "upon request."<sup>518</sup> Indeed, the ability to purchase or request an audibly accessible device or accessibility solution means little if consumers are unaware of its existence and availability. Certainly, the Commission will do its part to inform consumers about the availability of audibly accessible devices upon request, but we believe such efforts are no substitute for consumers getting information directly from service providers. Accordingly, we establish two notification rules requiring MVPDs to notify consumers that navigation devices with the required accessibility features are available to consumers who are blind or visually impaired upon request.<sup>519</sup> First, when providing information about equipment options in response to a consumer inquiry about service, accessibility, or other issues, MVPDs must clearly and conspicuously inform consumers about the availability of accessible navigation devices.<sup>520</sup> Although we do not require a specific means for satisfying this notice requirement, we find that the MVPD could provide this required notice by instructing their customer service representatives to provide this information orally to consumers calling the MVPD's customer service line.<sup>521</sup> Second, MVPDs must provide notice on their official websites about the availability of accessible navigation devices.<sup>522</sup> MVPDs must prominently display accessibility information on their websites in a way that makes it available (and in an accessible format) to all current and potential customers of their products and services. For example, we agree with DIRECTV that providing notice through a link on the home page would be appropriate.<sup>523</sup> Also, while we do not specify the content of these notifications, we agree with Consumer Groups that the notices must publicize the availability of accessible devices and solutions and convey "the means for making requests for accessible equipment and the specific person, office or entity to whom such requests are to be made."<sup>524</sup> In the accompanying *Further Notice*, we seek comment on whether additional notification requirements on MVPDs are necessary and, if so, what those requirements should be.

135. At this time, we do not impose any notification requirements on equipment manufacturers. We find the record is insufficient regarding the scope of what such obligations, if any, should be. However, we encourage equipment manufacturers to publicize information about their accessible devices and accessibility solutions through information on their websites, in marketing efforts, and through their retailers. In the accompanying *Further Notice*, we seek comment on whether and how equipment manufacturers should notify consumers about the availability of accessible devices.

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DISH/EchoStar Comments at 13 ("[A]ny mandate could hinder efforts to advertise the availability of accessible devices."); NCTA Comments at 21, n. 72 (saying the Commission and consumer groups should help make consumers aware of the availability of accessibility solutions and that "[c]able operators may not know which of their customers are likely to benefit from accessibility features").

<sup>518</sup> Notice to consumers about the availability of accessible devices takes on even more importance given that covered entities may be subject to different compliance deadlines and may have different equipment roll-out schedules. *See supra* Section VI.B.

<sup>519</sup> *See* Appendix B final rule 47 C.F.R. § 79.108(d)(1)-(2).

<sup>520</sup> *See* Appendix B final rule 47 C.F.R. § 79.108(d)(1).

<sup>521</sup> We note that customer service representatives are not required to repeat this required notice to a repeat caller about the same inquiry.

<sup>522</sup> *See* Appendix B final rule 47 C.F.R. § 79.108(d)(2).

<sup>523</sup> DIRECTV Sept. 5 *Ex Parte* Letter at 2 ("providing notice through a link available on the home page might be a suitable approach").

<sup>524</sup> AFB Reply at 8.

## VII. ELIMINATION OF ANALOG CLOSED CAPTIONING LABELING REQUIREMENT AND RENAMING PART 79

136. Although this is not mandated by the CVAA, we adopt the *NPRM*'s tentative conclusion to eliminate the analog closed captioning labeling requirements from our rules. That is, we will eliminate the requirement that manufacturers label analog television receivers based on whether they contain an analog closed captioning decoder and the requirement that manufacturers include information in a television's user manual if the receiver implements only a subset of the analog closed captioning functionality.<sup>525</sup> As we explained in the *NPRM*, we find that these requirements are no longer necessary. As of March 1, 2007, our rules require that all televisions contain a digital television receiver,<sup>526</sup> and, by extension, a digital closed captioning decoder.<sup>527</sup> CEA and NAD/Consumer Groups, the only two commenters who addressed our tentative conclusion to eliminate the analog closed captioning labeling requirements, both agree that the requirements are unnecessary because all television receivers that are currently sold are required to support the features of digital closed captioning, which are more extensive than those of analog closed captioning.<sup>528</sup> Given that it appears that no televisions are being manufactured in or imported into the United States today that implement only a subset of the analog closed captioning functionality, we believe that it is no longer appropriate to continue requiring the labeling of television receivers that include analog tuners or the requirement that user manuals indicate if a device does not support all of the aspects of the analog closed captioning standard.

137. We also adopt our proposal to rename Part 79 and divide Part 79 into two subparts; the first subpart includes rules applying to video programming owners, providers, and distributors and the second subpart includes rules that apply to apparatus manufacturers. CEA and NAD/Consumer Groups were the only commenters to address our proposed renaming and reorganization and both expressed support for the idea.<sup>529</sup> We agree with CEA that our proposed reorganization of Part 79 will assist readers in browsing and locating our accessibility rules.<sup>530</sup> We therefore rename Part 79 of the Commission's rules "Accessibility of Video Programming" and divide it into two subparts, Subpart A, entitled "Video Programming Owners, Distributors, and Providers," which will contain those rules regarding the provision of various services, and Subpart B, "Apparatus," which will contain those rules pertaining to devices and other equipment used to receive, play back, or record video programming. In taking this action, we clarify that the renaming and reorganization of Part 79 is purely procedural in nature and does not affect any of the underlying substance of the rules.<sup>531</sup>

## VIII. FURTHER NOTICE OF PROPOSED RULEMAKING

138. *Usability Requirements.* We seek comment on whether we should adopt rules to define the term "usable" for purposes of implementing Section 204 of the CVAA. Section 303(aa)(1) of the Act specifies that covered apparatus must "be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to *and usable by* individuals who are blind or visually impaired."<sup>532</sup> Similarly, Section 303(aa)(2) of the Act specifies that the appropriate built-in apparatus functions that are accessed through on-screen text menus or other visual indicators "shall be accompanied by audio output that is either integrated or peripheral to the apparatus, so that such menus or

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<sup>525</sup> See 47 C.F.R. § 79.101(m).

<sup>526</sup> See *id.* § 15.117(i).

<sup>527</sup> *Id.* § 79.102.

<sup>528</sup> CEA Comments at 27; NAD/Consumer Groups Comments at 14.

<sup>529</sup> CEA Comments at 27; NAD/Consumer Groups Comments at 14-15.

<sup>530</sup> CEA Comments at 27.

<sup>531</sup> See NAD/Consumer Groups Comments at 15.

<sup>532</sup> 47 U.S.C. § 303(aa)(1) (emphasis added).

indicators are accessible to *and usable by* individuals who are blind or visually impaired in real-time.<sup>533</sup> In other CVAA contexts, the Commission has relied on the definition of “usable” in Section 6.3(l) of our rules, which states that “[t]he term *usable* shall mean that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, bills and technical support which is provided to individuals without disabilities.”<sup>534</sup> For example, Section 716 of the Act requires providers of advanced communications services (“ACS”) (*i.e.*, non-interconnected VoIP service, electronic messaging service, and interoperable video conferencing service) and manufacturers of equipment used for ACS to make their products “accessible to and usable by” persons with disabilities, and the rules implementing these sections adopt the Commission’s “well established” definition of “usable” in Section 6.3(l).<sup>535</sup> In addition, when implementing Section 718 of the Act, which imposes accessibility requirements on service providers and manufacturers with respect to Internet browsers on mobile phones, the Commission defined the term “usable” “as the Commission has previously defined th[is] term[] when implementing Sections [716 and 255] of the Act.”<sup>536</sup> We seek comment on whether we should define the term “usable” consistent with the definition in Section 6.3(l). We also seek comment on the costs and benefits of imposing usability requirements on covered entities, including small entities.

139. Further, we seek comment on whether we should impose information, documentation, and training requirements consistent with the requirements set forth in Section 6.11 of our rules for purposes of implementing Sections 204 and 205 of the CVAA. Section 6.11 of our rules requires manufacturers and service providers to “ensure access to information and documentation it provides to its customers, if readily achievable,” which “includes user guides, bills, installation guides for end-user installable devices, and product support communications, regarding both the product in general and the accessibility features of the product,” and it delineates “other readily achievable steps” that should be taken “as necessary.”<sup>537</sup> Section 6.11 also requires manufacturers and service providers to include the contact method for obtaining the information required by Section 6.11(a) in general product information, and to consider certain accessibility-related topics when developing or modifying training programs.<sup>538</sup> The Commission previously has adopted information, documentation, and training requirements when implementing Sections 716 and 718 of the Act, which both require that covered products be “accessible to and usable by” individuals with disabilities.<sup>539</sup> We seek comment on whether to adopt analogous requirements pursuant to Section 204, which likewise requires that covered apparatus be “accessible to and usable by” individuals with visual disabilities. We also seek comment on whether we should impose such information, documentation, and training requirements on entities covered by Section 205, pursuant to our authority to “prescribe such regulations as are necessary to implement” the requirements of that

<sup>533</sup> *Id.* § 303(aa)(2) (emphasis added).

<sup>534</sup> 47 C.F.R. § 6.3(l). The Commission adopted the definition of “usable” in Section 6.3(l) of its rules pursuant to Section 255 of the Act, which requires telecommunications providers and equipment manufacturers to make their products “accessible to and usable by” persons with disabilities, relying on the U.S. Access Board’s guidelines. *See Section 255 Order*, 16 FCC Rcd at 6429-30, ¶¶ 21-29. The U.S. Access Board is “an independent Federal agency devoted to accessibility for people with disabilities [which] . . . develops and maintains design criteria for the built environment, transit vehicles, telecommunications equipment, and for electronic and information technology.” *ACS Order*, 26 FCC Rcd at 14563, ¶ 10, n. 30.

<sup>535</sup> *See* 47 C.F.R. § 14.21(c); *ACS Order*, 26 FCC Rcd at 14605, ¶ 115.

<sup>536</sup> *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket Nos. 10-213, 10-145, WT Docket No. 96-198, Second Report and Order, 28 FCC Rcd 5957, 5967, ¶ 19 (2013) (“*ACS Second Report and Order*”).

<sup>537</sup> 47 C.F.R. § 6.11(a).

<sup>538</sup> *Id.* §§ 6.11(b)-(c).

<sup>539</sup> *See id.* § 14.20(d); *ACS Order*, 26 FCC Rcd at 14595-96, ¶ 94; *ACS Second Report and Order*, 28 FCC Rcd at 5969, ¶ 23.

section.<sup>540</sup> We seek comment on the costs and benefits of imposing information, documentation, and training requirements on covered entities, including small entities.

140. *Mechanism for Activating Other Accessibility Features.* We seek further comment on whether the phrase “accessibility features” in Sections 303(aa)(3) and 303(bb)(2) of the Act includes user display settings for closed captioning and whether those sections can be interpreted to require covered entities to ensure that consumers are able to locate and control such settings. In the *NPRM*, we sought comment on whether there are additional “accessibility features” that Sections 204 and 205 require to be activated via a mechanism similar to a button, key, or icon, including closed captioning settings (*e.g.*, font, color, and size of captions), and whether such settings should be required to be in the first level of a menu.<sup>541</sup> The record reflects divergent views on this issue. As discussed in the *Report and Order*, several commenters support a broad interpretation of the term “accessibility features” to include other accessibility settings such as closed captioning settings,<sup>542</sup> whereas CEA and other industry commenters argue that the phrase “accessibility features” “is *not* an invitation to impose new, and hitherto unspecified, regulatory requirements on additional accessibility features.”<sup>543</sup>

141. We believe there are important public interest considerations in favor of ensuring that consumers are able to locate and access user display settings for closed captioning. When the Commission adopted technical standards for the display of closed captions on digital television receivers, it explained that the “capability to alter fonts, sizes, colors, backgrounds and more, can enable a greater number of persons who are deaf and hard of hearing to take advantage of closed captioning.”<sup>544</sup> Noting the limitations of the “one-size fits all approach” in use by the analog captioning system, the Commission concluded that “[o]nly by requiring decoders to respond to these various [display] features can we ensure that closed captioning will be accessible for the greatest number of persons who are deaf and hard of hearing, and thereby achieve Congress’ vision that to the fullest extent made possible by technology, people who are deaf or hard of hearing have equal access to the television medium.”<sup>545</sup> More recently, the Commission adopted a recommendation from the VPAAC to ensure viewer access to display capabilities in video devices that deliver closed captions on programs over the Internet.<sup>546</sup> The Commission explained that access to these display capabilities would ensure that consumers viewing such online programming would have a captioning experience equivalent to the experience provided when the

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<sup>540</sup> Pub. L. No. 111-260, § 205(b)(1).

<sup>541</sup> *NPRM*, 28 FCC Rcd at 8525-26, ¶¶ 47-48.

<sup>542</sup> See Montgomery County Comments at 18; NAD/Consumer Groups Comments at 11; Walt Comments at 1; Montgomery County Reply at 12 (noting the “significant number of older adult television viewers within the County who experience both hearing and vision loss as they age,” and urging the Commission to enact rules that would make captioning accessibility features “as useful as possible to the television audience”); Letter from Andrew S. Phillips, Policy Counsel, NAD, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 11, 2013) (“NAD/Consumer Groups Sept. 11 *Ex Parte* Letter”) (requesting the Commission to ensure that covered entities provide user interfaces that provide viewers access to the ten specific capabilities that video apparatus must implement, including requirements related to “presentation, character color, character opacity, character size, fonts, caption background color and opacity, character edge attributes, caption window color, language and preview and setting retention”) (footnote omitted). See *supra* Section IV.B.2.

<sup>543</sup> CEA Comments at 22 (emphasis in original). See also AT&T Comments at 17; CEA Comments at 22-23; DIRECTV Comments at 19; DISH/EchoStar Comments at 9-10; CEA Reply at 16-17; CenturyLink Reply at 7.

<sup>544</sup> *Closed Captioning Requirements for Digital Television Receivers; Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, ET Docket No. 99-254, MM Docket No. 95-176, Report and Order, 15 FCC Rcd 16788, 16792, ¶ 10 (2000) (“*DTV Closed Captioning Order*”).

<sup>545</sup> *Id.* at 16793, ¶ 13.

<sup>546</sup> *IP Closed Captioning Order*, 27 FCC Rcd at 850-54, ¶¶ 109-13.

content was aired on television,<sup>547</sup> and further “noted the ‘substantial benefits for consumers’ that are provided when video programming apparatus support user options that enable closed caption displays to be customized to suit the needs of individual viewers.”<sup>548</sup>

142. Notwithstanding these Commission efforts to provide consumers with the ability to tailor the display of closed captions to their needs, the record in this proceeding reflects the ongoing problems that consumers have in finding and controlling these display features.<sup>549</sup> NAD/Consumer Groups reference the “long and frustrating history of the difficulties in accessing closed captioning features on apparatus and navigation devices,” and describe the “[m]ost infamously difficult” example, in which a cable box must first be turned off in order to access the captioning mechanisms through a special menu feature.<sup>550</sup> One interpretation of the statute could be that the explicit inclusion of the term “accessibility features” in Sections 303(aa)(3) and 303(bb)(2) of the Act by Congress,<sup>551</sup> which had prior knowledge of Commission efforts to provide viewers with the tools to control the appearance of closed captions, gives the Commission sufficient discretion to require the provision of a mechanism that is reasonably comparable to a button, key, or icon designated for accessing caption display settings. We seek comment on this interpretation, including the costs to covered entities, including small entities, and the benefits to consumers of requiring this access. Alternatively, under another interpretation of the statute the phrase “accessibility features” “merely describes an activation mechanism — *i.e.*, a mechanism for activating multiple accessibility features — to which the mandated user control mechanism for closed captioning . . . may be reasonably comparable to satisfy the requirements of the statute.”<sup>552</sup> Thus, under this interpretation, Sections 303(aa)(3) and 303(bb)(2) would not give the Commission the authority to require the provision of a mechanism that is reasonably comparable to a button, key, or icon designated for accessing caption display settings. We seek comment on this interpretation.

143. In addition, to develop the record more fully on this issue, we seek comment on how we would implement a requirement to provide an activation mechanism reasonably comparable to a button, key, or icon with regard to user display settings for closed captioning, which, at the present time, typically require users to navigate through multiple on-screen text menus to select settings. Specifically, should we require, pursuant to Sections 303(aa)(3) and 303(bb)(2) of the Act, that covered entities facilitate the ability of viewers to locate and control such settings? Would inclusion of closed captioning settings in the first level of a menu be one way of achieving compliance with such a requirement? Alternatively, should the first level menu include a means of generally accessing “accessibility features,” which could

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<sup>547</sup> *Id.* at 852-53, ¶ 112.

<sup>548</sup> *Id.* at 851, ¶ 109, citing *DTV Closed Captioning Order*, 15 FCC Rcd at 16793, ¶ 7.

<sup>549</sup> The technical standards for closed captioning display for digital television receivers have been in effect for over a decade. See 47 C.F.R. § 79.102; *DTV Closed Captioning Order*, 15 FCC Rcd at 16810, ¶ 66. Similar rules for other apparatus (such as computers and tablets) adopted in the *IP Closed Captioning Order* will begin applying to devices manufactured after January 1, 2014. See *IP Closed Captioning Reconsideration Order*, 28 FCC Rcd at 8786, ¶ 1.

<sup>550</sup> NAD/Consumer Groups Comments at 8. See also NAD/Consumer Groups Sept. 11 *Ex Parte* Letter at 3 (noting that “[t]o this day, many people who are deaf or hard of hearing continue to have difficulties accessing closed captioning controls on MVPD-provided products,” and that consumers must “navigate complex menu settings in order to find the closed captioning control or configuration settings”).

<sup>551</sup> 47 U.S.C. §§ 303(aa)(3), 303(bb)(2). Section 303(aa)(3) requires digital apparatus covered by Section 204 of the CVAA to provide “built in access to [] closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning *or accessibility features*.” *Id.* § 303(aa)(3) (emphasis added). Similarly, Section 303(bb)(2) requires “navigation devices with built-in closed captioning capability” covered by Section 205 of the CVAA to provide “access to that capability through a mechanism [that] is reasonably comparable to a button, key, or icon designated for activating the closed captioning, *or accessibility features*.” *Id.* § 303(bb)(2) (emphasis added).

<sup>552</sup> CEA Comments at 22 (footnote omitted). See also AT&T Comments at 17; DIRECTV Comments at 19; CEA Reply at 16-17; CenturyLink Reply at 7.



then guide consumers to various features, including the closed captioning display settings, as well as any information about built-in or the peripheral provision of audible output for on-screen text menus (and program guides for 205 navigation devices)? With respect to Section 205 of the CVAA, would this approach provide the “maximum flexibility” to covered entities “in the selection of means for compliance,” as mandated by the statute?<sup>553</sup> Should we require covered entities to consult with consumer groups to achieve best practices to ensure the accessibility of closed captioning settings? What time frame would be appropriate for requiring covered entities to provide a mechanism reasonably comparable to a button, key, or icon for activating the caption display user settings? We ask commenters to justify any deadline they propose by explaining what must be done by that deadline to comply with the proposed requirement.

144. *Program Information for PEG Channels.* We find in the *Report and Order* above that the record is insufficient to require MVPDs to include specific information in video programming guides and menus at this time.<sup>554</sup> We seek comment on possible sources of authority for requiring MVPDs to ensure that video programming guides and menus that provide channel and program information include “high level channel and program descriptions and titles, as well as a symbol identifying the programs with accessibility options (captioning and video description).”<sup>555</sup> For example, some commenters state that the Commission has direct authority under the CVAA to adopt this requirement.<sup>556</sup> We seek comment on that assertion. We also seek comment from industry members on any technical issues that MVPDs may face in complying with a requirement to include specific information in video programming guides and menus, and in particular whether it is technically feasible for operators to provide this specific information for PEG or other programs. What are the costs that would be incurred by MVPDs, including small MVPDs, to comply with such a requirement, and what would be the benefits of adopting this requirement? Should such a requirement apply to all channels and programs included in a guide or menu, or should it apply only to PEG channels and programs?<sup>557</sup>

145. *Accessing Secondary Audio Stream for Emergency Information (MB Docket No. 12-107).* We seek comment on whether to require manufacturers of apparatus covered by Section 203 of the CVAA to provide access to the secondary audio stream used for audible emergency information by a mechanism reasonably comparable to a button, key, or icon. Section 203 requires that apparatus designed to receive and play back video programming transmitted simultaneously with sound “have the capability to . . . make available emergency information (as that term is defined in section 79.2 of the Commission’s regulations [ ]) in a manner that is accessible to individuals who are blind or visually impaired.”<sup>558</sup> In the *Emergency Information/Video Description Order*, we adopted rules implementing Section 202 of the CVAA that require video programming distributors, video programming providers, and program owners to convey televised emergency information aurally in a secondary audio stream, when such information is

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<sup>553</sup> Pub. L. No. 111-260, § 205(b)(5).

<sup>554</sup> See *supra* ¶¶ 74-75.

<sup>555</sup> See, e.g., LTC Comments at 1-2.

<sup>556</sup> See also Letter from Claude L. Stout, Chair, Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), to Chairwoman Mignon Clyburn, Commissioner Ajit Pai, and Commissioner Jessica Rosenworcel, FCC, at 2-3 (Oct. 22, 2013) (stating that the Commission has direct authority under Sections 204 and 205 of the CVAA, and citing the *VPAAC Second Report: User Interfaces*); Letter from Benjamin J. Soukup, Chief Executive Officer, Communication Service for the Deaf, Inc., to FCC, at 2 (Oct. 2, 2013) (same).

<sup>557</sup> See Letter from Claude L. Stout, Chair, Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), to Chairwoman Mignon Clyburn, Commissioner Ajit Pai, and Commissioner Jessica Rosenworcel, FCC, at 1 (Oct. 22, 2013).

<sup>558</sup> 47 U.S.C. § 303(u)(1)(C). Section 203 also requires covered apparatus to “have the capability to . . . make available the transmission and delivery of video description services.” *Id.* § 303(u)(1)(B).

conveyed visually during programming other than newscasts, for example, in an on-screen crawl.<sup>559</sup> We also adopted rules implementing Section 203 of the CVAA that “require covered apparatus to decode and make available the secondary audio stream, in a manner that enables consumers to select the stream used for the transmission and delivery of emergency information.”<sup>560</sup> The record in this proceeding reflects the experiences of numerous individuals who are blind or visually impaired who currently are unable to get to the secondary audio stream to access video described programming because the mechanism for switching from the main program audio to the secondary audio stream is buried in on-screen menus that are not accessible to them. While it is important that consumers who are blind or visually impaired be able to access the video description services that make video programming accessible to them, it is even more critical that consumers who are blind or visually impaired be able to access the audible emergency information that will be required to be provided via the secondary audio stream.

146. Section 303(u)(1)(C) requires covered apparatus to “make available emergency information . . . in a manner that is accessible to individuals who are blind or visually impaired.”<sup>561</sup> Because of the critically urgent nature of emergency information, which is defined in our rules as “[i]nformation, about a current emergency, that is intended to further the protection of life, health, safety, and property,”<sup>562</sup> we believe that individuals who are blind or visually impaired should be able to access the secondary audio stream to obtain audible emergency information in a simple, straightforward, and timely manner. Does Section 303(u)(1)(C) of the Act give the Commission authority to require that access to the secondary audio stream for audible emergency information on apparatus covered by Section 203 be available in a simple, straightforward, and timely manner, such as through a mechanism that is reasonably comparable to a button, key, or icon?<sup>563</sup> Or, is the Commission’s authority to impose such a requirement limited to the Section 204 or 205 context? For example, because Congress specifically required a mechanism reasonably comparable to a button, key, or icon in Sections 204 and 205 but did not do so in Section 203, does the statute restrict the Commission from imposing such a requirement in the Section 203 context? We also seek comment on the costs and benefits of imposing these requirements on covered entities, including small entities.

147. We invite input on how we would implement a requirement that entities covered by Section 203 of the CVAA provide access to the secondary audio stream used for audible emergency information by a mechanism reasonably comparable to a button, key, or icon. What time frame would be appropriate for requiring covered entities to provide a mechanism reasonably comparable to a button, key, or icon for accessing the secondary audio stream? Should the deadline be consistent with the deadline for compliance with Section 203 apparatus requirements that we adopted in the *Emergency Information/Video Description Order*?<sup>564</sup> Or would device manufacturers need additional time to come into compliance? We ask commenters to justify any deadline they propose by explaining what must be done by that deadline to comply with the proposed requirement. We also seek comment on the costs to manufacturers, including those that are small entities, and the benefits to consumers of requiring access to the secondary audio stream used for audible emergency information by a mechanism reasonably comparable to a button, key, or icon.

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<sup>559</sup> See *Emergency Information/Video Description Order*, 28 FCC Rcd at 4881, ¶ 12.

<sup>560</sup> *Id.* at 4907, ¶ 50.

<sup>561</sup> 47 U.S.C. § 303(u)(1)(C).

<sup>562</sup> 47 C.F.R. § 79.2(a)(2).

<sup>563</sup> See *supra* Section IV.B.1.

<sup>564</sup> See *Emergency Information/Video Description Order*, 28 FCC Rcd at 4923, ¶ 76 (imposing a deadline of two years from the date of *Federal Register* publication for compliance with the emergency information and video description apparatus requirements of Section 203 adopted therein; the compliance deadline is May 26, 2015).

148. *Additional MVPD Notice.* The accompanying *Report and Order* concludes that MVPDs subject to Section 205 must inform their subscribers about the availability of audibly accessible devices and accessibility solutions pursuant to Section 205(b)(1). Specifically, we require that, when providing information about equipment options in response to a consumer inquiry about service, accessibility, or other issues, MVPDs must clearly and conspicuously inform consumers about the availability of accessible navigation devices. We also require that MVPDs provide notice on their official websites about the availability of accessible navigation devices.<sup>565</sup> We seek comment on whether we should impose additional notification requirements on MVPDs and, if so, what those notification requirements should be. Should we require annual notices to all subscribers, as proposed by Montgomery County?<sup>566</sup> Should MVPDs be required to include this information on or with every monthly bill? Are there other methods by which we should require MVPDs to publicize information about their audibly accessible devices and accessibility solutions? For example, should MVPDs be required to notify consumers about the availability of accessible devices or accessibility solutions in marketing efforts, through their customer service centers and phone systems, or by other means? If so, describe what those measures should be and the costs and benefits associated with such measures to covered entities, including small entities. To what extent should voluntary notification efforts by covered MVPDs obviate the need for additional requirements?

149. We seek specific comment from individuals who are blind or visually impaired about the types of MVPD notices that would most effectively communicate information about the availability of audibly accessible devices and accessibility solutions. We also seek comment about whether MVPD notification requirements are necessary to inform consumers about the availability of devices with an accessible activation mechanism for built-in closed captioning and, if so, what those notification requirements should be. We seek specific comment from individuals who are deaf or hard of hearing about the types of notices that would most effectively communicate this information.

150. *Equipment Manufacturer Notice.* We tentatively conclude that equipment manufacturers subject to Section 205 should be required pursuant to Section 205(b)(1) to inform consumers about the availability of audibly accessible devices and accessibility solutions. We propose that equipment manufacturers must prominently display accessibility information on their official websites, such as a through a link on their home pages. Similar to our requirement on MVPDs, such notices must publicize the availability of accessible devices and solutions and convey “the means for making requests for accessible equipment and the specific person, office or entity to whom such requests are to be made.”<sup>567</sup> In addition, we seek comment on whether we need to impose additional notification requirements on equipment manufacturers subject to Section 205 and, if so, what those notification requirements should be. Should manufacturers also be required to notify consumers about the availability of audibly accessible devices or accessibility solutions in marketing efforts, through their customer service centers and phone systems, or by other means? If so, describe what those measures should be and the costs and benefits associated with those measures to covered entities, including small entities.

151. If manufacturers choose to make available Section 303(bb)(1)-compliant devices or solutions at retail in the same way they make available other navigation devices in order to satisfy the “upon request” requirement in Section 205, should we require them to notify consumers at the point of sale that audibly accessible devices or accessibility solutions are available to consumers with disabilities to purchase or request. What should be the form of such a notice requirement? For example, do we need to impose a labeling requirement to identify Section 303(bb)(1) audibly accessible devices, or can

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<sup>565</sup> See *supra* ¶ 134.

<sup>566</sup> See Montgomery County Comments at 20. If so, should the annual requirement be limited to no more than five years after the rules become effective? Should the notices occur more frequently than annually, such as on a monthly or quarterly basis?

<sup>567</sup> See *supra* ¶ 134.

manufacturers otherwise ensure adequate information to consumers at the point of sale about which devices contain the required accessibility features? To what extent should voluntary notification efforts by covered equipment manufacturers obviate the need for any specific notice requirements? We seek comment on the costs and benefits associated with such requirements on covered entities, including small entities. We seek specific comment from individuals who are blind or visually impaired about the types of equipment manufacturer notices that would most effectively communicate information about the availability of audibly accessible devices and accessibility solutions. We also seek comment about whether equipment manufacturer notification requirements are necessary to inform consumers about the availability of devices with an accessible activation mechanism for built-in closed captioning and, if so, what those notification requirements should be. We seek specific comment from individuals who are deaf or hard of hearing about the types of notices that would most effectively communicate this information.

152. We seek comment on whether we need to impose notification requirements on equipment manufacturers subject to Section 204 to ensure consumers with disabilities are informed about which products contain the required accessibility features and which ones lack such features. To the extent we should adopt any notification requirements, we ask parties to describe what those notification requirements should be and the costs and benefits associated with any such requirements to covered entities, including small entities. Similar to our proposal for Section 205 covered equipment manufacturers, should we require Section 204 covered equipment manufacturers to display accessibility information on their official websites prominently, such as a through a link on their home pages?<sup>568</sup> Such information might include a point of contact, as well as other information about how to seek assistance about accessibility issues or concerns. Should we require that customer service representatives of covered entities be able to answer consumer questions about which products contain the required accessibility features and which ones lack such features? How can manufacturers ensure that consumers are provided with accessibility information at the point of sale? For example, do we need to impose a labeling requirement to identify accessible digital apparatus, or can manufacturers otherwise ensure adequate information to consumers at the point of sale about which apparatus contain the required accessibility features? To what extent should voluntary notification efforts by covered equipment manufacturers obviate the need for any specific notice requirements? We seek specific comment from individuals who are blind or visually impaired and who are deaf or hard of hearing about the types of notices that would most effectively communicate this information.

## **IX. PROCEDURAL MATTERS**

### **A. Regulatory Flexibility Act**

153. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>569</sup> the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Report and Order* in MB Docket No. 12-108. The FRFA is set forth in Appendix C.

154. *Initial Regulatory Flexibility Analysis.* As required by the RFA, the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to the *Further Notice*. The IRFA is attached to this *Report and Order and Further Notice of Proposed Rulemaking* as Appendix E.

### **B. Paperwork Reduction Act**

155. The *Report and Order* contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).<sup>570</sup> The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the

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<sup>568</sup> See *supra* ¶ 150.

<sup>569</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (“CWAAA”).

general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the *Federal Register* at a later date seeking these comments. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002 (SBPRA),<sup>571</sup> we seek specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

156. The *Further Notice* contains new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the OMB to comment on the information collection requirements contained in this *Further Notice*, as required by the PRA.<sup>572</sup> In addition, pursuant to the SBPRA, the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”<sup>573</sup>

#### C. Congressional Review Act

157. The Commission will send a copy of the *Report and Order* in MB Docket No. 12-108 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

#### D. Ex Parte Rules

158. Permit-But-Disclose. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>574</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

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<sup>570</sup> The Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

<sup>571</sup> The Small Business Paperwork Relief Act of 2002 (SBPRA), Pub. L. No. 107-198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.). *See* 44 U.S.C. § 3506(c)(4).

<sup>572</sup> *See* 44 U.S.C. §§ 3501-3520.

<sup>573</sup> *See id.* § 3506(c)(4).

<sup>574</sup> 47 C.F.R. §§ 1.1200 *et seq.*



**E. Filing Requirements**

159. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

160. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, CY-A257, Washington, DC, 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

161. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

**F. Additional Information**

162. For additional information on this proceeding, contact Adam Copeland, [Adam.Copeland@fcc.gov](mailto:Adam.Copeland@fcc.gov), or Maria Mullarkey, [Maria.Mullarkey@fcc.gov](mailto:Maria.Mullarkey@fcc.gov), of the Media Bureau, Policy Division, (202) 418-2120.

**X. ORDERING CLAUSES**

163. Accordingly, **IT IS ORDERED** that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and the authority found in Sections 4(i), 4(j), 303(r), 303(u), 303(aa), 303(bb), and 716(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 303(u), 303(aa), 303(bb), and 617(g), this *Report and Order and Further Notice of Proposed Rulemaking IS ADOPTED*, effective thirty (30) days after the date of publication in the *Federal Register*, except for 47 C.F.R. §§ 79.107(c), 79.108(a)(5), 79.108(c)-(e), and 79.110, which shall become effective upon announcement in the *Federal Register* of OMB approval and an effective date of the rules.

164. **IT IS ORDERED** that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and the authority found in Sections 4(i), 4(j), 303(r), 303(aa), 303(bb), and 716(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 303(aa), 303(bb), and 617(g), the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix B.

165. **IT IS FURTHER ORDERED** that we delegate authority to the Media Bureau and the Consumer and Governmental Affairs Bureau to consider all requests for declaratory rulings pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, all waiver requests pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and all informal requests for Commission action pursuant to Section 1.41 of the Commission's rules, 47 C.F.R. § 1.41, filed under these rules and pursuant to Sections 204 and 205 of the CVAA as discussed herein.

166. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in MB Docket No. 12-108, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

167. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in MB Docket No. 12-108 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## List of Commenters

**Comments filed in MB Docket No. 12-108**

Alliance for Communications Democracy  
Alliance for Community Media  
American Cable Association (ACA)  
American Council of the Blind (ACB)  
AT&T Services, Inc.  
Chicago Access Corporation  
Comcast Corporation  
Consumer Electronics Association (CEA)  
DIRECTV, LLC  
DISH Network L.L.C. & EchoStar Technologies L.L.C.  
Entertainment Software Association (ESA)  
Information Technology Industry Council (ITIC)  
Lowell Telecommunications Corporation  
Montgomery County, Maryland  
National Association of Counties, National Association of Telecommunications Officers and Advisors, &  
U.S. Conference of Mayors  
National Association of the Deaf *et al.* (NAD/Consumer Groups<sup>1</sup>)  
National Cable & Telecommunications Association (NCTA)  
Panasonic Corporation of North America  
Rovi Corporation  
Telecommunications Industry Association (TIA)  
Tonkinson, Maggie  
Verizon and Verizon Wireless  
Walt, Dorothy L.

**Reply Comments filed in MB Docket No. 12-108**

Alliance for Communications Democracy  
AllVid Tech Company Alliance  
American Cable Association (ACA)  
American Foundation for the Blind (AFB)  
AT&T Services, Inc.  
CenturyLink, Inc.  
Consumer Electronics Association (CEA)  
CTIA—The Wireless Association (CTIA)  
Entertainment Software Association (ESA)  
Montgomery County, Maryland  
Motorola Solutions, Inc.  
National Cable & Telecommunications Association (NCTA)  
NTCA—The Rural Broadband Association (NTCA)  
Rehabilitation Engineering Research Center for Wireless Technologies (Wireless RERC)

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<sup>1</sup> In addition to NAD, Consumer Groups include Telecommunications for the Deaf and Hard of Hearing, Inc., Deaf and Hard of Hearing Consumer Advocacy Network, Association of Late-Deafened Adults, Inc., Hearing Loss Association of America, California Coalition of Agencies Serving the Deaf and Hard of Hearing, Cerebral Palsy and Deaf Organization, and Telecommunication-RERC.

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WGBH, Carl and Ruth Shapiro Family National Center for Accessible Media (NCAM)

In addition, several dozen individual consumers filed comments and reply comments in this proceeding, and public, educational, and governmental (“PEG”) programmers<sup>2</sup> filed reply comments in this proceeding.

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<sup>2</sup> PEG reply commenters include: Access Fort Wayne; Access Humboldt; Access Tucson Community Media; Amherst Media; Arlington TV; Athol-Orange Community Television, Inc.; Belmont Community Media Center, Inc.; Beverly Community Access Media; Bloomfield Municipal Access; Brattleboro Community Television; Cambridge Public Access Corporation; Capital Community Television; CCTV Center for Media & Democracy; CitiCable; Citizens Television, Inc.; City of Boston, Massachusetts; City of Connersville TV3; City of Germantown, Tennessee Telecommunications Commission; City of Oakland KTOP-TV; City of Tacoma, Washington; City of Wheaton, Illinois; Community Access Partners of San Buenaventura; Community Access Television Services; Community Media Center of Marin; Community Television Association of Maine; Community Television Network; Dakota Media Access; Danvers Community Access Television, Inc.; Davis Community Television; Dayton Access Television; Easton Community Access Television; Falmouth Community Television; Framingham Public Access Corporation; Greater Northshire Access Television, Inc.; Howard County, Maryland Office of Cable Administration; HTV Houston Television; The Iris Network; KTOP TV-10; Lincoln County Television; Ludlow Community Television; MCTV Network; Media Alliance; Methuen Community Television; MetroEast Community Media; Metro Television; Middlebury Community Television; Montgomery Community Media; Montgomery County Public Schools Television; Mountain View Community Television; Newburyport Community Media Center, Inc.; Northampton Community Television; North Andover Community Access & Media, Inc.; Pasadena Media; Pasco City Television; Peabody Access Telecommunications, Inc.; Pittsburgh Community Television Corporation; Pittsfield Community Cable Broadcasting, Inc.; Philadelphia Community Access Media; Portland Community Media; Raynham Community Access & Media Inc.; Regional Educational Television Network, Inc.; San Jose Community Media Access Corporation; Santa Maria Community Television; South Coast Community Media Access Center; Thornton 8; Thurston Community Television; TV-2 Sacopee Valley; Vermont Access Network; Village of Elk Grove Village, Illinois; WACA TV; Watertown TV; Waycross Community Media; WCCA TV 13; West Bend Community Television; West Hartford Community Television; and Winchester Community Access & Media.

## APPENDIX B

## Final Rules

The Federal Communications Commission amends Part 79 of Title 47 of the Code of Federal Regulations (CFR) as follows:

**PART 79 – Closed Captioning and Video Description of Video Programming**

1. The authority citation for Part 79 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, 617.

2. Rename Part 79 as follows:

## PART 79 – Accessibility of Video Programming

3. Revise the Table of Contents for Part 79 to add Subparts A and B as follows:

## Subpart A – Video Programming Owners, Providers, and Distributors

- § 79.1 Closed captioning of video programming.
- § 79.2 Accessibility of programming providing emergency information.
- § 79.3 Video description of video programming.
- § 79.4 Closed captioning of video programming delivered using Internet protocol.

## Subpart B – Apparatus

- § 79.100 Incorporation by reference.
- § 79.101 Closed caption decoder requirements for analog television receivers.
- § 79.102 Closed caption decoder requirements for digital television receivers and converter boxes.
- § 79.103 Closed caption decoder requirements for apparatus.
- § 79.104 Closed caption decoder requirements for recording devices.
- § 79.105 Video description and emergency information accessibility requirements for all apparatus.
- § 79.106 Video description and emergency information accessibility requirements for recording devices.
- § 79.107 User interfaces provided by digital apparatus.
- § 79.108 Video programming guides and menus provided by navigation devices.
- § 79.109 Activating accessibility features.
- § 79.110 Complaint procedures for user interfaces, menus and guides, and activating accessibility features on digital apparatus and navigation devices.

4. Remove and reserve § 79.101(m):

**§ 79.101 Closed caption decoder requirements for analog television receivers.**

\* \* \* \* \*

~~(m) [reserved] Labeling and consumer information requirements. (1) The box or other package in which the individual television receiver is to be marketed shall carry a statement in a prominent location, visible to the buyer before purchase, which reads as follows:~~

~~This television receiver provides display of television closed captioning in accordance with FCC rules.~~



~~(2) Receivers that do not support color attributes or text mode, as well as receivers that display only upper case characters pursuant to paragraph (g) of this section, must include with the statement, and in the owner's manual, language indicating that those features are not supported.~~

\* \* \* \* \*

5. Rename § 79.103 to read as follows:

§ 79.103 Closed caption decoder requirements for apparatus

\* \* \* \* \*

6. Add § 79.107 to read as follows:

§ 79.107. User interfaces provided by digital apparatus.

(a)(1) A manufacturer of digital apparatus manufactured in or imported for use in the United States and designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, must ensure that digital apparatus be designed, developed, and fabricated so that control of appropriate built-in functions included in the digital apparatus are accessible to and usable by individuals who are blind or visually impaired. Digital apparatus do not include navigation devices as defined in § 76.1200 of this subchapter. Manufacturers must comply with the provisions of this section only if achievable as defined in § 79.107(c)(2).

Note 1 to paragraph (a)(1): The term digital apparatus as used in this section includes the physical device and the video player(s) capable of displaying video programming transmitted in digital format simultaneously with sound that manufacturers install into the devices they manufacturer before sale, whether in the form of hardware, software, or a combination of both, as well as any video players capable of displaying video programming in digital format transmitted simultaneously with sound that manufacturers direct consumers to install after sale. The term software includes third-party applications that are pre-installed on a device by the manufacturer or that the manufacturer directs consumers to install after sale.

Note 2 to paragraph (a)(1): This paragraph places no restrictions on the importing, shipping, or sale of digital apparatus manufactured before the applicable compliance deadline for this section.

(2) If on-screen text menus or other visual indicators built in to the digital apparatus are used to access the appropriate built-in apparatus functions, manufacturers of the digital apparatus must ensure that those functions are accompanied by audio output that is either integrated or peripheral to the digital apparatus, so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired in real time.

(3) For appropriate built-in digital apparatus functions that are not accessed through on-screen text menus or other visual indicators, *i.e.*, those that are not required to be accompanied by audio output in accordance with paragraph (a)(2) of this section, manufacturers of digital apparatus must make such functions accessible to individuals who are blind or visually impaired by ensuring that the input, control, and mechanical functions are locatable, identifiable, and operable in accordance with each of the following, assessed independently:

(i) Operable without vision. The digital apparatus must provide at least one mode that does not require user vision.

- 
- (ii) Operable with low vision and limited or no hearing. The digital apparatus must provide at least one mode that permits operation by users with visual acuity between 20/70 and 20/200, without relying on audio output.
- (iii) Operable with little or no color perception. The digital apparatus must provide at least one mode that does not require user color perception.
- (4) Appropriate built-in apparatus functions are those functions that are used for receiving, playing back, or displaying video programming, and include the following functions:
- (i) Power On / Off. Function that allows the user to turn the device on or off.
- (ii) Volume Adjust and Mute. Function that allows the user to adjust the volume and to mute or un-mute the volume.
- (iii) Channel / Program Selection. Function that allows the user to select channels and programs (*e.g.*, via physical numeric or channel up/channel down buttons or via on-screen guides and menus).
- (iv) Display Channel / Program Information. Function that allows the user to display channel or program information.
- (v) Configuration – Setup. Function that allows the user to access and change configuration or setup options (*e.g.*, configuration of video display and audio settings, selection of preferred language for on-screen guides or menus, etc.).
- (vi) Configuration – CC Control. Function that allows the user to enable or disable the display of closed captioning.
- (vii) Configuration – CC Options. Function that allows the user to modify the display of closed caption data (*e.g.*, configuration of the font size, font color, background color, opacity, etc.).
- (viii) Configuration – Video Description Control. Function that allows the user to enable or disable the output of video description (*i.e.*, allows the user to change from the main audio to the secondary audio stream that contains video description, and from the secondary audio stream back to the main audio).
- (ix) Display Configuration Info. Function that allows the user to display how user preferences are currently configured.
- (x) Playback Functions. Function that allows the user to control playback functions (*e.g.*, pause, play, rewind, fast forward, stop, and record).
- (xi) Input Selection. Function that allows the user to select their preferred input source.
- (b) *Compliance deadline.* Compliance with the requirements of this section is required no later than [INSERT DATE THREE YEARS AFTER FEDERAL REGISTER PUBLICATION]; except that compliance with the requirements of this section is required no later than [INSERT DATE EIGHT YEARS AFTER FEDERAL REGISTER PUBLICATION] for the following digital apparatus: (1) display-only monitors and video projectors; (2) devices that are primarily designed to capture and display still and/or moving images consisting of consumer generated media, or of other images that are not video programming as defined under § 79.4(a)(1) of this part, and that have limited capability to display video programming transmitted simultaneously with sound; and (3) devices that are primarily designed to display still images and that have limited capability to display video programming transmitted

simultaneously with sound.

(c)(1) *Achievable*. Manufacturers of digital apparatus (i) may file a petition seeking a determination from the Commission, pursuant to § 1.41 of this chapter, that compliance with the requirements of this section is not achievable, which the Commission may grant upon a finding that such compliance is not achievable, or (ii) may raise as a defense to a complaint or Commission enforcement action that a particular digital apparatus does not comply with the requirements of this section because compliance was not achievable, and the Commission may dismiss a complaint or Commission enforcement action upon a finding that such compliance is not achievable.

(2) The petitioner or respondent must support a petition filed pursuant to paragraph (c)(1) of this section or a response to a complaint or Commission enforcement action with sufficient evidence to demonstrate that compliance with the requirements of this section is not “achievable.” “Achievable” means with reasonable effort or expense. The Commission will consider the following factors when determining whether compliance with the requirements of this section is not “achievable” under the factors set out in 47 U.S.C. 617(g):

- (i) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question;
- (ii) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;
- (iii) The type of operations of the manufacturer or provider; and
- (iv) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

7. Add § 79.108 to read as follows:

§ 79.108. Video programming guides and menus provided by navigation devices.

(a)(1) Manufacturers that place navigation devices, as defined by § 76.1200 of this subchapter, into the chain of commerce for purchase by consumers, and multichannel video programming distributors (“MVPDs”) as defined by § 76.1200 of this subchapter that lease or sell such devices must ensure that the on-screen text menus and guides provided by navigation devices for the display or selection of multichannel video programming are audibly accessible in real time upon request by individuals who are blind or visually impaired. Manufacturers and MVPDs must comply with the provisions of this section only if doing so is achievable as defined in § 79.108(c)(2).

Note 1 to paragraph (a)(1): This paragraph places no restrictions on the importing, shipping, or sale of navigation devices manufactured before the applicable compliance deadline for this section.

Note 2 to paragraph (a)(1): In determining whether a particular device is considered a “navigation device” subject to the requirements of this section, the Commission will look to the device’s built-in functionality at the time of manufacture.

(2) The following functions are used for the display or selection of multichannel video programming and must be made audibly accessible by manufacturers of navigation devices and MVPDs covered by this section when included in a navigation device and accessed through on-screen text menus or guides:

- (i) Channel / Program Selection. Function that allows the user to select channels and programs (e.g., via

physical numeric or channel up/channel down buttons or via on-screen guides and menus).

(ii) Display Channel / Program Information. Function that allows the user to display channel or program information.

(iii) Configuration – Setup. Function that allows the user to access and change configuration or setup options (*e.g.*, configuration of video display and audio settings, selection of preferred language for on-screen guides or menus, etc.).

(iv) Configuration – CC Control. Function that allows the user to enable or disable the display of closed captioning.

(v) Configuration – CC Options. Function that allows the user to modify the display of closed caption data (*e.g.*, configuration of the font size, font color, background color, opacity, etc.).

(vi) Configuration – Video Description Control. Function that allows the user to enable or disable the output of video description (*i.e.*, allows the user to change from the main audio to the secondary audio stream that contains video description, and from the secondary audio stream back to the main audio).

(vii) Display Configuration Info. Function that allows the user to display how user preferences are currently configured.

(viii) Playback Functions. Function that allows the user to control playback functions (*e.g.*, pause, play, rewind, fast forward, stop, and record).

(ix) Input Selection. Function that allows the user to select their preferred input source.

(3) Manufacturers of navigation devices and MVPDs covered by this section must ensure that the following functions are made accessible, as defined by § 79.107(a)(3), to individuals who are blind or visually impaired:

(i) Power On / Off. Function that allows the user to turn the device on or off.

(ii) Volume Adjust and Mute. Function that allows the user to adjust the volume and to mute or un-mute the volume.

(4) With respect to navigation device features and functions:

(i) Delivered in software, the requirements set forth in this section shall apply to the manufacturer of such software; and

(ii) Delivered in hardware, the requirements set forth in this section shall apply to the manufacturer of such hardware.

(5) Manufacturers of navigation devices and MVPDs covered by this section must permit a requesting blind or visually impaired individual to request an accessible navigation device through any means that such covered entities generally use to make available navigation devices to other consumers. Any such means must not be more burdensome to a requesting blind or visually impaired individual than the means required for other consumers to obtain navigation devices. A manufacturer that provides navigation devices at retail to requesting blind or visually impaired consumers must make a good faith effort to have retailers make available compliant navigation devices to the same extent they make available navigation devices to other consumers generally.

(6) Manufacturers of navigation devices and MVPDs covered by this section must provide an accessible navigation device to a requesting blind or visually impaired individual within a reasonable time, defined as a time period comparable to the time that such covered entities generally provide navigation devices to other consumers.

(7) *Compliance through the use of separate equipment or software.* Manufacturers of navigation devices and MVPDs covered by this section may comply with the requirements of paragraphs (a)(1) through (a)(3) of this section through the use of software, a peripheral device, specialized consumer premises equipment, a network-based service or other solution, and shall have maximum flexibility to select the manner of compliance. An entity that chooses to comply with paragraphs (a)(1) through (a)(3) of this section through the use of separate equipment or software must:

(i) ensure that any software, peripheral device, equipment, service or solution relied upon achieves the accessibility required by this section. If a navigation device has any functions that are required to be made accessible pursuant to this section, any separate solution must make all of those functions accessible or enable the accessibility of those functions.

(ii) provide any software, peripheral device, equipment, service or solution in a manner that is not more burdensome to a requesting blind or visually impaired individual than the manner in which such entity generally provides navigation devices to other consumers.

(iii) provide any software, peripheral device, equipment, service or solution at no additional charge.

(iv) provide any software, peripheral device, equipment, service or solution within a reasonable time, defined as a time period comparable to the time that such entity generally provides navigation devices to other consumers.

(8) Manufacturers of navigation devices and MVPDs covered by this section shall only be responsible for compliance with the requirements of this section with respect to navigation devices that such covered entities provide to a requesting blind or visually impaired individual.

(b) *Compliance deadline.* Compliance with the requirements of this section is required no later than [INSERT DATE THREE YEARS AFTER FEDERAL REGISTER PUBLICATION]; except that compliance with the requirements of this section is required no later than [INSERT DATE FIVE YEARS AFTER FEDERAL REGISTER PUBLICATION] for the following covered entities: (1) MVPD operators with 400,000 or fewer subscribers as of year-end 2012; and (2) MVPD systems with 20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers as of year-end 2012.

(c)(1) *Achievable.* MVPDs and manufacturers of navigation device hardware or software (i) may file a petition seeking a determination from the Commission, pursuant to § 1.41 of this chapter, that compliance with the requirements of this section is not achievable, which the Commission may grant upon a finding that such compliance is not achievable, or (ii) may raise as a defense to a complaint or Commission enforcement action that a particular navigation device does not comply with the requirements of this section because compliance was not achievable, and the Commission may dismiss a complaint or Commission enforcement action upon a finding that such compliance is not achievable.

(2) The petitioner or respondent must support a petition filed pursuant to paragraph (c)(1) of this section or a response to a complaint or Commission enforcement action with sufficient evidence to demonstrate that compliance with the requirements of this section is not “achievable.” “Achievable” means with reasonable effort or expense. The Commission will consider the following factors when determining whether compliance with the requirements of this section is not “achievable” under the factors set out in 47 U.S.C. 617(g):



- (i) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question;
  - (ii) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;
  - (iii) The type of operations of the manufacturer or provider; and
  - (iv) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.
- (d) *MVPD notices.* Covered MVPDs must notify consumers that navigation devices with the required accessibility features are available to consumers who are blind or visually impaired upon request as follows:
- (1) When providing information about equipment options in response to a consumer inquiry about service, accessibility, or other issues, MVPDs must clearly and conspicuously inform consumers about the availability of accessible navigation devices.
  - (2) MVPDs must provide notice on their official websites about the availability of accessible navigation devices. MVPDs must prominently display information about accessible navigation devices and separate solutions on their websites in a way that makes such information available to all current and potential subscribers. The notice must publicize the availability of accessible devices and separate solutions and explain the means for making requests for accessible equipment and the specific person, office or entity to whom such requests are to be made. All information required by this section must be provided in a website format that is accessible to people with disabilities.
- (e) *Verification of eligibility.* Entities covered by this section may only require consumer verification of eligibility as an individual who is blind or visually impaired to the extent the entity chooses to rely on an accessibility solution that involves providing the consumer with sophisticated equipment and/or services at a price that is lower than that offered to the general public. In this situation, entities covered by this section must allow a consumer to provide a wide array of documentation to verify eligibility for the accessibility solution provided. Entities covered by this section that choose to require verification of eligibility must comply with the requirements of 47 U.S.C. 338(i)(4)(A) and 47 U.S.C. 631(c)(1) to protect personal information gathered from consumers through their verification procedures.

8. Add § 79.109 to read as follows:

§ 79.109 Activating accessibility features.

- (a) *Requirements applicable to digital apparatus.*
  - (1) Manufacturers of digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, with built-in closed-captioning capability must ensure that closed captioning can be activated through a mechanism that is reasonably comparable to a button, key, or icon. Digital apparatus do not include navigation devices as defined in § 76.1200 of this subchapter.
  - (2) Manufacturers of digital apparatus designed to receive or play back video programming transmitted

in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, with built-in video description capability must ensure that video description can be activated through a mechanism that is reasonably comparable to a button, key, or icon. Digital apparatus do not include navigation devices as defined in § 76.1200 of this subchapter.

Note 1 to paragraph (a): The term digital apparatus includes the physical device and the video player(s) capable of displaying video programming transmitted in digital format simultaneously with sound that manufacturers install into the devices they manufacture before sale, whether in the form of hardware, software, or a combination of both, as well as any video players capable of displaying video programming in digital format transmitted simultaneously with sound that manufacturers direct consumers to install after sale. The term software includes third-party applications that are pre-installed on a device by the manufacturer or that the manufacturer directs consumers to install after sale.

Note 2 to paragraph (a): This paragraph places no restrictions on the importing, shipping, or sale of digital apparatus manufactured before the applicable compliance deadline for this section.

(b) *Requirements applicable to navigation devices.* Manufacturers that place navigation devices, as defined in § 76.1200 of this subchapter, into the chain of commerce for purchase by consumers, and MVPDs that lease or sell such navigation devices with built-in closed-captioning capability must ensure that closed captioning can be activated through a mechanism that is reasonably comparable to a button, key, or icon.

Note 1 to paragraph (b): In determining whether a particular device is considered a “navigation device” subject to the requirements of this section, the Commission will look to the device’s built-in functionality at the time of manufacture.

Note 2 to paragraph (b): This paragraph places no restrictions on the importing, shipping, or sale of navigation devices manufactured before the applicable compliance deadline for this section.

(c) *Compliance deadline.* Compliance with the requirements of this section is required no later than [INSERT DATE THREE YEARS AFTER FEDERAL REGISTER PUBLICATION]; except that compliance with the requirements of this section is required no later than [INSERT DATE FIVE YEARS AFTER FEDERAL REGISTER PUBLICATION] for the following covered entities: (1) MVPD operators with 400,000 or fewer subscribers as of year-end 2012; and (2) MVPD systems with 20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers as of year-end 2012.

9. Add § 79.110 to read as follows:

§ 79.110. Complaint procedures for user interfaces, menus and guides, and activating accessibility features on digital apparatus and navigation devices.

(a) Complaints concerning an alleged violation of the requirements of §§ 79.107, 79.108, or 79.109 of this part must be filed in accordance with this section. For purposes of this section, a covered entity is the entity or entities responsible for compliance with §§ 79.107, 79.108, or 79.109.

(1) Complaints must be filed with the Commission or with the covered entity within 60 days after the date the complainant experiences a problem relating to compliance with the requirements of §§ 79.107, 79.108, or 79.109. A complaint filed with the Commission may be transmitted to the Consumer and Governmental Affairs Bureau by any reasonable means, such as the Commission’s online informal complaint filing system, letter, facsimile, telephone (voice/TRS/TTY), e-mail, or some other method that

would best accommodate the complainant's disability.

(2) A complaint should include the following information:

(i) The complainant's name, address, and other contact information, such as telephone number and e-mail address;

(ii) The name and contact information of the covered entity;

(iii) Information sufficient to identify the software or digital apparatus/navigation device used;

(iv) The date or dates on which the complainant purchased, acquired, or used, or tried to purchase, acquire, or use the digital apparatus/navigation device;

(v) A statement of facts sufficient to show that the covered entity has violated, or is violating, the Commission's rules;

(vi) The specific relief or satisfaction sought by the complainant;

(vii) The complainant's preferred format or method of response to the complaint; and

(viii) If a complaint pursuant to § 79.108 of this part, the date that the complainant requested an accessible navigation device and the person or entity to whom that request was directed.

(3) If a complaint is filed first with the Commission, the Commission will forward a complaint satisfying the above requirements to the named covered entity for its response, as well as to any other entity that Commission staff determines may be involved. The covered entity or entities must respond in writing to the Commission and the complainant within 30 days after receipt of the complaint from the Commission.

(4) If a complaint is filed first with the covered entity, the covered entity must respond in writing to the complainant within 30 days after receipt of a complaint. If the covered entity fails to respond to the complainant within 30 days, or the response does not satisfy the consumer, the complainant may file the complaint with the Commission within 30 days after the time allotted for the covered entity to respond. If the consumer subsequently files the complaint with the Commission (after filing with the covered entity) and the complaint satisfies the above requirements in paragraph 2 of this section, the Commission will forward the complaint to the named covered entity for its response, as well as to any other entity that Commission staff determines may be involved. The covered entity must then respond in writing to the Commission and the complainant within 30 days after receipt of the complaint from the Commission.

(5) In response to a complaint, the covered entity must file with the Commission sufficient records and documentation to prove that it was (and remains) in compliance with the Commission's rules. Conclusory or insufficiently supported assertions of compliance will not carry the covered entity's burden of proof. If the covered entity admits that it was not, or is not, in compliance with the Commission's rules, it must file with the Commission sufficient records and documentation to explain the reasons for its noncompliance, show what remedial steps it has taken or will take, and show why such steps have been or will be sufficient to remediate the problem.

(6) The Commission will review all relevant information provided by the complainant and the covered entity, as well as any additional information the Commission deems relevant from its files or public sources. The Commission may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violations of Commission rules. When the Commission requests additional information, parties to which such requests are addressed must provide the requested information in the manner and within the

time period the Commission specifies.

(7) If the Commission finds that a covered entity has violated the requirements of §§ 79.107, 79.108, or 79.109 of this part, it may employ the full range of sanctions and remedies available under the Communications Act of 1934, as amended, against any or all of the violators.

(b) *Contact information.* A covered entity must make contact information available for the receipt and handling of complaints. The contact information required must include the name of a person with primary responsibility for accessibility compliance issues. This contact information must also include that person's title or office, telephone number, fax number, postal mailing address, and e-mail address. A covered entity must keep this information current and update it within 10 business days of any change.

## APPENDIX C

**Final Regulatory Flexibility Act Analysis for the *Report and Order***

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>1</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rulemaking* in this proceeding.<sup>2</sup> The Federal Communications Commission (“Commission”) sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Report and Order**

2. Pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),<sup>4</sup> the *Report and Order* adopts rules requiring the accessibility of user interfaces on digital apparatus and navigation devices used to view video programming for individuals with disabilities. The rules we adopt here will effectuate Congress’s goals in enacting Sections 204 and 205 of the CVAA by: (1) enabling individuals who are blind or visually impaired to more easily access video programming on a range of video devices; and (2) enabling consumers who are deaf or hard of hearing to more easily activate closed captioning on video devices. Specifically, and as discussed more thoroughly in Section D *infra*, the rules require that digital apparatus subject to Section 204<sup>5</sup> make appropriate built-in apparatus functions (*i.e.*, the functions used to receive, play back, and display video programming) accessible to individuals who are blind or visually impaired.<sup>6</sup> The rules also require that navigation devices subject to Section 205<sup>7</sup> make on-screen text menus and guides used for the display or selection of multichannel video programming audibly accessible, and that they make the controls used to access covered functions (*i.e.*, power on/off, volume adjust/mute) accessible to individuals who are blind or visually impaired.<sup>8</sup> Covered entities must also provide a mechanism reasonably comparable to a button, key, or icon for accessing certain accessibility features.<sup>9</sup> By imposing new requirements with regard to the accessibility of user interfaces and video programming guides and menus, the regulations adopted herein further the

<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

<sup>2</sup> See *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Notice of Proposed Rulemaking, FCC 13-77 (rel. May 30, 2013) (“*NPRM*”).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA). The foregoing are collectively referred to herein as the CVAA. The CVAA was enacted on October 8, 2010.

<sup>5</sup> Specifically, Section 204 applies to “digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol,” excluding navigation devices. 47 U.S.C. § 303(aa)(1).

<sup>6</sup> See *Report and Order*, Section IV.A.1.

<sup>7</sup> Specifically, Section 205 applies to “navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations).” 47 U.S.C. § 303(bb)(1). Section 76.1200 of the Commission’s rules defines “navigation device” to include “[d]evices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c).

<sup>8</sup> See *Report and Order*, Section IV.A.2.

<sup>9</sup> See *id.* Section IV.B.



purpose of the CVAA to “update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.”<sup>10</sup>

3. Legal Basis. The authority for the action taken in this rulemaking is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and Sections 4(i), 4(j), 303(aa), 303(bb), and 716(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(aa), 303(bb), and 617(g).

**B. Summary of Significant Issues Raised in Response to the IRFA**

**1. Summary of Significant Issues Raised by Public Comments**

4. No public comments were filed in response to the IRFA.

**2. Response to Comments filed by the Small Business Administration**

5. The Small Business Administration (“SBA”) Office of Advocacy filed an *ex parte* letter in MB Docket No. 12-108, in which it forwarded the concerns of small multichannel video programming distributors (“MVPDs”), including those affiliated with rural local exchange carriers, “regarding the potential for the proposed rule to place a disproportionate economic impact on small MVPDs,” and in which it recommended that the Commission exempt small MVPDs serving fewer than 20,000 subscribers from the proposed rule and adopt a delayed compliance schedule for all small MVPDs.<sup>11</sup> SBA also shared concerns regarding compliance with the RFA in the IRFA,<sup>12</sup> which we address in Sections D and E of this FRFA by providing a discussion of the potential disproportionate impact of the final rules on small entities, as well as steps taken to mitigate those impacts.

**C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

6. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in the *Report and Order*.<sup>13</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>14</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>15</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>16</sup> Small entities that are directly affected by the rules adopted in the *Report and Order* include manufacturers of digital apparatus, MVPDs leasing or selling navigation devices, equipment manufacturers of navigation devices that place devices into the chain of commerce for sale to consumers, and other manufacturers of navigation device hardware and software.

<sup>10</sup> H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S.Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

<sup>11</sup> See Letter from Winslow L. Sargeant, Chief Counsel, Small Business Administration Office of Advocacy, at 1-2 (Aug. 15, 2013) (“SBA Aug. 15 *Ex Parte* Letter”).

<sup>12</sup> See *id.* at 2-3.

<sup>13</sup> 5 U.S.C. § 603(b)(3).

<sup>14</sup> *Id.* § 601(6).

<sup>15</sup> *Id.* § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>16</sup> 15 U.S.C. § 632.

7. Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.”<sup>17</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>18</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>19</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>20</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

8. Cable Companies and Systems. The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.<sup>21</sup> Industry data shows that there were 1,141 cable companies at the end of June 2012.<sup>22</sup> Of this total, all but 10 incumbent cable companies are small under this size standard.<sup>23</sup> In addition, under the Commission’s rate regulation rules,

<sup>17</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (“CCTV”) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (“DTH”) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (“MMDS”).

<sup>18</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>19</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>20</sup> *Id.*

<sup>21</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>22</sup> NCTA, Industry Data, Number of Cable Operating Companies (June 2012), <http://www.ncta.com/Statistics.aspx> (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99 at ¶ 24 (rel. July 22, 2013) (“15<sup>th</sup> Annual Competition Report”).

<sup>23</sup> See SNL Kagan, “Top Cable MSOs – 12/12 Q”; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>. We note that, when applied to an MVPD operator, under this size standard (i.e., 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) (“CALM Act Report and Order”) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>24</sup> Current Commission records show 4,945 cable systems nationwide.<sup>25</sup> Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

9. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>26</sup> There are approximately 56.4 million incumbent cable video subscribers in the United States today.<sup>27</sup> Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>28</sup> Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.<sup>29</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>30</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

10. Direct Broadcast Satellite (DBS) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,<sup>31</sup> which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer

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<sup>24</sup> 47 C.F.R. § 76.901(c).

<sup>25</sup> The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

<sup>26</sup> 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>27</sup> *See* NCTA, Industry Data, Cable Video Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

<sup>28</sup> 47 C.F.R. § 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

<sup>29</sup> *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

<sup>30</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. *See* 47 C.F.R. § 76.901(f).

<sup>31</sup> *See* 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.*” (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

employees.<sup>32</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>33</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>34</sup> Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.<sup>35</sup> Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.<sup>36</sup> Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,<sup>37</sup> which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>38</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>39</sup> Of this total, 30,178 establishments had fewer than 100

<sup>32</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>33</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>34</sup> *Id.*

<sup>35</sup> 13 C.F.R. § 121.201; NAICS code 517510 (2002).

<sup>36</sup> See *15<sup>th</sup> Annual Competition Report*, at ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at ¶¶ 27, 110-11.

<sup>37</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>38</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>39</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

employees, and 1,818 establishments had 100 or more employees.<sup>40</sup> Therefore, under this size standard, the majority of such businesses can be considered small.

12. Home Satellite Dish (HSD) Service. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.<sup>41</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>42</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>43</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>44</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

13. Open Video Services. The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>45</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>46</sup> OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.<sup>47</sup> The SBA has developed a small business size standard for this category,

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<sup>40</sup> *Id.*

<sup>41</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services." U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>42</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>43</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>44</sup> *Id.*

<sup>45</sup> 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("Thirteenth Annual Cable Competition Report").

<sup>46</sup> See 47 U.S.C. § 573.

<sup>47</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services." U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.



which is: all such businesses having 1,500 or fewer employees.<sup>48</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>49</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>50</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>51</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>52</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

14. Wireless cable systems – Broadband Radio Service and Educational Broadband Service. Wireless cable systems use the Broadband Radio Service (BRS)<sup>53</sup> and Educational Broadband Service (EBS)<sup>54</sup> to transmit video programming to subscribers. In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>55</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>56</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.<sup>57</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its

<sup>48</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>49</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>50</sup> *Id.*

<sup>51</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

<sup>52</sup> See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>53</sup> BRS was previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS). See *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

<sup>54</sup> EBS was previously referred to as the Instructional Television Fixed Service (ITFS). See *id.*

<sup>55</sup> 47 C.F.R. § 21.961(b)(1).

<sup>56</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1,500 or fewer employees.

<sup>57</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>58</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>59</sup> Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

15. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services."<sup>60</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>61</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>62</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>63</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses.<sup>64</sup> The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.<sup>65</sup>

<sup>58</sup> *Id.* at 8296.

<sup>59</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

<sup>60</sup> U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television ("CCTV") services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system ("DTH") services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services ("MMDS").

<sup>61</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>62</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>63</sup> *Id.*

<sup>64</sup> <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp>.

<sup>65</sup> The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

16. Incumbent Local Exchange Carriers (ILECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. ILECs are included in the SBA's economic census category, Wired Telecommunications Carriers.<sup>66</sup> Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>67</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>68</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>69</sup> Therefore, under this size standard, the majority of such businesses can be considered small.

17. Small Incumbent Local Exchange Carriers. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."<sup>70</sup> The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.<sup>71</sup> We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

18. Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. These entities are included in the SBA's economic census category, Wired Telecommunications Carriers.<sup>72</sup> Under this

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<sup>66</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.*" (*Emphasis added to text relevant to satellite services.*) U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>67</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>68</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>69</sup> *Id.*

<sup>70</sup> 15 U.S.C. § 632.

<sup>71</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>72</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that*

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category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>73</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>74</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>75</sup> Therefore, under this size standard, the majority of such businesses can be considered small.

19. Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”<sup>76</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees.<sup>77</sup> Census data for 2007 shows that there were 939 establishments that operated for part or all of the entire year.<sup>78</sup> Of those, 912 operated with fewer than 500 employees, and 27 operated with 500 or more employees.<sup>79</sup> Therefore, under this size standard, the majority of such establishments can be considered small.

20. Audio and Video Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing electronic audio and video equipment for home entertainment, motor vehicles, and public address and musical instrument amplification. Examples of products made by these establishments are video cassette recorders, televisions, stereo equipment, speaker systems, household-type video cameras, jukeboxes, and amplifiers for musical instruments and public address systems.”<sup>80</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees.<sup>81</sup> Census data for 2007 shows that there were 492 establishments in this category operated for part or all of the entire year.<sup>82</sup> Of those, 488 operated with fewer than 500 employees, and four operated with 500 or more

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*they operate are included in this industry.” (Emphasis added to text relevant to satellite services.)* U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>73</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>74</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>75</sup> *Id.*

<sup>76</sup> U.S. Census Bureau, 2012 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>77</sup> 13 C.F.R. § 121.201; 2012 NAICS code 334220.

<sup>78</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007 – 2007 Economic Census,” NAICS code 334220, Table EC0731SG3; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>79</sup> *Id.*

<sup>80</sup> U.S. Census Bureau, 2012 NAICS Definitions, “334310 Audio and Video Equipment Manufacturing” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>81</sup> 13 C.F.R. § 121.201; 2012 NAICS code 334310.

<sup>82</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007 – (continued....)

employees.<sup>83</sup> Therefore, under this size standard, the majority of such establishments can be considered small.

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

21. In this section, we describe the reporting, recordkeeping, and other compliance requirements adopted in the *Report and Order* and consider whether small entities are affected disproportionately by these requirements.

22. *Reporting Requirements.* The *Report and Order* does not adopt reporting requirements.

23. *Recordkeeping Requirements.* The *Report and Order* adopts certain recordkeeping requirements, which are applicable to covered small entities. Specifically, the following provisions will require covered entities to make a filing and, thus, to make and keep records of the filing:

- *Achievability* – The *Report and Order* implements rules for determining whether compliance with Section 204 and 205 accessibility requirements is “achievable.”<sup>84</sup> When faced with a complaint or enforcement action for a violation of the requirements adopted herein pursuant to either Section 204 or Section 205 of the CVAA, a covered entity may raise as a defense that a particular apparatus or navigation device does not comply with the rules because compliance was not achievable under the statutory factors.<sup>85</sup> Alternatively, a covered entity may seek a determination from the Commission that compliance with all of our rules is not achievable before manufacturing or importing the apparatus or navigation device.
- *Alternate Means of Compliance* – The *Report and Order* permits entities covered by Section 204 to comply with the requirements adopted pursuant to that section by alternate means.<sup>86</sup> A covered entity seeking to use an alternate means of compliance with Section 204 may either: (i) request a Commission determination that the proposed alternate means satisfies the statutory requirements through a request pursuant to Section 1.41 of the Commission’s rules; or (ii) claim in defense to a complaint or enforcement action that the Commission should determine that the party’s actions were permissible alternate means of compliance.
- *Complaint Procedures* – The *Report and Order* adopts procedures for consumer complaints alleging a violation of the Commission’s rules requiring accessibility of user interfaces and video programming guides and menus.<sup>87</sup> These procedures allow complainants to file their complaints either with the Commission or with the covered entity responsible for the problem and provide the covered entity 30 days to respond in writing to the complaint. In response to a complaint, a

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2007 Economic Census,” NAICS code 334310, Table EC0731SG3; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>83</sup> *Id.*

<sup>84</sup> See *Report and Order*, Section IV.A.4.

<sup>85</sup> Achievability is determined through a four factor analysis that examines: “(1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question. (2) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies. (3) The type of operations of the manufacturer or provider. (4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.” *Id.* Through this analysis, an otherwise covered entity can demonstrate that accessibility is not achievable.

<sup>86</sup> See *id.* Section VI.A.

<sup>87</sup> See *id.* Section VI.C.



covered entity must file with the Commission sufficient records and documentation to prove that it was (and remains) in compliance with the Commission's rules.<sup>88</sup> The procedures also require covered entities to make contact information available to consumers for the receipt and handling of written complaints.<sup>89</sup>

- Notification Requirements – The *Report and Order* requires MVPDs to notify consumers that navigation devices with the required accessibility features are available to consumers who are blind or visually impaired “upon request.”<sup>90</sup> Specifically, MVPDs must clearly and conspicuously inform consumers about the availability of accessible navigation devices when providing information about equipment options in response to a consumer inquiry about service, accessibility, or other issues<sup>91</sup> and also must provide notice about the availability of accessible navigation devices on their official website, such as a through a link on their home page. The notices must publicize the availability of accessible devices and solutions and convey the means for making requests for accessible equipment and the specific person, office or entity to whom such requests are to be made.
- Verification Requirements – The *Report and Order* allows covered entities to require verification of eligibility (as an individual who is blind or visually impaired) to the extent the covered entity chooses to rely on an accessibility solution that involves providing the consumer with sophisticated equipment and/or services at a price that is lower than that offered to the general public.<sup>92</sup> With respect to proof of eligibility, covered entities must allow a consumer to provide a wide array of documentation to verify eligibility for the accessibility solution provided.<sup>93</sup> In addition, they must protect personal information gathered from consumers through their verification procedures.<sup>94</sup>

24. *Other Compliance Requirements.* Under Section 204, the entities responsible for compliance are digital apparatus manufacturers.<sup>95</sup> Under Section 205, the entities responsible for compliance are MVPDs leasing or selling navigation devices, equipment manufacturers of navigation devices that place devices into the chain of commerce for sale to consumers, and other manufacturers of

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<sup>88</sup> *See id.*

<sup>89</sup> *See id.* Covered entities are encouraged to include this information with the other accessibility information they must post on their official website and are expected to prominently display their contact information in a way that makes it available and accessible to all consumers of their products and services. The *Report and Order* emphasizes that such notice should be provided in a location that is conspicuous to consumers and accessible to those who are blind or visually impaired, and requires covered entities to make available and accessible the contact information of a person with primary responsibility for accessibility compliance issues. Covered entities must provide that person's name and title or office, telephone number, fax number, postal mailing address, and email address. Covered entities must keep this information current and update it within 10 business days of any change.

<sup>90</sup> *See id.* Section VI.E.

<sup>91</sup> The *Report and Order* does not require a specific means of notification for these notices. *See id.*

<sup>92</sup> *See id.* Section VI.D.

<sup>93</sup> *Id.* In order to ensure that fulfilling such verification requests and the processes needed to verify the consumer's eligibility to receive the device will not be burdensome to consumers, the *Report and Order* strongly encourages covered entities to consult with people who are blind and visually impaired. In addition, although not required, the *Report and Order* encourages a covered entity to seek a determination from the Commission's Consumer and Governmental Affairs Bureau as to whether its proposed verification procedures would be burdensome to consumers before implementing such procedures. *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.* Section III.B.

navigation device hardware and software.<sup>96</sup> The *Report and Order* adopts the following compliance requirements, which are applicable to covered small entities:

- Requires apparatus covered by Section 204 – *i.e.*, digital apparatus designed to receive or play back video programming transmitted simultaneously with sound – to make “appropriate” built-in functions (*i.e.*, those used for the reception, play back, or display of video programming) accessible to individuals who are blind or visually impaired.<sup>97</sup> At this time, the “appropriate” built-in functions under Section 204 are limited to the 11 essential functions identified by the Video Programming Accessibility Advisory Committee (“VPAAC”), an advisory committee comprised of industry and consumer groups established by the Chairman of the Commission pursuant to the CVAA.<sup>98</sup>
- Requires navigation devices covered by Section 205 to make on-screen text menus and guides for the display or selection of multichannel video programming audibly accessible.<sup>99</sup> Nine of the 11 essential functions identified by the VPAAC are used for the display or selection of video programming and must be made audibly accessible on navigation devices to the extent they are accessed through on-screen text menus and guides. In addition, two functions (power on/off and volume adjust/mute) must be made accessible (but not necessarily *audibly* accessible) because they are controls necessary to access covered functions.
- Requires apparatus covered by Section 204 to provide access to closed captioning and video description through a mechanism for each that is reasonably comparable to a button, key, or icon,<sup>100</sup> and requires navigation devices covered by Section 205 to provide access to closed captioning through a mechanism reasonably comparable to a button, key, or icon.<sup>101</sup> With regard to Section 205, covered entities must ensure that mechanisms reasonably comparable to a button, key, or icon for activating closed captioning are provided on all their navigation devices (*i.e.*, such mechanisms are not subject to the “upon request” language in Section 205).<sup>102</sup>
- Requires entities covered by Section 205 to provide accessible navigation devices to requesting blind or visually impaired individuals “within a reasonable time,” defined as a time period comparable to the time it takes such entity to provide navigation devices generally to other consumers.<sup>103</sup>
- Requires entities covered by Section 205 to permit consumers who are blind or visually impaired to request compliant devices through any means that they generally make available to other consumers that request navigation devices.<sup>104</sup>

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<sup>96</sup> See *id.* Section III.C.

<sup>97</sup> See *id.* Section IV.A.1.

<sup>98</sup> See *id.* See also Pub. L. No. 111-260, § 201(a).

<sup>99</sup> See *Report and Order*, Section IV.A.2.

<sup>100</sup> See *id.* Section IV.B.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* Section V.C.

<sup>103</sup> See *id.* Section V.A.

<sup>104</sup> See *id.*

- Requires a manufacturer that provides navigation devices at retail to requesting blind or visually impaired consumers to make a good faith effort to have retailers make available compliant navigation devices to the same extent they make available navigation devices to other consumers generally.<sup>105</sup>
- Requires entities covered by Section 205 to ensure that any means they employ to accept requests for accessible devices are not more burdensome to blind or visually impaired individuals than the means they employ to provide navigation devices generally to other consumers.<sup>106</sup>
- Requires entities covered by Section 205 that rely on separate equipment or software (“separate solution”) to achieve accessibility under Section 205(b)(4) to provide such solution to a requesting individual who is blind or visually impaired.<sup>107</sup> In addition, the *Report and Order*:
  - Requires that if a non-compliant navigation device has any functions that are required to be made accessible pursuant to the rules we adopt in the *Report and Order*, any separate solution relied upon to achieve accessibility must make all of those functions accessible or enable the accessibility of those functions;
  - Requires that a separate solution be provided in a manner that is not more burdensome to requesting blind or visually impaired individuals than the manner in which other consumers generally obtain navigation devices;
  - Requires that a covered entity relying on a separate solution must make available such solution “within a reasonable time,” defined as a period of time comparable to the time in which it generally provides navigation devices to consumers who are not blind or visually impaired;
  - Concludes that a covered entity that provides separate equipment or software may not impose on a requesting consumer who is blind or visually impaired any charges beyond those it has imposed for the non-compliant navigation device. In cases where an entity provides accessibility functionality in only select devices, this constitutes an “other solution” under Section 205(b)(4)(B) for which an entity can impose no additional charge. For example, if a covered entity’s only solution is to provide a sophisticated navigation device (one with enhanced features and functions) to a consumer that requests a less sophisticated device, it cannot charge the consumer more than the price of the less sophisticated device; and
  - Concludes that if a covered entity’s chosen manner of compliance involves a software solution that must be operated on a third-party device (*e.g.*, a laptop, tablet, smart phone) or if additional services are required to make use of the device, this manner of compliance constitutes an “other solution” under Section 205(b)(4)(B); thus, the covered entity must provide that solution - *i.e.*, the software, third-party device, and any service needed to use the accessibility features - to the requesting individual at no additional charge.<sup>108</sup>
- Sets a three-year compliance deadline by which covered entities must generally comply with the requirements of Sections 204 and 205, and sets a five-year compliance deadline by which certain

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<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.* Section V.B.

<sup>108</sup> *See id.*

mid-sized and smaller MVPD operators and small MVPD systems must comply with the requirements of Section 205.<sup>109</sup>

25. *Potential for disproportionate impact on small entities.* As required by Sections 204 and 205 of the CVAA, the rules require covered entities, such as equipment manufacturers and MVPD service providers, to ensure that user interfaces and video programming guides on digital apparatus and navigation devices used to view video programming are accessible to consumers with disabilities (unless doing such is not achievable). Neither the statute nor the rules mandate a specific means of compliance. Indeed, Sections 204 and 205 of the CVAA restrict the Commission from specifying the technical standards, protocols, procedures, and other technical requirements for meeting the accessibility requirements of those sections.<sup>110</sup> In addition, entities covered by Section 205 of the CVAA have “maximum flexibility to select the manner of compliance” with Section 303(bb)(1) of the Act, as well as “maximum flexibility in the selection of the means for compliance with Section 303(bb)(2)” of the Act.<sup>111</sup> Entities covered by Section 204 may build in accessibility on digital apparatus or they can use alternate means to comply with the accessibility requirements of that section. Entities covered by Section 205 may build in solutions to make navigation devices accessible or they may use separate solutions (such as software, peripheral devices, specialized consumer premises equipment, a network-based service, or other solution) to ensure accessibility. No commenter provided information concerning the costs and administrative burdens associated with the *Report and Order’s* compliance requirements. Although the record does not contain specific information about the costs of compliance, covered entities have flexibility to choose the most cost-effective solution possible, and we anticipate that some solutions may be considerably less costly than others. For example, MVPDs may be able to purchase an accessible navigation device (e.g., TiVo) and provide it to a requesting customer who is blind or visually impaired to satisfy their accessibility obligations, which may be significantly less costly than having to develop a built-in solution and make corresponding changes to their headend facility. As discussed below, MVPD commenters said they do not know how they will comply, only that they expect that, whatever means is used, the costs will likely be greater for smaller entities than for larger ones.

26. In the record of this proceeding, MVPDs, in particular, have expressed concern regarding the potential for the proposed rule to place a disproportionate economic impact on smaller MVPDs.<sup>112</sup> Industry commenters, such as NCTA and NTCA,<sup>113</sup> state that the proposed rules may have greater impacts on smaller companies than larger ones,<sup>114</sup> and that “[s]maller cable operators do not have the financial wherewithal to develop these solutions on their own and typically rely on the research and development efforts of the larger operators prior to deploying new equipment and services to their customers.”<sup>115</sup> ACA states that “compliance with the accessible user guide requirements within a three-year timeframe will be challenging for all but the very largest MVPDs because there is substantial uncertainty about how accessibility requirements will be implemented, what technologies and equipment

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<sup>109</sup> See *id.* Section VI.B.

<sup>110</sup> 47 U.S.C. §§ 303(aa)(1), 303(bb)(1).

<sup>111</sup> See Pub. L. No. 111-260, §§ 205(b)(4)(A), 205(b)(5).

<sup>112</sup> See NCTA Comments at 17-19; ACA Comments 6-9; NTCA Comments at 5-6. See also SBA Aug. 15 *Ex Parte* Letter.

<sup>113</sup> NTCA represents small, rural local exchange carrier-affiliated MVPDs that use a myriad of different technologies to provide video in high-cost rural markets. NTCA Comments at 1 and 6.

<sup>114</sup> NCTA Comments at 18; NTCA Comments at 5.

<sup>115</sup> NCTA Comments at 18-19. See also ACA Comments at 8 (“accessibility solutions will be developed for the larger operators first and will benefit smaller operators only if these solutions are compatible with smaller or older systems”); SBA Aug. 15 *Ex Parte* Letter at 2 (“smaller MVPDs will face higher costs while possessing less of an ability to absorb or pass-through those costs to consumers”).

will be available for operators to meet them, and when they will be made commercially available.”<sup>116</sup> Regardless of the solution ultimately employed, MVPDs explain that, because of their relatively diminished purchasing power, small MVPDs will likely face higher prices than large MVPDs for technology solutions developed to meet the statute’s accessibility requirements. Therefore, while the economic impacts of the rules are uncertain at this time, it seems likely that the rules may disproportionately impact small MVPDs. As a result, the Commission takes steps to minimize this impact on small entities (see discussion below in Section E of this FRFA), consistent with the statutory mandate.

27. We note that it would be premature to undertake the formal cost-of-compliance analysis required by Section D of the RFA because the flexibility granted to covered entities in accordance with Sections 204 and 205 of the CVAA permits a wide array of means of compliance with varied costs, the Commission does not yet know how covered entities will choose to comply with the accessibility requirements, and more concrete financial data based on experience is not available because the rules have not yet gone into effect.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>117</sup> The *NPRM* invited comment on issues that had the potential to have significant impact on some small entities.<sup>118</sup>

29. The rules adopted in this *Report and Order* may have a significant economic impact in some cases, and that impact may affect a substantial number of small entities. Although the Commission has considered alternatives where possible, as directed by the RFA, to minimize economic impact on small entities, we emphasize that our action is governed by the congressional mandate contained in Sections 204 and 205 of the CVAA.

30. In formulating the final rules, however, the Commission has considered alternatives to minimize the economic impact on small entities. As discussed below, covered entities (including small entities) may avoid potentially economically burdensome compliance with certain requirements if accessibility is not “achievable” and are afforded flexibility with respect to the means of compliance. In addition, based on the record in the proceeding, certain mid-sized and smaller MVPD operators (*i.e.*, those with 400,000 or fewer subscribers) and small MVPD systems (*i.e.*, those with 20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers) are afforded more time to comply with the requirements of Section 205.

31. With regard to the accessibility requirements adopted pursuant to Sections 303(aa)(1) and 303(bb)(1) of the Act, the *Report and Order* adopts procedures enabling the Commission to grant exemptions to the rules where a petitioner has shown that compliance is not achievable (*i.e.*, cannot be accomplished with reasonable effort or expense).<sup>119</sup> This process will allow the Commission to address the impact of the rules on individual entities, including smaller entities, on a case-by-case basis and to

<sup>116</sup> ACA Comments at 6-7.

<sup>117</sup> 5 U.S.C. § 603(c)(1)-(c)(4).

<sup>118</sup> See *NPRM*, 28 FCC Rcd at 8538, Appendix B, ¶ 1.

<sup>119</sup> See *Report and Order*, Section IV.A.4. See also *supra* note 85.



modify the application of the rules to accommodate individual circumstances, which can reduce the costs of compliance for these entities. We note that two of the four statutory factors that the Commission will consider in determining achievability are particularly relevant to small entities: the nature and cost of the steps needed to meet the requirements, and the technical and economic impact on the entity's operations.

32. As an additional means of reducing the costs of compliance, the *Report and Order* provides that entities covered by Section 204 of the CVAA may use alternate means of compliance for the rules adopted pursuant to this section.<sup>120</sup> Under this approach, the Commission will permit an entity that seeks to use an alternate means of compliance to file a request pursuant to Section 1.41 of the Commission's rules for a determination that the proposed alternate means of compliance satisfies the requirements, or to claim in defense to a complaint or enforcement action that the Commission should determine that the party's actions were permissible alternate means of compliance. The Commission will evaluate these filings on a case-by-case basis. In addition, entities covered by Section 205 of the CVAA have "maximum flexibility to select the manner of compliance" with Section 303(bb)(1) of the Act, as well as "maximum flexibility in the selection of the means for compliance with Section 303(bb)(2)" of the Act.<sup>121</sup> Individual entities, including small entities, can benefit from the flexibility provided by these provisions.

33. Finally, in response to industry's request, the Commission adopted a two-year delay in compliance with the requirements of Section 205 for certain mid-sized and smaller MVPD operators and small MVPD systems.<sup>122</sup> Specifically, the later deadline will apply to: (1) MVPD operators with 400,000 or fewer subscribers; and (2) MVPD systems with 20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers. The delayed compliance deadline (which will be five (5) years from the date the *Report and Order* is published in the Federal Register) for such smaller entities will help minimize the economic impact of Section 205's requirements and addresses the potential for disproportionate impact discussed above (in Section D of this FRFA).

34. We note that the Commission also considered, but declined at this time to grant, a permanent exemption for small cable systems with 20,000 or fewer subscribers, as permitted by Section 205(b)(2).<sup>123</sup> However, all small cable systems other than those affiliated with an operator serving more than 10.1 million subscribers will benefit from the delayed compliance deadline described above. In addition, we note that, if the delayed compliance deadline proves insufficient to allow small systems to implement an affordable solution, the Commission may consider requests for a further extension on an individual or industry-wide basis. Whereas the uncertainty surrounding how covered small entities will comply makes it reasonable to afford a later compliance deadline, it also means it would be premature to assume that small cable systems will never be able to comply with the requirements of Section 205.

35. Overall, we believe we have appropriately considered both the interests of individuals with disabilities and the interests of the entities who will be subject to the rules, including those that are smaller entities, consistent with Congress' goal to "update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming."<sup>124</sup>

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<sup>120</sup> See *Report and Order*, Section VI.A.

<sup>121</sup> See Pub. L. No. 111-260, §§ 205(b)(4)(A), 205(b)(5).

<sup>122</sup> See *Report and Order*, Section VI.B.

<sup>123</sup> See *id.*

<sup>124</sup> H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S.Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

**F. Report to Congress**

36. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>125</sup> In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>126</sup>

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<sup>125</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>126</sup> See *id.* § 604(b).

## APPENDIX D

## Proposed Rules

The Federal Communications Commission proposes to amend Part 79 of Title 47 of the Code of Federal Regulations (CFR) as follows:

**PART 79 – Closed Captioning and Video Description of Video Programming**

1. The authority citation for Part 79 will continue to read as follows:

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, 617.

2. Amend § 79.108 by revising paragraph (d) and adding new paragraph (d)(2) to read as follows:

§ 79.108. Video programming guides and menus provided by navigation devices.

\* \* \* \* \*

**(d) Notification Requirements.**

**(1) MVPD notices.** Covered MVPDs must notify consumers that navigation devices with the required accessibility features are available to consumers who are blind or visually impaired upon request as follows:

**(i)** When providing information about equipment options in response to a consumer inquiry about service, accessibility, or other issues, MVPDs must clearly and conspicuously inform consumers about the availability of accessible navigation devices.

**(ii)** MVPDs must provide notice on their official websites about the availability of accessible navigation devices. MVPDs must prominently display information about accessible navigation devices and separate solutions on their websites in a way that makes such information available to all current and potential subscribers. The notice must publicize the availability of accessible devices and separate solutions and explain the means for making requests for accessible equipment and the specific person, office or entity to whom such requests are to be made. All information required by this section must be provided in a website format that is accessible to people with disabilities.

**(2) Navigation device manufacturer notices.** Navigation device manufacturers must notify consumers that navigation devices with the required accessibility features are available to consumers who are blind or visually impaired upon request as follows: A navigation device manufacturer must provide notice on its official website about the availability of accessible navigation devices. A navigation device manufacturer must prominently display information about accessible navigation devices and solutions on its website in a way that makes such information available to all current and potential consumers. The notice must publicize the availability of accessible devices and solutions and explain the means for making requests for accessible equipment and the specific person, office or entity to whom such requests are to be made. All information required by this section must be provided in a website format that is accessible to people with disabilities.

\* \* \* \* \*

## APPENDIX E

**Initial Regulatory Flexibility Act Analysis for the *Further Notice***

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities by the policies and rules proposed in the *Further Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments as specified in the *Further Notice*. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>2</sup> In addition, the *Further Notice* and this IRFA (or summaries thereof) will be published in the *Federal Register*.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rule Changes**

2. The *Further Notice* seeks comment on several issues relating to implementation of Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). In general, these provisions direct the Commission to adopt rules requiring that digital apparatus and navigation device user interfaces used to view video programming be accessible to and usable by individuals who are blind or visually impaired. Specifically, Section 204 directs the Commission to require that “appropriate built-in apparatus functions” be made accessible to blind or visually impaired people. Section 205 directs the Commission to require that “on-screen text menus and guides provided by navigation devices” be made accessible upon request by blind or visually impaired individuals. Both of these provisions also require that covered devices provide a mechanism that is “reasonably comparable to a button, key, or icon designated for activating” closed captioning, video description, and accessibility features. In the *Further Notice*, the Commission also seeks comment on whether Section 203 of the CVAA provides the agency with authority to require apparatus covered by that provision to make the secondary audio stream used for audible emergency information accessible through a mechanism reasonably comparable to a button, key, or icon.

3. The *Report and Order* accompanying the *Further Notice* adopts rules requiring the accessibility of user interfaces on digital apparatus and navigation devices used to view video programming. The rules adopted in the *Report and Order* effectuate Congress’s goals in enacting Sections 204 and 205 of the CVAA by: (1) enabling individuals who are blind or visually impaired to more easily access video programming on a range of devices; and (2) enabling consumers who are deaf or hard of hearing to more easily activate closed captioning on video programming devices. By imposing requirements with regard to the accessibility of user interfaces and video programming guides and menus, the rules adopted in the *Report and Order* advance Congress’s objective in the CVAA to “update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.”<sup>4</sup> In the *Further Notice*, the Commission seeks comment on the adoption of targeted additional rules to implement Sections 204 and 205 of the CVAA, as discussed in Section D below.

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

**B. Legal Basis**

4. The proposed action is authorized pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, and the authority contained in Sections 4(i), 4(j), 303(aa), 303(bb), 303(r), 303(u), and 716(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(aa), 303(bb), 303(r), 303(u), 617(g).

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in the *Report and Order*.<sup>5</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>6</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>7</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>8</sup> Small entities that are directly affected by the rules adopted in the *Report and Order* and proposed in the *Further Notice* include manufacturers of digital apparatus, MVPDs leasing or selling navigation devices, equipment manufacturers of navigation devices that place devices into the chain of commerce for sale to consumers, and other manufacturers of navigation device hardware and software.

6. Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.”<sup>9</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>10</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>11</sup> Of this total, 30,178 establishments had fewer than 100

<sup>5</sup> 5 U.S.C. § 603(b)(3).

<sup>6</sup> *Id.* § 601(6).

<sup>7</sup> *Id.* § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>8</sup> 15 U.S.C. § 632.

<sup>9</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (“CCTV”) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (“DTH”) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (“MMDS”).

<sup>10</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>11</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007

(continued....)



employees, and 1,818 establishments had 100 or more employees.<sup>12</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

7. Cable Companies and Systems. The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.<sup>13</sup> Industry data shows that there were 1,141 cable companies at the end of June 2012.<sup>14</sup> Of this total, all but 10 incumbent cable companies are small under this size standard.<sup>15</sup> In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>16</sup> Current Commission records show 4,945 cable systems nationwide.<sup>17</sup> Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

8. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>18</sup> There are approximately 56.4 million incumbent cable video subscribers in the United States today.<sup>19</sup> Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates,

(Continued from previous page)

Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>12</sup> *Id.*

<sup>13</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>14</sup> NCTA, Industry Data, Number of Cable Operating Companies (June 2012), <http://www.ncta.com/Statistics.aspx> (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99 at ¶ 24 (rel. July 22, 2013) ("15<sup>th</sup> Annual Competition Report").

<sup>15</sup> See SNL Kagan, "Top Cable MSOs – 12/12 Q"; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc>. We note that, when applied to an MVPD operator, under this size standard (*i.e.*, 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) ("CALM Act Report and Order") (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

<sup>16</sup> 47 C.F.R. § 76.901(c).

<sup>17</sup> The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

<sup>18</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>19</sup> See NCTA, Industry Data, Cable Video Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

do not exceed \$250 million in the aggregate.<sup>20</sup> Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.<sup>21</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>22</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

9. Direct Broadcast Satellite (DBS) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, Wired Telecommunications Carriers,<sup>23</sup> which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>24</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>25</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>26</sup> Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.<sup>27</sup> Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.<sup>28</sup>

<sup>20</sup> 47 C.F.R. § 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

<sup>21</sup> *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Aug. 30, 2013).

<sup>22</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. *See* 47 C.F.R. § 76.901(f).

<sup>23</sup> *See* 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>24</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>25</sup> U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>26</sup> *Id.*

<sup>27</sup> 13 C.F.R. § 121.201; NAICS code 517510 (2002).

<sup>28</sup> *See 15<sup>th</sup> Annual Competition Report*, at ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at ¶¶ 27, 110-11.

Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

10. Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, Wired Telecommunications Carriers,<sup>29</sup> which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>30</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>31</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>32</sup> Therefore, under this size standard, the majority of such businesses can be considered small.

11. Home Satellite Dish (HSD) Service. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.<sup>33</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having

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<sup>29</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.*" (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>30</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>31</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>32</sup> *Id.*

<sup>33</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services." U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

1,500 or fewer employees.<sup>34</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>35</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>36</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

12. Open Video Services. The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>37</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>38</sup> OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.<sup>39</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>40</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>41</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>42</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>43</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>44</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

<sup>34</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>35</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>36</sup> *Id.*

<sup>37</sup> 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) (“*Thirteenth Annual Cable Competition Report*”).

<sup>38</sup> See 47 U.S.C. § 573.

<sup>39</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.” U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>40</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>41</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>42</sup> *Id.*

<sup>43</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

<sup>44</sup> See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

13. Wireless cable systems – Broadband Radio Service and Educational Broadband Service. Wireless cable systems use the Broadband Radio Service (BRS)<sup>45</sup> and Educational Broadband Service (EBS)<sup>46</sup> to transmit video programming to subscribers. In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>47</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>48</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.<sup>49</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>50</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>51</sup> Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

14. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to

<sup>45</sup> BRS was previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS). *See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

<sup>46</sup> EBS was previously referred to as the Instructional Television Fixed Service (ITFS). *See id.*

<sup>47</sup> 47 C.F.R. § 21.961(b)(1).

<sup>48</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

<sup>49</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

<sup>50</sup> *Id.* at 8296.

<sup>51</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).



provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.<sup>52</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.<sup>53</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>54</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>55</sup> Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses.<sup>56</sup> The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.<sup>57</sup>

15. Incumbent Local Exchange Carriers (ILECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. ILECs are included in the SBA's economic census category, Wired Telecommunications Carriers.<sup>58</sup> Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>59</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>60</sup> Of this total, 30,178

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<sup>52</sup> U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition) at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television ("CCTV") services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system ("DTH") services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services ("MMDS").

<sup>53</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>54</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>55</sup> *Id.*

<sup>56</sup> <http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp>.

<sup>57</sup> The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

<sup>58</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>59</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>60</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.



establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>61</sup> Therefore, under this size standard, the majority of such businesses can be considered small.

16. Small Incumbent Local Exchange Carriers. We have included small incumbent local exchange carriers in this present RFA analysis. A “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>62</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>63</sup> We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

17. Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. These entities are included in the SBA’s economic census category, Wired Telecommunications Carriers.<sup>64</sup> Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>65</sup> Census data for 2007 shows that there were 31,996 establishments that operated that year.<sup>66</sup> Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.<sup>67</sup> Therefore, under this size standard, the majority of such businesses can be considered small.

18. Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile

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<sup>61</sup> *Id.*

<sup>62</sup> 15 U.S.C. § 632.

<sup>63</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>64</sup> See 13 C.F.R. § 121.201; 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television services using facilities and infrastructure that they operate are included in this industry.*” (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>65</sup> 13 C.F.R. § 121.201; 2012 NAICS code 517110.

<sup>66</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>67</sup> *Id.*

communications equipment, and radio and television studio and broadcasting equipment.<sup>768</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees.<sup>69</sup> Census data for 2007 shows that there were 939 establishments that operated for part or all of the entire year.<sup>70</sup> Of those, 912 operated with fewer than 500 employees, and 27 operated with 500 or more employees.<sup>71</sup> Therefore, under this size standard, the majority of such establishments can be considered small.

19. Audio and Video Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing electronic audio and video equipment for home entertainment, motor vehicles, and public address and musical instrument amplification. Examples of products made by these establishments are video cassette recorders, televisions, stereo equipment, speaker systems, household-type video cameras, jukeboxes, and amplifiers for musical instruments and public address systems.”<sup>72</sup> The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees.<sup>73</sup> Census data for 2007 shows that there were 492 establishments in this category operated for part or all of the entire year.<sup>74</sup> Of those, 488 operated with fewer than 500 employees, and four operated with 500 or more employees.<sup>75</sup> Therefore, under this size standard, the majority of such establishments can be considered small.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

20. In the accompanying *Report and Order*, the Commission adopted rules establishing the general regulatory framework applicable to entities subject to Sections 204 and 205 of the CVAA. The Commission, in the *Further Notice*, proposes a few additional rules to address possible gaps in coverage of rules adopted in the *Report and Order*. In this section, we describe the reporting, recordkeeping, and other compliance requirements proposed in the *Further Notice* and consider whether small entities are affected disproportionately by any such requirements.

21. *Reporting Requirements.* The *Further Notice* does not propose to adopt reporting requirements.

22. *Recordkeeping Requirements.* The *Further Notice* proposes certain recordkeeping requirements that would be applicable to covered small entities. In particular, the *Further Notice*:

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<sup>68</sup> U.S. Census Bureau, 2012 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>69</sup> 13 C.F.R. § 121.201; 2012 NAICS code 334220.

<sup>70</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007 – 2007 Economic Census,” NAICS code 334220, Table EC0731SG3; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>71</sup> *Id.*

<sup>72</sup> U.S. Census Bureau, 2012 NAICS Definitions, “334310 Audio and Video Equipment Manufacturing” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>73</sup> 13 C.F.R. § 121.201; 2012 NAICS code 334310.

<sup>74</sup> U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2007 – 2007 Economic Census,” NAICS code 334310, Table EC0731SG3; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

<sup>75</sup> *Id.*

- proposes to implement the requirement that covered apparatus make appropriate built-in functions “usable by” individuals who are blind or visually impaired, by defining the term “usable,” and by adopting information, documentation, and training requirements that are analogous to rules the Commission has adopted in other CVAA contexts;
- seeks comment on whether to adopt additional consumer notification requirements for MVPDs, and what those requirements should be;
- tentatively concludes that equipment manufacturers subject to Section 205 should be required to inform consumers about the availability of accessible devices and accessibility solutions, proposes that equipment manufacturers must prominently display accessibility information on their official website, and seeks comment on whether additional notification requirements are necessary and, if so, what those requirements should be; and
- requests comment on whether to impose notification requirements on equipment manufacturers subject to Section 204 to ensure consumers with disabilities are informed about which products contain the required accessibility features and which ones lack such features.

23. *Other Compliance Requirements.* The *Further Notice* proposes other compliance requirements that would be applicable to covered small entities. In particular, the *Further Notice*:

- seeks comment on whether the phrase “accessibility features” in Sections 303(aa)(3) and 303(bb)(2) of the Act includes user display settings for closed captioning, whether those sections can be interpreted to require covered entities to ensure that consumers are able to locate and control such settings, and how the Commission would implement a requirement to provide an activation mechanism reasonably comparable to a button, key or icon with regard to user display settings for closed captioning;
- seeks comment on whether to require manufacturers of apparatus covered by Section 203 of the CVAA to provide access to the secondary audio stream used for audible emergency information by a mechanism reasonably comparable to a button, key, or icon, and how to implement such a requirement.

24. Because no commenter provided specific information quantifying the costs and administrative burdens associated with the rules adopted in the accompanying *Report and Order*, we cannot precisely estimate the impact of the rules proposed in the *Further Notice* on small entities. As discussed in Section E *infra*, however, Sections 204 and 205 of the CVAA afford covered entities maximum flexibility in the means and manner of complying with the statute and its implementing rules, including those proposed in the *Further Notice*. In addition, entities subject to Sections 203, 204 and 205 need not comply with certain accessibility requirements if they are able to demonstrate to the Commission that compliance is not achievable.<sup>76</sup>

25. Based on the record of this proceeding, MVPDs, in particular, have expressed concern regarding the potential for the rules adopted in accompanying *Report and Order* to place a disproportionate economic impact on smaller MVPDs.<sup>77</sup> In particular, NCTA and NTCA<sup>78</sup> have asserted

<sup>76</sup> See 47 U.S.C. § 303(u)(2) (requiring that certain apparatus comply with accessibility requirements in Section 303(u)(1) of the Act only “if achievable”); 47 U.S.C. § 303(aa)(1) (requiring, among other things, that certain digital apparatus be designed, developed, and fabricated so that control of appropriate built-in functions are accessible to and usable by individuals who are blind or visually impaired “if achievable”); 303(bb)(1) (requiring, among other things, that certain on-screen text menus and guides be audibly accessible in real time “if achievable”).

<sup>77</sup> See NCTA Comments at 17-19; ACA Comments 6-9; NTCA Comments at 5-6. See also SBA *ex parte* letter (dated Aug. 15, 2013).

that the rules proposed in the *Notice of Proposed Rulemaking* likely would affect small companies to a greater extent than large companies.<sup>79</sup> Thus, while the economic impact of the rules on small entities is not quantifiable at this time, based on the general assertions of these parties, it appears likely that the proposed rules, if adopted, would affect small MVPDs disproportionately. As a result, the Commission in Section E below considers alternatives that have the potential to minimize the economic effect of its proposed rules on small entities, consistent with Congress's mandates in Sections 203, 204 and 205.<sup>80</sup>

**E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered**

26. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>81</sup>

27. Similar to the rules promulgated in the accompanying *Report and Order*, the rules proposed in the *Further Notice*, if adopted, could have a significant economic impact on a substantial number of small entities.<sup>82</sup> Although the proposals in the *Further Notice* stem from the Congressional mandates set forth in Sections 203, 204 and 205 of the CVAA, the Commission has considered whether any alternatives exist that would allow it to minimize the economic impact of such proposals (if adopted) on small entities. As discussed below, Sections 203, 204 and 205 of the CVAA each contain provisions that allow the Commission to tailor its rules, as necessary, to small entities for whom compliance with such rules is economically burdensome.

28. First, an entity (including a small entity) subject to Sections 203, 204 and 205 can avoid compliance with certain accessibility requirements if it is able to demonstrate to the Commission that such compliance is not "achievable" (*i.e.*, cannot be accomplished with reasonable effort or expense).<sup>83</sup> In the accompanying *Report and Order*, the Commission adopted procedures enabling it to determine that a particular entity, including a small entity, need not comply with the accessibility requirements in Sections 204 and 205 where such entity has made this showing.<sup>84</sup> These procedures will allow the

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<sup>78</sup> NTCA represents small, rural local exchange carrier-affiliated MVPDs that use a myriad of different technologies to provide video in high-cost rural markets. NTCA Comments at 1 and 6.

<sup>79</sup> NCTA Comments at 18; NTCA Comments at 5.

<sup>80</sup> We note that SBA filed comments in response to the initial IRFA in this proceeding expressing concerns regarding the IRFA's compliance with the RFA. In view of SBA's concerns, we discuss in greater detail in this IRFA the potential disproportionate impact on small entities of the rules proposed in the *Further Notice*, as well as discussing the impact of the final rules on such entities. See FRFA, Appendix C, Sections B, D and E.

<sup>81</sup> 5 U.S.C. § 603(c)(1)-(c)(4).

<sup>82</sup> In the *Further Notice*, the Commission seeks comment on the impact of its proposed rules on small entities. See *Further Notice*, ¶¶ 138-52.

<sup>83</sup> See *supra* note 76.

<sup>84</sup> See *Report and Order*, Section IV.A.4. Achievability is determined through a four factor analysis that examines: "(1) the nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment

(continued....)

Commission to address the impact of the rules on individual entities, including smaller entities, on a case-by-case basis, and to modify application of its rules to accommodate individual circumstances, thereby potentially reducing the costs of compliance for such entities. We note that two of the four statutory factors that the Commission must consider in assessing achievability are particularly relevant to small entities: (i) the nature and cost of the steps needed to meet the requirements, and (ii) the technical and economic impact on the entity's operations. Thus, with respect to certain proposed rules that derive from Sections 203, 204 or 205 of the CVAA, a small entity may be able to avoid compliance in cases where it can demonstrate that compliance is not achievable.

29. In addition, with respect to rules proposed in the *Further Notice* that have their statutory basis in Section 204 of the CVAA (e.g., proposal to define the term "usable" and to adopt information, documentation, and training requirements analogous to rules the Commission has adopted in other CVAA contexts), we note that entities covered by Section 204(a), including small entities, can pursue alternate means of complying with the requirements of that provision. As set forth in the accompanying *Report and Order*, the Commission will permit an entity that seeks to use an alternate means of compliance to file a request pursuant to Section 1.41 of the Commission's rules for a determination that the proposed alternate means of compliance satisfies the relevant requirements, or to claim in defense to a complaint or enforcement action that the Commission should determine that the party's actions were permissible alternate means of compliance. The Commission will evaluate such filings on a case-by-case basis.<sup>85</sup> Similarly, entities covered by Section 205 of the CVAA can satisfy their accessibility obligations through the use of built-in or separate solutions and are given "maximum flexibility to select the manner of compliance" with Section 303(bb)(1) of the Act, as well as "maximum flexibility in the selection of the means for compliance with Section 303(bb)(2)" of the Act.<sup>86</sup> Individual entities, including small entities, can take advantage of the flexibility afforded by these provisions.

30. With respect to the proposal in the *Further Notice* to require apparatus covered by Section 203 to make the secondary audio stream used for audible emergency information accessible through a mechanism reasonably comparable to a button, key, or icon,<sup>87</sup> we note that if the Commission were to adopt this requirement, entities covered by Section 203, including small entities, potentially can benefit from provisions in Section 203 that impose certain accessibility requirements only where "achievable" or "technically feasible."<sup>88</sup>

31. Finally, in the accompanying *Report and Order*, the Commission adopted rules that defer compliance with the requirements of Section 205 by two years for certain mid-sized and smaller MVPD operators and small MVPD systems.<sup>89</sup> In particular, the Commission afforded certain mid-sized and smaller MVPD operators (i.e., those with 400,000 or fewer subscribers) and small MVPD systems (i.e., those with 20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers) more time to comply with the requirements of Section 205. This type of delayed compliance schedule can help to minimize the economic impact of any requirements adopted pursuant to the *Further Notice* and address any disproportionate impact of such requirements on small entities. In addition, we note that, if the delayed compliance deadline proves insufficient to allow small systems to implement an affordable solution, the Commission may consider requests for a further extension on an individual or industry-wide basis.

(Continued from previous page)\_\_\_\_\_ containing varying degrees of functionality and features, and offered at differing price points." *Id.* Through this analysis, an otherwise covered entity can demonstrate that accessibility is not achievable.

<sup>85</sup> See *Report and Order*, Section VI.A.

<sup>86</sup> See Pub. L. No. 111-260, §§ 205(b)(4)(A), 205(b)(5).

<sup>87</sup> See *Further Notice*, ¶ 147.

<sup>88</sup> See 47 U.S.C. § 303(u)(1), (2).

<sup>89</sup> See *Report and Order*, Section VI.B.



32. Based on these considerations, we believe that, in proposing additional rules in the *Further Notice*, we have appropriately considered both the interests of blind or visually impaired individuals and the interests of the entities who will be subject to the rules, including those that are smaller entities, consistent with Congress' goal to "update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming."<sup>90</sup>

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

33. None.

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<sup>90</sup> H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S.Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

## APPENDIX F

## Relevant Portions of the CVAA

**SEC. 204. USER INTERFACES ON DIGITAL APPARATUS.**

(a) Amendment- Section 303 of the Communications Act of 1934 (47 U.S.C. 303) is further amended by adding after subsection (z), as added by section 203 of this Act, the following new subsection:

“(aa) Require--

“(1) if achievable (as defined in section 716) that digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement;

“(2) that if on-screen text menus or other visual indicators built in to the digital apparatus are used to access the functions of the apparatus described in paragraph (1), such functions shall be accompanied by audio output that is either integrated or peripheral to the apparatus, so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired in real-time;

“(3) that for such apparatus equipped with the functions described in paragraphs (1) and (2) built in access to those closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features; and

“(4) that in applying this subsection the term ‘apparatus’ does not include a navigation device, as such term is defined in section 76.1200 of the Commission’s rules (47 CFR 76.1200).”

(b) Implementing Regulations- Within 18 months after the submission to the Commission of the Advisory Committee report required by section 201(e)(2), the Commission shall prescribe such regulations as are necessary to implement the amendments made by subsection (a).

(c) Alternate Means of Compliance- An entity may meet the requirements of section 303(aa) of the Communications Act of 1934 through alternate means than those prescribed by regulations pursuant to subsection (b) if the requirements of those sections are met, as determined by the Commission.

(d) Deferral of Compliance with ATSC Mobile DTV Standard A/153- A digital apparatus designed and manufactured to receive or play back the Advanced Television Systems Committee’s Mobile DTV Standards A/153 shall not be required to meet the requirements of the regulations prescribed under subsection (b) for a period of not less than 24 months after the date on which the final regulations are published in the Federal Register.

**SECTION 205— ACCESS TO VIDEO PROGRAMMING GUIDES AND MENUS PROVIDED ON NAVIGATION DEVICES.**

(a) Amendment- Section 303 of the Communications Act of 1934 (47 U.S.C. 303) is further amended by adding after subsection (aa), as added by section 204 of this Act, the following new subsection

(bb) Require--

(1) if achievable (as defined in section 716), that the on-screen text menus and guides provided by navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations) for the display or selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement;

(2) for navigation devices with built-in closed captioning capability, that access to that capability through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features; and

(3) that, with respect to navigation device features and functions--

(A) delivered in software, the requirements set forth in this subsection shall apply to the manufacturer of such software; and

(B) delivered in hardware, the requirements set forth in this subsection shall apply to the manufacturer of such hardware.

(b) Implementing Regulations-

(1) IN GENERAL- Within 18 months after the submission to the Commission of the Advisory Committee report required by section 201(e)(2), the Commission shall prescribe such regulations as are necessary to implement the amendment made by subsection (a).

(2) EXEMPTION- Such regulations may provide an exemption from the regulations for cable systems serving 20,000 or fewer subscribers.

(3) Responsibility- An entity shall only be responsible for compliance with the requirements added by this section with respect to navigation devices that it provides to a requesting blind or visually impaired individual.

(4) SEPARATE EQUIPMENT OR SOFTWARE-

(A) IN GENERAL- Such regulations shall permit but not require the entity providing the navigation device to the requesting blind or visually impaired individual to comply with section 303(bb)(1) of the Communications Act of 1934 through that entity's use of software, a peripheral device, specialized consumer premises equipment, a network-based service or other solution, and shall provide the maximum flexibility to select the manner of compliance.

(B) REQUIREMENTS- If an entity complies with section 303(bb)(1) of the Communications Act of 1934 under subparagraph (A), the entity providing the navigation device to the requesting blind or visually impaired individual shall provide any such software, peripheral device, equipment, service, or solution at no additional charge and

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within a reasonable time to such individual and shall ensure that such software, device, equipment, service, or solution provides the access required by such regulations.

(5) USER CONTROLS FOR CLOSED CAPTIONING- Such regulations shall permit the entity providing the navigation device maximum flexibility in the selection of means for compliance with section 303(bb)(2) of the Communications Act of 1934 (as added by subsection (a) of this section).

(6) PHASE-IN-

(A) IN GENERAL- The Commission shall provide affected entities with--

(i) not less than 2 years after the adoption of such regulations to begin placing in service devices that comply with the requirements of section 303(bb)(2) of the Communications Act of 1934 (as added by subsection (a) of this section); and

(ii) not less than 3 years after the adoption of such regulations to begin placing in service devices that comply with the requirements of section 303(bb)(1) of the Communications Act of 1934 (as added by subsection (a) of this section).

(B) APPLICATION- Such regulations shall apply only to devices manufactured or imported on or after the respective effective dates established in subparagraph (A).

**STATEMENT OF  
ACTING CHAIRWOMAN MIGNON L. CLYBURN**

*Re: Accessibility of User Interfaces, and Video Programming Guides and Menus, MB Docket No. 12-108; Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 12-107*

The way that Americans watch video has changed profoundly in the twenty-first century. The modern television is connected to an array of set-top boxes, video game systems, and removable media players that allow consumers to view online video, cable and satellite video, DVDs, and Blu-ray discs. Companies in all sectors constantly develop new solutions for consumers to use when navigating this universe of content and viewing video, but consumers with disabilities have often been left behind because too few of these options are accessible to them. With this Order, we adopt rules that fulfill Congress's goal of making these solutions available to all.

Congress adopted Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 because they recognized that people with disabilities need better access to video programming devices and navigational tools. These days, it is nearly impossible to find the channel or show you want to watch without navigating some sort of visual guide that can only be accessed on your television screen. But for people who are blind or visually impaired, that may leave them at risk because they are unable to find a news channel during an emergency or frustrated by missing the hottest new show or a big game. Likewise, it is often too difficult to switch captions and video description on and off. Congress recognized these challenges and directed us to adopt rules to address them, and I am pleased that we are doing just that.

This Order was carefully written to ensure that manufacturers, cable, and satellite providers have the flexibility to comply with our rules in ways that make sense for them. It certainly helps that consumer and industry groups found a lot of common ground as the rulemaking proceeded, and for that I am grateful. With companies using the flexibility our rules affords them, along with guidance from those in the disability community, to develop accessibility solutions that are as easy to use and as innovative as the navigation solutions they continue to develop, I am hopeful that we are only at the beginning of a long, fruitful relationship that will blossom as companies discover innovative ways to make their devices accessible.

The Media Bureau, Consumer and Governmental Affairs Bureau, and Office of General Counsel staff members that worked on this Order and Further Notice deserve special recognition. They worked diligently with a complex part of the statute and under an extremely tight deadline to present us with an item that will make it easier for people with disabilities to access video programming. They are shining examples of the important work that our federal government employees do on behalf of all Americans, and I thank them for their service.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108; *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 12-107, Report and Order and Further Notice of Proposed Rulemaking

We live in a world of programming abundance. The number of available channels has multiplied—and with it the choices we need to make every time we turn on the television or seek video programming on any screen handy. Yet for the blind and visually impaired, small tasks—like finding a favorite show or tracking down information about programs—can be difficult.

That is why today's decision is so important. It will help ensure that individuals who are blind or visually impaired can more easily access video programming on a wide range of video devices. It also will enable consumers who are deaf and hard of hearing to more easily activate closed captioning on video devices. Given the speed with which programming guides are changing, crafting rules and regulations like this is no small task. Going forward we need to be vigilant and enforce the rules we have put in place. But more than that, we will need to monitor the marketplace and to make sure that as time and technology march on our rules continue to provide the access contemplated in the law.

This decision marks the last new rulemaking that the Commission must complete to implement the Twenty-First Century Communications and Video Act. Our work is not yet done, but this milestone merits attention. For all the complexity of this law, its goal is undeniably simple: putting in place policies that will extend opportunity and access in the digital age. I want to thank my colleagues at the Commission for their hard work to date implementing this legislation. I also want to recognize the work of the consumer electronics industry, telecommunications companies, and providers and distributors of video programming.

Finally, we would not be celebrating our success today without the tireless advocacy of the many champions of Americans with disabilities who fought for this law and pressed for its just implementation. I know that both from my time at the Commission and from my work on Capitol Hill before I arrived at the agency. They have my support and deep admiration.



**STATEMENT OF  
COMMISSIONER AJIT PAI  
APPROVING IN PART AND CONCURRING IN PART**

*Re: Accessibility of User Interfaces, and Video Programming Guide and Menus*, MB Docket No. 12-108; *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Act of 2010*, MB Docket No. 12-107.

Today, the Commission issues the final set of rules required by the Twenty-First Century Communications and Video Accessibility Act (CVAA). We certainly didn't save the easiest for last. Sections 204 and 205 of the CVAA present many interpretive challenges. In fact, they are probably the most difficult statutory provisions I have encountered during my tenure at the Commission.

Much hard work has gone into this item, and on the whole, I believe that we have ended up with a good result. The rules that we adopt today will help our nation's blind and visually impaired citizens access video programming more easily while also providing the private sector with sufficient flexibility to achieve this important objective. I commend all stakeholders for coming to the table and helping the Commission formulate the sensible approach that is embodied in this Order.

I am particularly pleased that this item remains true to the language of the statute in distinguishing devices covered by Section 204 from those covered by Section 205. As I indicated in my statement accompanying the Notice of Proposed Rulemaking,<sup>1</sup> the CVAA clearly provides that navigation devices—whether or not they are supplied by a multichannel video programming distributor—are covered by Section 205 while digital apparatus that are not navigation devices are covered by Section 204.<sup>2</sup> The regulations promulgated in this item respect this dividing line drawn by Congress.

Although I approve of the vast majority of today's Order, I am concurring in part for two reasons. *First*, for the reasons set forth in my statement accompanying the *IP Closed Captioning Reconsideration Order*,<sup>3</sup> I continue to believe that items such as digital still cameras and baby monitors are not “designed to receive or play back video programming transmitted . . . simultaneously with sound.” The language of the CVAA (“designed to”) indicates that we should not focus solely on a device's capabilities but rather employ an objective intent test under which we ask whether a reasonable person would conclude that a device was intended to receive or play back video programming. Applying this test, I do not think that digital still cameras and baby monitors fall within the scope of Section 204. I appreciate the Commission's decision here to defer manufacturers' obligations with respect to such equipment for a lengthy period of eight years. And I recognize that the Commission's interpretation of Section 204 today is consistent with our interpretation of similar language in Section 203. Nevertheless, I continue to believe that the Commission's prior interpretation was flawed and that the better course in this item would

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<sup>1</sup> *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Notice of Proposed Rulemaking, 28 FCC Rcd 8506, 8554 (2013) (Statement of Commissioner Ajit Pai, Approving in Part and Concurring in Part), available at <http://go.usa.gov/W2Tw>.

<sup>2</sup> See 47 U.S.C. § 303(aa)(4) (“[I]n applying this subsection the term ‘apparatus’ does not include a navigation device, as such term is defined in section 76.1200 of the Commission's rules (47 CFR 76.1200).”); 47 U.S.C. § 303(bb)(1) (covering “navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations)”).

<sup>3</sup> See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-54, Order on Reconsideration and Further Proposed Notice of Rulemaking, 28 FCC Rcd 8785, 8828–29 (2013) (Statement of Commissioner Ajit Pai, Approving in Part and Concurring in Part), available at <http://go.usa.gov/W2Te>.

have been to correct our past mistake rather than trying to work around it by establishing an eight-year compliance deadline.<sup>4</sup>

*Second*, I harbor serious doubts about the decision to require *all* navigation devices with built-in closed captioning capability to provide access to that capability through a mechanism reasonably comparable to a button, key, or icon. Section 205(b)(3) of the CVAA states: “An entity shall *only* be responsible for compliance with the requirements added by this section with respect to navigation devices that it provides to a requesting blind or visually impaired individual.”<sup>5</sup> And the mandate for navigation devices to provide a mechanism reasonably comparable to a button, key, or icon that can access closed captioning is indisputably a requirement added by Section 205 of the CVAA. The statutory language is thus unambiguous: An entity is only responsible for complying with the requirement to provide such a mechanism when a navigation device is provided to a requesting blind or visually impaired individual.

To be sure, such an outcome would be unusual to say the least. After all, closed captioning is of the greatest use to individuals with a hearing impairment, not a visual impairment. Today’s item, however, recognizes that closed captions can be of benefit to those with a visual impairment.<sup>6</sup> So perhaps Congress thought that individuals with visual impairments would have the greatest difficulty accessing closed captions (hence the need to give them an easy way of accessing closed captioning capability). Or perhaps Congress simply made a drafting error.<sup>7</sup> Whatever the case, although I believe that the Commission’s decision on this issue is well intentioned, I do not believe that Congress left us with the discretion to impose a policy preference different than the one dictated by the plain meaning of the CVAA.<sup>8</sup>

All of this, however, should not overshadow my general support for this item and my appreciation for the yeoman’s work done by Commission staff in this proceeding. Indeed, this proceeding reflects our agency at its best. Through an open dialogue with all stakeholders and collaboration among all Commissioners’ offices, the Media Bureau, the Consumer and Governmental Affairs Bureau, and the Office of General Counsel, we were able to reach a consensus that should serve everyone well.

Finally, I look forward to working with my colleagues in addressing the issues teed up in the Further Notice of Proposed Rulemaking. I appreciate the Commission’s decision to defer action on those issues where the record was insufficient to allow us to move forward at this time. I’m especially hopeful that the rules we adopt today and those we adopted in the *IP Closed Captioning Order* will be given time to work before we impose substantially more regulation. As a general matter, we should allow room for innovative solutions to emerge in response to our rules implementing the CVAA before reaching any judgment as to whether yet more rules are necessary.

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<sup>4</sup> I also continue to believe, as explained in my statement accompanying the *IP Closed Captioning Reconsideration Order*, that removable media players are not “designed to receive or play back video programming transmitted . . . simultaneously with sound.” *See id.* I thus would exclude them from our regulations implementing Section 204 as well.

<sup>5</sup> Pub. L. No. 111-260, § 205(b)(3), 124 Stat. 2751 (2010) (emphasis added).

<sup>6</sup> *Order* at note 262.

<sup>7</sup> *Cf. AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 397 (1999) (“It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.”).

<sup>8</sup> *Cf. U.S. v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95–96 (1820) (Marshall, C.J.) (“Where there is no ambiguity in the words [of a statute], there is no room for construction.”).