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

In the Matter of	)	
	)	
Accessibility of User Interfaces, and Video Programming Guides and Menus	)	MB Docket No. 12-108
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: May 30, 2013 **Released: May 30, 2013**

Comment Date: [25 days after date of publication in the Federal Register]
Reply Comment Date: [50 days after date of publication in the Federal Register]

By the Commission: Commissioner Pai approving in part, concurring in part and issuing a statement.

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I. INTRODUCTION

1. With this Notice of Proposed Rulemaking ("NPRM"), we begin our implementation of Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act

("CVAA").[1] These sections generally require that user interfaces on digital apparatus and navigation devices used to view video programming be accessible to and usable by individuals who are blind or visually impaired. Both of these sections also require that these devices provide a mechanism that is "reasonably comparable to a button, key, or icon designated for activating" certain accessibility features. As set forth below, we seek comment on whether to interpret Section 205 of the CVAA to apply to navigation devices supplied by multichannel video programming distributors ("MVPDs") and Section 204 of the CVAA to apply to all other "digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound." Alternatively, we seek comment on whether to interpret Section 205 to apply to navigation devices, as that term is defined in section 76.1200 of the Commission's rules, and Section 204 to apply to all other digital apparatus. Consistent with our statutory mandate, we tentatively conclude that the requirement for the appropriate functions of the digital apparatus or navigation device to be accessible covers all "user functions" of such apparatus and devices, and that such functions do not include the debugging and diagnostic functions. In addition, in accordance with the statute, we do not propose to specify the technical standards for making those user functions accessible. Consistent with the report of the Video Programming Accessibility Advisory Committee ("VPAAC") that examined this topic, we propose to require that the 11 essential functions of an apparatus identified by the VPAAC are representative, but not an exhaustive list, of the user functions that must be made accessible to and usable by individuals who are blind or visually impaired. We also seek comment on whether the most effective way to implement the requirement that certain accessibility features be activated through a mechanism reasonably comparable to a button, key, or icon is to require those features to be activated (and deactivated) in a single step. We tentatively conclude that we should handle alternate means of compliance and enforcement matters in the same way that we implemented those matters in other CVAA contexts. We propose deadlines consistent with those that the VPAAC proposed. Finally, in addition to our implementation of the CVAA, we take this opportunity to modernize our apparatus rules by proposing to eliminate the outdated requirement that manufacturers label analog television sets based on whether they include a closed-caption decoder and rename Part 79 of our rules.

II. BACKGROUND

2. Section 204 of the CVAA, entitled "User Interfaces on Digital Apparatus," 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 that makes them "accessible to and useable by individuals who are blind or visually impaired."[2] Section 204 also directs the Commission to require those 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."[3] Section 204 also 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."[4]

3. Section 205 of the CVAA, entitled "Access to Video Programming Guides and Menus Provided on Navigation Devices," 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

[1] Pub. L. No. 111-260, § 204, 124 Stat. 2751 (2010). *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).

[2] 47 U.S.C. § 303(aa)(1)..

[3] 47 U.S.C. § 303(aa)(3).

[4] 47 U.S.C. § 303(aa)(4).

guides[5] 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."[6] 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."[7]

4. On April 9, 2012, the Video Programming Accessibility Advisory Committee ("VPAAC") released the *VPAAC Second Report: User Interfaces* as directed by Section 201(e)(2) of the CVAA.[8] In it, VPAAC Working Group 4, which was the working group assigned to recommend ways to implement Sections 204 and 205 of the CVAA, defined the functional requirements needed to carry out those sections. Among other things, the *VPAAC Second Report: User Interfaces* lists 11 criteria that it deems essential to make digital apparatus and navigation devices accessible.[9] Working Group 4 stated that it sought to develop the criteria without hindering innovation or product differentiation, and that "the consumer marketplace [will] identify the optimal technologies and implementations."[10] The *VPAAC Second Report: User Interfaces* offers some examples of how to achieve the criteria, but stated that the examples "are only meant to clarify the intent of the associated functional requirement."[11] The *VPAAC Second Report: User Interfaces* also lists "open issues" about which Working Group 4 could not develop consensus; significantly, the members could not achieve consensus on a recommendation for the method of turning closed captioning on and off.[12] On April 24, 2012, the Commission released a Public Notice seeking comment on the *VPAAC Second Report: User Interfaces*.[13]

III. DISCUSSION

5. We organize our discussion of Sections 204 and 205 of the CVAA into the following sections: (A) Scope of Sections 204 and 205; (B) Functions That Must Be Made Accessible; (C) Activating Accessibility Features; (D) Making Navigation Devices Available "Upon Request"; (E) Alternate Means of Compliance; (F) Enforcement; (G) Exemption for Small Cable Operators; and (H) Timing. In addition, we tentatively conclude that we should eliminate outdated closed captioning labeling rules that apply to analog television receivers and rename Part 79 of our rules.

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[5] 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, 124 Stat. 2751, 2775 (2010).

[6] 47 U.S.C. § 303(bb)(1).

[7] 47 U.S.C. § 303(bb)(2).

[8] 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, April 9, 2012, available at http://apps.fcc.gov/ecfs/document/view?id=7021913531 ("*VPAAC Second Report: User Interfaces*"). Sections 204(b) and 205(b) state 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. Therefore, we must prescribe our regulations by October 9, 2013.

[9] *Id.* at 8.

[10] *Id.* at 3.

[11] *Id.* at 3.

[12] *Id.* at 20-21.

[13] *Media Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Second VPAAC Report: User Interfaces, and Video Programming Guides and Menus*, 27 FCC Rcd 4191 (2012). In response this Public Notice, we received six comments, one reply comment, one late-filed reply comment, and three ex parte letters.

A. Scope of Sections 204 and 205

6. As stated above, Sections 204 and 205 of the CVAA require that accessible user interfaces be included in two categories of equipment: "digital apparatus" and "navigation devices." 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."[14] Section 204 states that the "term 'apparatus' does not include a navigation device" as that term is defined in Section 76.1200 of the Commission's rules.[15] Instead, accessibility requirements for "navigation devices" are governed by the provisions of Section 205.[16] Section 76.1200(c) defines "navigation devices" as "[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."[17] Congress' intended meaning of the terms "digital apparatus" and "navigation devices," as used in the context of Sections 204 and 205, however, is not entirely clear. We discuss below the appropriate scope of Sections 204 and 205 and the interrelationship between these sections. Our goal is to interpret these sections in a manner that best effectuates Congressional intent.

1. Categories of Devices Covered Under Sections 204 and 205

7. We seek comment on whether we should interpret Section 205 of the CVAA to apply only to navigation devices that are supplied to subscribers by their MVPDs[18] and Section 204 of the CVAA to apply more broadly, covering all other digital apparatus that receive or play back video programming. Under this interpretation, equipment provided to MVPD subscribers by MVPDs would be covered under Section 205, while all other digital apparatus, including equipment purchased at retail by a consumer to access video programming, would be covered under Section 204.[19] We seek comment on this interpretation.

8. We note that the statutory language of Section 205 could be read to apply to navigation devices provided by MVPDs. Significantly, Section 205 contains numerous provisions that appear to presume a preexisting relationship between the individual requesting or using the device, menu and/or guide and the entity providing it. For example, Section 205(b)(3) states that an "entity shall only be

[14] 47 U.S.C. § 303(aa)(1). We will refer to this class of devices as "digital apparatus."

[15] 47 U.S.C. § 303(aa)(4).

[16] 47 U.S.C. § 303(bb)(1) (requiring that "if achievable . . . that the on-screen text menus and guides provided by navigation devices . . . for the display and selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired"); 47 U.S.C. § 303(bb)(2) (requiring that "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").

[17] 47 C.F.R. § 76.1200(c).

[18] Section 602 of the Communications Act of 1934 ("Communications Act") defines a multichannel video programming distributor as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13). The Commission's rules adopt the same definition. *See* 47 C.F.R. § 76.800.

[19] We recognize that under this interpretation Section 205 would apply to MVPD-provided equipment used to receive non-video services, such as cable modems. We believe, however, that MVPDs would have no additional obligations under Section 205 with respect to this non-video equipment as such equipment does not provide "on-screen text menus and guides . . . for the display or selection of multichannel video programming" and does not have "built-in closed captioning capability." 47 U.S.C. §§ 303(bb)(1), (2). We seek comment on this analysis.

responsible for compliance with the requirements [of Section 205(a)] with respect to navigation devices that *it provides* to a *requesting* blind or visually impaired individual."[20] Likewise, Sections 205(b)(4) and (b)(5) discuss the obligations of "the entity providing the navigation device."[21] We believe that Section 205's references to an "entity" "providing" the device, menu or guide in these provisions could reasonably be interpreted to mean an MVPD, because in contrast to a consumer electronics retailer that offers consumers devices for purchase, an MVPD *provides* devices (typically for lease) to its customers upon *request*. Accordingly, we believe that the Commission could reasonably conclude that MVPDs are the entities "responsible for compliance" with Section 205, and the equipment, menus and guides these entities provide to their subscribers are what Congress intended to cover under Section 205.

9. In addition, Section 205(b)(4)(B) states that 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."[22] This language also appears to be directed at MVPDs because the obligations identified in this provision – responding to a "requesting individual" "within a reasonable time" and providing a device "at no additional charge" – presupposes an existing relationship between the provider and the consumer. A consumer enters a retail store or visits a retailer's website and expects to be able to purchase the products offered immediately, and does not expect to get them for free. In contrast, when an MVPD subscriber contacts the MVPD to request an accessible device, the MVPD must either ship the device or schedule an appointment to install it in the subscriber's home. Either of these actions would take some amount of time, and Congress could reasonably be understood to have sought, through this provision, to ensure that MVPDs would fulfill these requests promptly and without greater expense to the consumer than if the MVPD were providing inaccessible equipment to the consumer.[23]

10. Moreover, Section 205(b)(6), which sets out phase-in periods for compliance with these rules, states that the Commission must provide "affected entities" with at least 3 years "to begin *placing in service* devices that comply with" accessibility requirements related to on-screen text menus and guides.[24] The phrase "placing in service" makes sense with respect to devices offered by MVPDs to their subscribers;[25] it does not appear to have any applicability to devices sold at retail.

11. Interpreting Section 205 to apply only to MVPD-supplied navigation devices, menus and guides appears further supported by Section 205(b)(2), which allows the Commission to "provide an exemption from the regulations [implementing Section 205(a)] for cable systems serving 20,000 or fewer subscribers."[26] Inclusion of this specific exemption for cable operators seems to suggest that the "affected entities" referred to in Section 205 are MVPDs. That is, if this section did not otherwise apply to MVPDs, there would be no need for Congress to exempt cable operators from our regulations.

12. As demonstrated, the statutory language of Section 205 could reasonably be understood that Congress's aim in this section was to apply a specialized set of regulations to navigation devices, menus

[20] Pub. L. No. 111-260, § 205(b)(3), 124 Stat. 2751, 2775 (2010) (emphasis added).

[21] Pub. L. No. 111-260, § 205(b)(4), (b)(5), 124 Stat. 2751, 2775 (2010).

[22] Pub. L. No. 111-260, § 205(b)(4)(B), 124 Stat. 2751, 2775 (2010).

[23] *See* discussion *infra* at ¶ 48-51.

[24] Pub. L. No. 111-260, § 205(b)(6)(A)(ii), 124 Stat. 2751, 2775 (2010) (emphasis added).

[25] For instance, Section 76.1204 of our rules uses the term "place in service" in connection with an MVPD's deployment of leased navigation devices. *See* 47 C.F.R. § 76.1204(a)(1) (stating that MVPDs subject to the rule cannot "*place in service* new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device.") (emphasis added).

[26] Pub. L. No. 111-260, § 205(b)(2), 124 Stat. 2751, 2775 (2010).

and guides provided by MVPDs to their subscribers.[27] We seek comment on the above interpretations of the cited provisions.

13. We ask that commenters address potential drawbacks associated with this interpretation. For example, given that no language in Section 205 explicitly limits the provision's scope to navigation devices supplied by MVPDs, is it permissible for us to interpret the statue in this manner? If we do so, how do we give meaning to terms of the statute that refer more broadly 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"?[28] Similarly, if we interpret Section 205 to only cover navigation devices supplied by MVPDs, how do we explain the provisions that apply certain requirements set forth in the statute to manufacturers of hardware and software?[29]

14. Moving to Section 204, this provision could be reasonably read to be directed towards equipment manufacturers. For example, Section 204(a) amends Section 303 of the Communications Act by adding language requiring that "digital apparatus . . . be designed, developed, and fabricated" to be accessible, all terms that would apply to manufacturers.[30] In addition, Section 204 indicates an intent by Congress to cover a broad array of devices: "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."[31] In the *IP Closed Captioning Order,* the Commission interpreted virtually identical statutory language contained in Section 203 of the CVAA (codified in 47 U.S.C. § 303(u)(1)), to cover a wide array of physical devices such as set-top boxes, PCs, smartphones and tablets, as well as integrated software.[32] As noted below, we believe the Commission could reasonably conclude that Congress intended the same broad meaning to apply in the context of Section 204, and we seek comment on that interpretation.[33]

15. The intended scope of Sections 204 is muddied, however, by a reference in that section to the term "navigation devices" as that term is defined by Section 76.1200 of the Commission's rules.[34] Specifically, Section 204 states that the "digital apparatus" covered under that section "does not include a navigation device, as such term is defined in section 76.1200 of the Commission's rules."[35] In contrast, Section 205's requirements expressly apply to "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)."[36] Section 76.1200(c) defines "navigation devices" as "[d]evices such as converter boxes, interactive

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[27] Some of Section 205's requirements appear to make more sense when viewed as applicable to MVPDs. As another example, Section 205(b)(4)(A) uses the phrase "network-based service." Pub. L. No. 111-260, § 205(b)(4)(A), 124 Stat. 2751, 2775 (2010). Although it is possible that some retail navigation devices may use a network-based service, we believe it is more likely Congress used this term to refer to MVPD's network-based service, as third-party manufacturers and retailers would not ordinarily provide a "network-based service" to the consumers who buy their devices. *See* discussion *infra* at ¶ 38. We seek comment on this interpretation.

[28] 47 U.S.C. § 303(bb)(1)

[29] *See* 47 U.S.C. § 303(bb)(1)

[30] *See* 47 U.S.C. § 303(aa)(1).

[31] *Id.*

[32] *See IP Closed Captioning Report and Order,* 27 FCC Rcd 787, 839 ¶ 93 (2012).

[33] *See* discussion *infra* ¶ 22.

[34] 47 U.S.C. § 303(aa)(4).

[35] *Id.*

[36] 47 U.S.C. § 303(bb)(1).

communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems."[37] The Commission has interpreted this term to encompass a broad array of "equipment used to access multichannel video programming or services."[38] For example, televisions, personal computers, cable modems, and VCRs all fall under the Commission's navigation devices definition.[39]

16. Given the broad scope of the term, however, interpreting the "navigation devices" exception in Section 204 literally could largely nullify Section 204. Specifically, nearly all Section 204 digital apparatus "designed to receive or play back video programming transmitted in digital format"[40] would also be classified as navigation devices under Section 76.1200(c) because they can be used "to access multichannel video programming and other services offered over multichannel video programming systems."[41] If we were to interpret the Section 204 exemption to exempt all "navigation devices" and not just those provided by MVPDs, it is possible that the only devices that would be covered by Section 204 would be removable media players, such as DVD and Blu-ray players. This is because any device that has a tuner, an audiovisual input,[42] or IP connectivity could be considered a navigation device. We seek comment on whether any other digital apparatus would be covered by Section 204 if we literally applied the navigation devices exception contained in that section to all navigation devices.

17. We believe that references in Sections 204 and 205 to "navigation devices" can be reasonably interpreted as language designed to prevent overlap in coverage between Sections 204 and 205; that is, a device can be a Section 204 device or a Section 205 device, but not both. We request comment on whether we should interpret Section 205 to cover navigation devices provided by MVPDs and Section 204 to exclude such devices, but otherwise to broadly cover all "apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound" as that term is broadly described in Section 204(a)(1).[43] We believe that this interpretation is a reasonable one under the tenet of statutory construction that requires statutory language be read in the context of the larger statutory scheme. We could conclude that Congress intended to carve out of Section 204 a subset of devices – MVPD-provided navigation devices covered by Section 205 – from the Section 204 provision that applies generally to all digital apparatus that receives or plays back video.[44] Moreover, interpreting the Section 204 exception for navigation devices broadly would appear to render virtually meaningless Section 204's statement that digital apparatus include "apparatus designed to receive or

[37] 47 C.F.R. § 76.1200(c).

[38] *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14784-85 (1998).

[39] *Id.*

[40] 47 U.S.C. § 303(aa)(1).

[41] 47 C.F.R. § 76.1200(c). We note that any device with an IP connection uses "data access" services, such as Internet access service. The Commission has defined "data access" services as "other services" for purposes of Section 629 and Section 76.1200(c) of our rules. *Implementation of Section 304 of the Telecommunications Act of 1996*, 14 FCC Rcd 7596, 7604, ¶ 17 (1999). Therefore, every device that uses Internet access service could be considered a navigation device, regardless of whether it is also capable of accessing MVPD video programming.

[42] An audio-visual input is an input that could connect to a set-top box to receive and display video service offered over a multichannel video programming system.

[43] 47 U.S.C. § 303(aa)(1).

[44] We note that under an alternate interpretation we could conclude that Congress wrote Section 204 to cover all digital apparatus designed to play back or record video programming but then excluded almost all equipment that does so. In other words, Section 205 would be the primary statutory provision and Section 204 would function as a gap-filling backstop.

display video programming transmitted in digital format using Internet protocol." This is because we believe that nearly any device that can display video programming using Internet protocol could use the Internet protocol to access MVPD programming or other services, thereby making that device a navigation device under the broad reading of that term. We seek comment on this interpretation.

18. We also find it notable that the National Cable & Telecommunications Association ("NCTA"), which is comprised of cable operators, presumes that Section 205 applies to its members. NCTA notes that "Congress granted *cable operators* 'maximum flexibility' to determine the manner of compliance" with the obligations of Section 205, and NCTA makes no suggestion that this section applies to any other entities beyond MVPDs.[45] In recognizing that Section 205 applies to its members, NCTA acknowledges that cable operators must provide accessible equipment for "blind or visually impaired customers who request such a feature or function" and that "cable operators must provide it free of charge."[46]

19. The legislative history on this provision is scant, and offers no additional insight into Congress's intent as to the scope of Sections 204 and 205. Neither does the *VPAAC Second Report: User Interfaces* provide us any guidance on how best to interpret the scope of Sections 204 and 205. We note, however, that the *VPAAC Second Report: User Interfaces* refers to devices covered by Section 205 as "set-top boxes," suggesting that, at a minimum, they presumed Congress did not intend Section 205 to cover the broad universe of devices covered by Section 76.1200 of our rules.[47] We seek comment on our analysis. Could Section 205 alternatively be interpreted more broadly to apply not just to MVPD-provided equipment but also to retail set-top boxes such as TiVos? If we were to interpret Section 205 to apply also to those retail set-top boxes, how would we apply to that equipment the many provisions in Section 205, analyzed above, that presume the complying entity is an MVPD?

20. Section 205 also includes a provision stating that, with respect to navigation device features and functions delivered in software, the requirements of Section 205 "shall apply to the manufacturer of such software," and with respect to navigation device features and functions delivered in hardware, the requirements of Section 205 "shall apply to the manufacturer of such hardware."[48] We seek comment on why Congress might have included this provision, how this provision should be interpreted, and the applicability of Section 205 to hardware and software manufacturers of navigation device features and functions. Does the inclusion of this provision indicate that Congress intended that manufacturers of hardware and software supplied to MVPDs for subscriber use share responsibility with MVPDs for compliance under Section 205? If such manufacturers do share liability with MVPDs, would such liability be joint and several?[49] Should the provision be read only as Congress' recognition that the manufacturer of the hardware and/or developer of the software for MVPD-supplied equipment are often different parties?

21. Alternatively, we seek comment on whether we should interpret the term "navigation device" for purposes of Sections 204[50] and 205 literally.[51] Under a literal interpretation, the term would

[45] *See* NCTA Comments at 3 (emphasis added).

[46] *Id.*

[47] *VPAAC Second Report: User Interfaces* at 9.

[48] 47 U.S.C. § 303(bb)(3).

[49] In other words, if a consumer brought a complaint against an MVPD, would an MVPD be precluded from asserting a defense that the issue underlying the complaint is solely a manufacturer problem, *i.e.,* would the MVPD be liable for a violation concerning their provided equipment regardless of whether the issue is manufacturer related?

[50] 47 U.S.C. § 303(aa)(4).

encompass the full array of equipment used to access multichannel video programming or services as defined under the Commission's rules[52] regardless of whether such equipment is provided by an MVPD. Under this interpretation, we would give literal effect to the language of the provision contained in Section 204 stating that "the term 'apparatus' does not include a navigation device, as such term is defined in section 76.1200 of the Commission's rules"[53] as well as the language of the provision in Section 205 defining navigation devices by reference to section 76.1200 of the Commission's rules.[54] We note that nowhere in the statute does it say that the navigation device carve-out contained in Section 204 or the term "navigation devices" in Section 205 applies only to navigation devices supplied by MVPDs. Do these statutory provisions have a "plain" meaning as the courts have used that term?

22. If we adopted this interpretation, would Section 204 apply only to small subset of devices– specifically, removable media players, such as DVD and Blu-ray players?[55] Under this alternative interpretation, would all other devices used to view video programming be covered under Section 205? Would a literal reading of the navigation devices exemption in Section 204 render meaningless other provisions of that section? For example, would literally interpreting the Section 204 exception for navigation devices render meaningless Section 204's statement that digital apparatus include "apparatus designed to receive or display video programming transmitted in digital format using Internet protocol" because every device with Internet connectivity is a navigation device under Commission precedent?[56]

23. In addition, we seek comment on what functions, if any, would need to be made accessible under Section 205 if Section 205 applies to navigation devices purchased at retail. For example, do smartphones, personal computers, and similar equipment that would be covered under this section under a broad reading of navigation devices provide on-screen text menus and guides *for the display of multichannel video programming*? If not, would such devices escape the accessibility requirements of Sections 204 and 205 altogether? We seek comment on this alternative interpretation of the statute. We also seek 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? In addition, we invite commenters to suggest any other interpretation of the statute which would effectuate Congressional intent and be consistent with the language contained in Sections 204 and 205 of the CVAA.

2. Coverage of MVPD-Provided Applications and Other Software

24. We also seek comment on whether the requirements of Section 205 apply to applications and other software developed by MVPDs to enable their subscribers to access their services on third-party

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[51] 47 U.S.C. § 303(bb)(1).

[52] *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14784-85 (1998).

[53] 47 U.S.C. § 303(aa)(4)

[54] 47 U.S.C. § 303(bb)(1)

[55] As stated above, we seek comment on whether any other digital apparatus would be covered by Section 204 if we broadly applied the navigation devices exception contained in that section. *See supra* ¶ 15.

[56] In the alternative, should we interpret the conjunction "and" in section 76.1200(c) to require that "navigation devices" be used by consumers to access *both* multichannel video programming *and* other services offered over multichannel video programming systems? *See* 47 C.F.R. § 76.1200(c) (defining navigation devices to mean "[d]evices. . . used by consumers to access multichannel video programming and other services offered over multichannel video programming systems"). Under that interpretation, would a cable modem or a device that streams Internet video, but cannot be used to access multichannel video programming, be a "navigation device"? How would we reconcile this interpretation with Commission precedent? *See supra* ¶ 15, n.38. Would this interpretation only apply for purposes of the CVAA?

devices such as tablets, laptops, smartphones, or computers. For example, at least one MVPD currently permits subscribers to access its entire package of video programming via an application that subscribers can download to personal computers, tablets, smartphones, and similar devices.[57] In this example, would the MVPD's application qualify as a navigation device subject to the requirements of Section 205?[58] If not, would it qualify as a digital apparatus under Section 204?[59] Should the applicability of Section 205 (or 204) to an MVPD application be impacted by that application's ability to fully replicate a subscriber's MVPD service versus providing only a subset of programming offerings? We recognize that some MVPDs currently enable subscribers to access video programming both inside and outside the home (*e.g.*, TV Everywhere offerings). Should it matter to our analysis whether the MVPD application can be used outside the home? Does it matter whether the video programming is being delivered over the MVPD's IP network or through a different Internet Service Provider? If we interpret the term "navigation devices" to include retail devices in addition to MVPD-provided navigation devices, how would we determine which party is responsible when a consumer uses an MVPD-provided application on a device purchased at retail?[60] What responsibility do manufacturers of digital apparatus and navigation devices covered by Sections 204 and 205 have to make such MVPD services accessible?

3. Definition of Digital Apparatus Under Section 204

25. Regarding Section 204, we tentatively conclude that the term "digital apparatus" as used in that section should be defined similarly to how the Commission defined the term "apparatus" when implementing the closed captioning apparatus requirements of Section 203,[61] but excluding the navigation devices that are subject to Section 205.[62] The descriptive language used in Sections 203 and 204 is largely parallel.[63] In the *IP Closed Captioning Order*, the Commission concluded that the scope of

[57] We note that Cablevision delivers programming both to traditional set-top boxes and to IP devices using "its secure and proprietary Advanced Digital Cable television network to deliver cable programming to customers for viewing on the Optimum App for iPad [and other devices] and content is not delivered over the Internet. . . . Customers do not need to have Internet access to use the Optimum App for iPad." See Cablevision's New Optimum App Delivers the Full Cable Television Experience to an iPad in the Home, April 2, 2011, *available at* http://www.prnewswire.com/news-releases/cablevisions-new-optimum-app-delivers-the-full-cable-television-experience-to-an-ipad-in-the-home-119117379.html.

[58] As noted above, Section 76.1200(c) defines navigation devices as "[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).

[59] *See* discussion *infra* at ¶ 23 (tentatively concluding that video players embedded, installed or required by the manufacturers of digital apparatus fall within the scope of Section 204).

[60] We note that Section 205 states that our regulations shall apply to software manufacturers when navigation device features and functions are delivered in software and shall apply to hardware manufacturers when navigation device features and functions delivered are delivered in hardware. 47 U.S.C. § 303(bb)(3). How, if at all, can we ensure that hardware and software manufacturers will work together to make their products compatible and accessible?

[61] *See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 27 FCC Rcd 787, 839-43, ¶¶ 93-96 (2012) ("*IP Closed Captioning Order*").

[62] *See* 47 U.S.C. § 303(aa)(4) (stating that in applying Section 204, "the term 'apparatus' does not include a navigation device, as such term is defined in section 76.12000 of the Commission's rules (47 CFR 76.1200)").

[63] Section 203 applies to "apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size." 47 U.S.C. § 303(u)(1). 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." 47 U.S.C. § 303(aa)(1).

apparatus covered by Section 203 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 video players that manufacturers direct consumers to install."[64] The Commission explained further that "apparatus" includes video players that manufacturers embed in their devices ("integrated video players"), video players designed by third parties but installed by manufacturers in their devices before sale, and video players that manufacturers require consumers to add to the device after sale in order to enable the device to play video.[65]

26. We seek comment on our tentative conclusion to interpret "digital apparatus" similarly for purposes of Section 204.[66] Does the terminology or purpose of Sections 203 and 204 differ in any material respects for the purpose of determining to what extent we should interpret the term "digital apparatus" to apply to hardware and associated software, as described above? Should the fact that Section 204 uses the term "digital" to modify apparatus (a modifier not present in Section 203) have any significance for our analysis?[67] How, as a practical matter, does this modifier affect the scope of apparatus subject to Section 204? For example, are there any devices currently being manufactured or marketed that are subject to Section 203 but should not be subject to Section 204 because such devices do not receive or display video programming transmitted in a "digital format"?

27. The VPAAC points out that, in contrast to the "[s]et-top boxes" covered by Section 205, digital apparatus subject to Section 204 "may have no native capability to decode and display [audiovisual] content, but with a suitable downloaded application, such capability may be enabled."[68] If a digital apparatus requires a downloaded application to enable the decoding and display of audiovisual content how should that impact our analysis of whether the device is covered by Section 204?

28. We tentatively conclude that the inclusion of the phrase "including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol"[69] is merely meant to clarify that this provision should not be limited to more traditional video-programming apparatus without IP functionality such as non-IP enabled televisions, and that the fact that this language appears in Section 204 but not Section 203 should not result in a different interpretation of the scope of

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[64] *IP Closed Captioning Order*, 27 FCC Rcd at 840, ¶ 93 (citing *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*, 26 FCC Rcd 14557, 14582 at ¶ 69 (2011) ("*ACS Order*") ("[m]anufacturers are responsible for the software components of their [devices] whether they pre-install the software, provide the software to the consumer on a physical medium such as a CD, or require the consumer to download the software.").

[65] *Id*. The Commission concluded that, if a manufacturer selects a third-party operating system that includes a video player, that video player will also be considered part of the "apparatus" under Section 203. *Id.* The Commission also required that manufacturer updates or upgrades to video player components of devices comply with Section 203. *See id.* However, Section 203 is not applicable to "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." *Id.* at ¶ 94.

[66] The Commission also found that removable media players, such as DVD and Blu-ray players, were subject to Section 203. *Id.* at 845-46, ¶¶ 99-100. In addition, the Commission found that professional and commercial equipment, such a movie theater projectors, were not subject to Section 203 on the ground that Congress intended the Commission's regulations to cover apparatus used by the public. *See id.* at 846-847, ¶ 101.

[67] Section 204 specifies that it 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." 47 U.S.C. § 303(aa)(1) (emphasis added).

[68] *VPAAC Second Report: User Interfaces* at 9. The report defines "A/V Content" as "video programming transmitted simultaneously with sound." *Id.* at 6.

[69] 47 U.S.C. § 303(aa)(1).

Section 204.[70] We seek comment on this tentative conclusion.

29. We also tentatively conclude that we should interpret the term "designed to"[71] as used in Section 204 the same way that the Commission interpreted it in the *IP Closed Captioning Order*.[72] There, the Commission rejected the argument that we should evaluate whether a device is covered by focusing on the original design or intent of the manufacturer of the apparatus.[73] The Commission concluded instead 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."[74] The Commission stated that this bright-line standard, based on the device's capability, will provide more certainty for manufacturers.[75] It also stated that, "to the extent a device is built with a video player, it would be reasonable to conclude that viewing video programming is one of the intended uses of the device," and that "[f]rom a consumer perspective, it would also be reasonable to expect that a device with a video player would be capable of displaying captions."[76] We seek comment on our proposal. In addition, although Section 204 does not contain the limitation in Section 203 to apparatus "manufactured in the United States or imported for use in the United States," we propose applying that same limitation for purposes of our regulations. . We seek comment on this proposal as well.

B. Functions That Must Be Made Accessible

1. Functions Required by Section 204

30. Section 204 directs the Commission to require that digital apparatus "be designed, developed, and fabricated so that control of *appropriate built-in apparatus functions*" is "accessible to and usable by individuals who are blind or visually impaired,"[77] and "that if on-screen text menus or other visual indicators built into the digital apparatus are used to access the [appropriate built-in apparatus functions], such functions shall be accompanied by audio output . . . so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired in real-time."[78] We tentatively conclude that the "appropriate" functions that must be made accessible under Section 204 include all user functions of the device, but that such user functions do not include the debugging/diagnostic functions.[79]

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[70] In addition, as the Commission stated in *IP Closed Captioning Order*, the phrase "uses a picture screen of any size" in Section 203 was included to eliminate a prior screen-size limitation in our apparatus closed captioning rules. Thus, it is of no import that this phrase was not included in Section 204. *See IP Closed Captioning Order*, 27 FCC Rcd at 842-43, ¶ 96.

[71] 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." 47 U.S.C. § 303(aa)(1) (emphasis added).

[72] *See IP Closed Captioning Order*, 27 FCC Rcd at 842, ¶ 95.

[73] *Id*.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] 47 U.S.C. § 303(aa)(1) (emphasis added).

[78] 47 U.S.C. § 303(aa)(2).

[79] These functions, sometimes referred to as "service mode," are functions that the manufacturer includes to help a technician repair a device. Although the National Association of the Deaf ("NAD") reasons that every function and feature of an apparatus or navigation device is "essential" – stating that otherwise it wouldn't be a feature of a device – it did not comment specifically on debugging and diagnostic functions. NAD Comments at 2-3.

We exclude the debugging/diagnostic functions as it is our understanding those functions are typically accessed by technicians and repair specialists and are not intended for consumer use. We seek comment on whether our understanding is correct or whether debugging/diagnostic functions should also be made accessible.

31. As to which functions constitute the user functions of the apparatus other than debugging/diagnostic functions, we look to the *VPAAC Second Report: User Interfaces*. This report identified 11 "essential functions," which VPAAC Working Group 4 defined as "the set of appropriate built-in apparatus functions" referred to in Section 204.[80] The 11 essential functions identified in the *VPAAC Second Report: User Interfaces* are: (1) power on/off; (2) volume adjust and mute; (3) channel and program selection; (4) channel and program information; (5) configuration – setup; (6) configuration – closed captioning control; (7) configuration – closed captioning options; (8) configuration – video description control; (9) display configuration info; (10) playback functions; and (11) input selection.[81] Most of these are fairly self-evident, and the *VPAAC Second Report: User Interfaces* provides additional information to describe them.[82] The VPAAC explains that each of these functions requires "user input" and "user feedback." User input refers to how the user would activate the function (for example, the power button for a device).[83] User feedback refers to how the user can surmise that the device or apparatus recognized and carried out the command.[84] The *VPAAC Second Report: User Interfaces* recommends that user input be readily identifiable, and that user feedback be readily accessible.[85] We seek comment on the list and the VPAAC's explanations of these functions. We specifically seek comment on the meaning of the ninth essential function, "display configuration info." How does this essential function differ from "Configuration – setup"? We also invite commenters to define these terms more specifically if they believe that the *VPAAC Second Report: User Interfaces*'s descriptions do not provide adequate guidance to manufacturers.

32. We tentatively conclude that the *VPAAC Second Report: User Interfaces*'s 11 essential functions are representative, but not an exhaustive list, of the categories of user functions of an apparatus, and therefore are examples of "appropriate built-in apparatus functions" as that term is used in Section 204 of the CVAA. We do not believe that Congress intended to limit the accessibility of digital apparatus and navigation devices to the "essential" features and functions, or to some but not to all features and functions that are typically accessed by and readily made available for consumers to use. In other words, we believe that the term "appropriate" can be interpreted to distinguish between the diagnostic, debugging, "service mode" functions and the user functions that consumers can access and use. We seek comment on our tentative conclusion. At the same time, we seek comment on whether there are any other functions that are not included in the 11 essential functions listed in the *VPAAC Second Report: User Interfaces*, such as V-Chip and other parental controls, that may provide additional guidance to manufacturers. If any commenter believes that any of the 11 essential functions do not represent appropriate functions that must be accessible, that commenter should identify and provide specific examples of those inappropriate functions. Is there a mechanism that we can establish in this proceeding to ensure that as new digital apparatus functions become available to consumers, they are also made accessible? Should we assume that any newly developed non-debugging/diagnostic functions are "appropriate" under the statute and should be made accessible unless a manufacturer receives a finding

[80] *VPAAC Second Report: User Interfaces* at 7-8.

[81] *Id.* at 8.

[82] *Id.* at 10-15.

[83] *Id*. at 9.

[84] *Id*. at 9.

[85] *Id.* at 10-15.

from the Commission to the contrary, or should we allow manufacturers to argue in defense to a complaint that a function was not made accessible because it was not an "appropriate function" under the statute?

33. Section 204 applies to 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."[86] We seek comment on the extent to which apparatus manufacturers will need channel and program information (or other information necessary to select programming) from third-party video programming distributors ("VPDs")[87] to meet Section 204's requirement that "on-screen text menus or other visual indicators built in to the digital apparatus" be "accompanied by audio that is either integrated or peripheral to the apparatus."[88] That is, if the apparatus is built to display visual information provided by a third party, does the apparatus need to make that information accessible? For example, if an Internet-connected TV includes a Netflix application, should we require that application to be accessible? Should we require that third-party applications that a consumer might download and install be accessible? Who is responsible for that accessibility? In implementing other Sections of the CVAA, the Commission applied its rules to integrated software and to third-party applications that the manufacturer requires to be downloaded, but not other third-party applications that a customer downloads and installs.[89] We tentatively conclude that we should take the same approach here, and we seek comment on that tentative conclusion. If commenters disagree, they should explain how the manufacturer can obtain the necessary information, such as guide data, from the VPD to make such information accessible to a user who is blind or visually impaired and whether the Commission has the authority to require a VPD to make this information accessible or pass through the necessary information to an apparatus. With respect to apparatus that are not provided by the MVPD but access MVPD services, does 47 U.S.C. § 303(bb)(3) or any other provision of the Communications Act provide the Commission with the authority to require channel and program information to be made available to apparatus? As we discuss above in Section III.A.2, we seek comment on whether MVPDs are responsible for the applications that they develop; what responsibilities does an MVPD have to make channel and program information available to a third-party application (for example, on a retail CableCARD device)?

34. In addition to the requirements related to accessibility of "on-screen text menus or other visual indicators," Section 204 also directs us to adopt regulations requiring that digital apparatus "be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible" to people who are blind or visually impaired. Of the 11 functions identified in the *VPAAC Second Report: User Interfaces*, only "power on/off" seems to be accessed other than through on-screen guides and menus, and we believe that other buttons on an apparatus that are not on-screen text menus or other visual indicators must also be made accessible. We seek comment on any other meaning of this phrase; that is, what functions of digital apparatus do people access in a manner other than through on-screen guides and menus? Does the inclusion of this provision in Section 204, but not in Section 205, suggest that digital apparatus are subject to additional requirements not applicable to navigation devices?

2. Functions Required by Section 205

35. Section 205 of the CVAA directs the Commission to require that "on-screen text menus and guides provided by navigation devices . . . for the display or selection of multichannel video programming

[86] 47 U.S.C. § 303(aa)(1).

[87] *See* 47 C.F.R. § 79.1(a)(2).

[88] 47 U.S.C. § 303(aa)(2).

[89] *IP Closed Captioning Order*, 27 FCC Rcd at 840, ¶ 93 (citing *ACS Order*, 26 FCC Rcd 14557, 14582 at ¶ 69 (2011).

are audibly accessible in real-time upon request."[90] We seek comment on whether, as a legal or policy matter, there should be any substantive differences between the specific functions of apparatus that are required to be made accessible under Section 204 as opposed to the specific functions of navigation devices that are required to be accessible under Section 205. We tentatively conclude that all of the user functions that are offered via on-screen text menus and guides should be accessible for navigation devices. Although we recognize that Sections 204 and 205 use slightly different language (Section 205's accessibility requirement applies to on-screen text menus and guides only),[91] we believe that all of a navigation device's user functions are activated via text menus and guides for the display or selection of multichannel video programming. We seek comment on our tentative conclusion.

36. We tentatively conclude that the *VPAAC Second Report: User Interfaces*'s 11 essential functions are representative, but not an exhaustive list, of the categories of functions that a navigation device must make accessible.[92] The *VPAAC Second Report: User Interfaces* stated that the "essential functions," are "applicable to devices covered under CVAA Section 204 and CVAA Section 205."[93] We seek comment on whether requiring navigation devices to make the 11 essential functions identified by the VPAAC accessible would achieve Section 205's requirement 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." We seek comment on whether there are any other on-screen text menus or guides provided for the display or selection of programming that are not included in the 11 listed in the *VPAAC Second Report: User Interfaces*, such as V-Chip and other parental controls, that may provide additional guidance to covered entities. As we asked in the Section 204 discussion above, if any commenter believes that any of the 11 essential functions do not represent on-screen text menus or guides that must be accessible, that commenter should identify and provide specific examples of those inappropriate functions. Is there a mechanism that we can establish in the proceeding to ensure that as new methods used to display or select multichannel video programming become available, they are also made accessible? Should we assume that any newly developed "on-screen text menus and guides provided by navigation devices" are covered under the statute and should be made accessible unless the Commission finds to the contrary, or should we allow covered entities to argue in defense to a complaint that a menu or guide was not made accessible because it was not "for the display or selection of multichannel video programming" under the statute? Does Section 205 provide us authority to require that MVPDs provide programming description information in programming guides for local programs and channels for the purpose of promoting accessibility?[94]

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[90] 47 U.S.C. § 303(bb)(1) (emphasis added).

[91] Section 204 states, "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." 47 U.S.C. § 303(aa)(2). Similarly, Section 205 requires that, "if achievable . . . 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. . ." 47 U.S.C. § 303(bb)(1). We recognize that Section 204 includes additional language without a corollary in Section 205, which requires digital apparatus be manufactured "so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired." 47 U.S.C. § 303(aa)(1).

[92] Again, we do not believe that debugging and diagnostic functions need to be accessible because they are not necessary for the display or selection of video programming.

[93] *VPAAC Second Report: User Interfaces* at 8 (emphasis added).

[94] Letter from Gail A. Karish, Counsel for Montgomery County, Maryland's Office of Cable and Broadband Services, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 12-108 (May 6, 2013); Letter from Gerard Lavery Lederer, Counsel to the National Associations of Counties, the U.S. Conference (continued….)

3. User Input and Feedback

37. The *VPAAC Second Report: User Interfaces* suggests that user input and feedback should be both visual and non-visual for all essential functions.[95] We agree that this is a vital aspect of making essential functions accessible to individuals who are blind or visually impaired, and note that a device can accept input and provide non-visual feedback audibly or through touch.[96] Sections 204 and 205 require, respectively, that "on-screen text menus" (and guides, in the case of Section 205) be "accompanied by audio output" and "audibly accessible in real-time."[97] We tentatively conclude that those feedback requirements are self-implementing. With respect to other functions of an apparatus, we seek comment on whether we should apply the guidance contained in Section 6.3(a) of our rules (which implements Section 255 and 716 of the CVAA), 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.
>
> * * *
>
> (2) All information necessary to operate and use the product, including but not limited to, text, static or dynamic images, icons, labels, sounds, or incidental operating cues, comply with each of the following, assessed independently:
>
> (i) Availability of visual information. Provide visual information through at least one mode in auditory form.
>
> (ii) Availability of visual information for low vision users. Provide visual information through at least one mode to users with visual acuity between 20/70 and 20/200 without relying on audio.[98]

Do we need to specify how a device accepts input or provides feedback to individuals who are blind or visually impaired with respect to the other functions of an apparatus, or will applying this guidance make the device accessible? We seek comment on whether the functions other than "on-screen text menus" can be made accessible in any way; that is, if the functions of the remote are made accessible in some way, does the remote itself need to be accessible?[99] We also seek comment on any other user input and

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of Mayors, and the National Association of Telecommunications Officers and Advisors, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 12-108 (May 6, 2013). Given the statutory deadline we face to implement Sections 204 and 205, we ask commenters to limit their comments on this issue to topics that directly affect individuals who are blind and visually impaired rather than television viewers at large.

[95] *Id.* at 9.

[96] In its comments, CEA requests that we not require that the user feedback be tactile, arguing that tactile feedback is unnecessary to make devices accessible and that, for certain devices (such as touch screen tablets), providing tactile feedback may be difficult for some manufacturers. CEA Comments at 5-8. We seek comment on CEA's request.

[97] 47 U.S.C. §§ 303(aa)(2); 303(bb)(1).

[98] 47 C.F.R. § 6.3.

[99] For example, if a blind or visually impaired person could activate all of the functions of a remote via a camera that tracks movement or via voice commands, then would the remote itself also need to be accessible? See Dean

(continued….)

feedback suggestions.

4. Technical Standards

38. The CVAA states that the "Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting" the requirement to make appropriate digital apparatus functions accessible to individuals who are blind or visually impaired.[100] Given this limitation on our authority, we seek comment on how the Commission can ensure that the rules it adopts in this proceeding are properly implemented. We seek comment on specific metrics that the Commission can use to evaluate accessibility and compliance with our implementation of Sections 204 and 205 of the CVAA. Are there performance objectives or functional criteria that covered entities can look to voluntarily as an aid in meeting these obligations?[101] We also seek comment on any other steps the Commission can take to promote accessibility in light of the statutory limitations.

5. Achievability

39. Both Sections 204 and 205 of the CVAA state that we should make our rules regarding the accessibility of user interfaces, guides, and menus effective only "if achievable (as defined in section 716)."[102] According to Section 716(g) of the Communications Act, "achievable" means:

> with reasonable effort or expense, as determined by the Commission. In determining whether the requirements of a provision are achievable, the Commission shall consider the following factors:
> (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.[103]

As the Commission has done in other contexts implementing the CVAA, we tentatively conclude that we will weigh each of the four factors equally and evaluate achievability on a case-by-case basis.[104] In the

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Takahashi, *Goodbye remote control: PrimeSense shows off post-Kinect TV motion-sensing system*, VULTUREBEAT, Jan. 14, 2012, *available at* http://venturebeat.com/2012/01/14/goodbye-remote-control-primesense-shows-off-post-kinect-tv-motion-sensing-system-video/.

[100] 47 U.S.C. § 303(aa)(1); 47 U.S.C. § 303(bb)(1).

[101] *See*, *e.g.*, U.S. Access Board, Information and Communication Technology (ICT) Standards and Guidelines Advance Notice of Proposed Rulemaking to Implement Section 508 of the Rehabilitation Act of 1973, as amended, *available at* http://www.access-board.gov/sec508/refresh/draft-rule.pdf; W3C's Web Content Accessibility Guidelines, *available at* http://www.w3.org/WAI/intro/wcag.

[102] 47 U.S.C. §§ 303(aa)(1), 303(bb)(1).

[103] 47 U.S.C. § 617(g).

[104] *ACS Order,* 26 FCC Rcd at 14610-14619, ¶¶ 127-148; *IP Closed Captioning Order*, 27 FCC Rcd at 848-9, ¶¶ 104-5 (2012); *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 No. 12-107, MB Docket No. 11-43, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-45, ¶¶ 67-68 (rel. April 9, 2013) ("*Emergency Info Order*").

event of a complaint over a possible violation of our rules under Sections 204 or 205, 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. Alternatively, a covered entity may seek a determination from the Commission before manufacturing or importing the apparatus or navigation device as to whether compliance with all of our rules is achievable. In evaluating evidence offered to prove that compliance was not achievable, the Commission will be informed by the analysis in the *ACS Order*.[105] We seek comment on our tentative conclusion.

6. Separate Equipment or Software

40. We seek comment on the directive in Section 205 that our regulations "shall permit but not require the entity providing the navigation device to the requesting blind or visually impaired individual to comply with [the on-screen text menu and guide accessibility requirements] 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."[106] Section 205 provides further that "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."[107] We tentatively conclude that this solution must achieve the same functions as a built-in accessibility solution and must be provided by the entity providing the navigation device, rather than requiring the customer to seek out such a solution from a third party. We seek comment on these tentative conclusions. We also seek comment on how to define what is "a reasonable time" to give a requesting subscriber accessible equipment. We tentatively conclude that the other requirements in this provision are self-implementing, and we seek comment on our tentative conclusion.

C. Activating Accessibility Features (Comparable to a Button, Key, or Icon)

41. In this Section, we seek comment on the mechanism that the Commission must establish for consumers to activate the accessibility features of an apparatus or navigation device.

1. Activating Closed Captioning and Video Description Features

42. *Closed Captioning.* Sections 204 and 205 both direct the Commission to require certain apparatus and navigation devices with built-in closed captioning capability to provide access to closed captioning features "through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features."[108] Working Group 4 did not reach consensus on what the phrase "reasonably comparable to a button, key, or icon" means, but it provided the different language proposed by "consumer representatives" and "proposed by NCTA (and endorsed by CEA and its member companies)."[109] Consumer representatives proposed that the *VPAAC Second Report: User Interfaces* recommend a closed captioning button when a dedicated physical button was used to control volume and/or channel selection,[110] while NCTA, with CEA, proposed requiring only

[105] *See ACS Order,* 26 FCC Rcd at 14607-14619, ¶¶ 119-148.

[106] Pub. L. No. 111-260, §§ 205(b)(4)(A), 124 Stat. 2751, 2775 (2010).

[107] Pub. L. No. 111-260, §§ 205(b)(4)(B), 124 Stat. 2751, 2775 (2010).

[108] 47 U.S.C. § 303(aa)(3); 47 U.S.C. § 303(bb)(2).

[109] *VPAAC Second Report: User Interfaces* at 20.

[110] *VPAAC Second Report: User Interfaces* at 20 (proposing that the report say: "When dedicated physical buttons are used to control volume and/or channel selection, the controls for access to closed captions (or video description) must also be dedicated physical buttons, comparable in location to those provided for control of volume or channel selection.").

a mechanism "reasonably comparable to physical buttons" in those situations.[111]

43. We seek comment on whether the most effective way to implement the requirement in Sections 204 and 205 that closed captioning be activated through a mechanism reasonably comparable to a button, key, or icon would be to require the closed captioning feature to be activated in a single step. That is, users would be able to activate closed captioning features on an MVPD-provided navigation device or other digital apparatus immediately in a single step just as a button, key, or icon can be pressed or clicked in a single step. We believe that this single-step proposal is consistent with Section 204 and 205's language describing "a mechanism that is reasonably comparable to a button, key, or icon,"[112] and consistent with Congress's intent "to ensure ready access to these features by persons with disabilities."[113] In addition, a single-step requirement is future-proofed in that it does not require that any particular technology be used to enable accessibility, providing entities subject to Section 204 and 205 the flexibility to continue to develop innovative compliance solutions. We seek comment on this concept, and on what constitutes a single step.[114] Alternatively, is the best solution to require that "[w]hen dedicated physical buttons are used to control volume and/or channel selection, the controls for access to closed captions (or video description) must also be dedicated physical buttons, comparable in location to those provided for control of volume or channel selection," as mentioned in the *VPAAC Second Report: User Interfaces*?[115] For example, if volume on a particular device is controlled through the use of a dedicated button, should we require that closed captioning on that device be activated through the use of a dedicated button as well because it is a comparable function? What if the device does not have volume control through the use of a dedicated button or has no volume control at all? How would the proposal by consumer representatives mentioned in the *VPAAC Second Report: User Interfaces* operate in this context? Should the Commission impose different activation mechanisms on different types of apparatus? Should the Commission require that the closed captioning feature also be deactivated in a single step?

44. We ask commenters to set forth the costs and benefits of our proposal as well as the costs and benefits of any other proposals. Commenters should describe with specificity how their proposals would be considered "reasonably comparable to a button, key or icon." Further, we seek comment on whether we should require covered entities to seek a Commission finding that a mechanism other than button, key, or icon is reasonably comparable to those mechanisms before building it into an apparatus or navigation device, or could they make that showing as a defense to a complaint? How should our regulations apply with respect to programmable universal remotes that can be programmed with different features?

45. *Video Description.* Section 204 explicitly requires certain apparatus to provide access to closed captioning and video description features through a mechanism reasonably comparable to a button,

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[111] *Id.* (proposing that the report say: "When dedicated physical buttons are used to control volume and/or channel selection, the controls for access to closed captions (or video description) must also be reasonably comparable to physical buttons, comparable in accessibility to those provided for control of volume or channel selection.").

[112] 47 U.S.C. §§ 303(aa)(3); 303(bb)(2).

[113] H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 30 (2010); S.Rep. No. 111-386, 111th Cong., 2d Sess. at 14 (2010).

[114] We believe that requiring a consumer to navigate a multi-step, main interface menu, such as a "Settings Menu," to activate closed captioning would not meet the single step proposal. However, we believe that a single step requirement would not be violated where a user is merely required to repeat the same motion multiple times, such as the double click of a button. Likewise, in the case of a graphical user interface designed to be controlled via mouse or touch, requiring two "clicks" or "taps," the first of which would display a captioning-specific option menu and the second of which would select a closed captioning option, would meet a single step requirement.

[115] *VPAAC Second Report: User Interfaces* at 20-21.

key or icon.[116] Section 205 includes a similar requirement for a mechanism reasonably comparable to a button, key, or icon, but explicitly references only closed captioning capability; video description is not mentioned. Section 205 does state, however, that the mechanism "should be reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features."[117] Despite the fact that Section 205 does not use the term "video description is it reasonable for us to interpret "accessibility features" in Section 205 to encompass video description?[118] For example, does the phrase "accessibility features" in Section 205 reference capabilities that the mechanism required by Section 205 must be able to access? Or is the term merely descriptive of the mechanism to which the mandated mechanism must be reasonably comparable? Video description is an essential accessibility feature. Therefore, would it be incongruous to require other digital apparatus to offer an activation mechanism for video description, but not navigation devices? We note in this regard that our video description rules currently apply to broadcasters and MVPDs. Thus, if accessibility requirements did not extend to video description in navigation devices then the requirements will not apply to devices used to access a large portion of video described programming. Given this, may we interpret the term "accessibility features" as used in Section 205(b)(5) to include, at a minimum, video description? How, if at all, is such an interpretation impacted by the heading in Section 205 that is titled "User Controls for Closed Captioning"?[119]

46. We also seek comment on whether Sections 204 and 205 require single-step activation of video description as we propose to require for closed captioning. We seek comment on whether a solution may be different for closed captioning and video description. We believe that the single-step approach is particularly appropriate for video description, given that following screen prompts (even on a device compliant with the accessibility rules we propose in this NPRM) can be challenging for individuals who are blind or visually impaired. We seek comment on whether Sections 204 and 205 require single-step activation of video description. We also seek comment on whether the fact that video description is not specifically mentioned in Section 205 means that there should be a different activation mechanism for video description for navigation devices.

2. Activating Other Accessibility Features

47. We seek comment on the phrase "accessibility features." Are there additional "accessibility features" besides closed captioning and video description that Sections 204 and 205 require be activated via a mechanism similar to a button, key, or icon?[120] Or is the term merely descriptive of the mechanism to which the mandated mechanism must be reasonably comparable and does not outline the capabilities that the mandated mechanism must itself access? To the extent that Congress contemplated additional "accessibility features," did it intend to include access to secondary audio programming for accessible emergency information as well as video description? In addition, should "accessibility features" include the activation of the audible output of on-screen text menus or guides required by

[116] 47 U.S.C. § 303(aa)(3).

[117] 47 U.S.C. § 303(bb)(2) (emphasis added). We note that Section 204 includes the same language. 47 U.S.C. § 303(aa)(3).

[118] Section 204 requires "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." 47 U.S.C. § 303(aa)(3). The comparable provision in Section 205 requires, "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." 47 U.S.C. § 303(bb)(2).

[119] Pub. L. No. 111-260, §§ 205(b)(5), 124 Stat. 2751, 2775 (2010).

[120] 47 U.S.C. § 303(bb)(2).

Sections 204 and 205?[121] If so, should we adopt the same single-step mechanism requirement to make these features accessible, or would it be permissible under the statute to use different methods depending on the feature involved?

48. We also seek comment on whether the term "accessibility features" in Sections 204 and 205 includes accessibility settings (such as font, color, and size of captions or, in the case of audible output of on-screen text menus or guides, settings such as volume, speed, and verbosity) as these settings enable consumers to make practical use of the closed captioning and audible output. We seek comment on how these settings must be made available. The NAD criticizes devices that require "the user [to] navigate a maze of many choices before reaching the closed captioning settings."[122] Would a requirement that accessibility settings be in the first level of a menu of a digital apparatus or navigation device address this concern? By "first level of a menu," we mean that "accessibility features," such as closed captions, video description and emergency information made available on the secondary audio stream, and audible output of on-screen text menus or guides, would be one of the choices on an initial menu screen; consumers would not need to navigate through a sub-menu to gain access to the menu of accessibility features and settings. Would that concept still achieve accessibility for video description given that screen prompts (even on a device compliant with the visual impairment accessibility rules we propose in this NPRM) can be challenging for individuals who are blind or visually impaired? We invite any other proposals that would make access to accessibility features easier for consumers and ask commenters to set forth the costs and benefits of any such proposals. We also seek comment on any other issues related to the activation of accessibility features, including how any adopted regulations should apply with respect to programmable universal remotes.

3. Maximum Flexibility

49. Section 205 also states that the Commission's rules should permit the entity providing the navigation device "maximum flexibility in the selection of means for compliance" with the mechanism for making accessibility features accessible.[123] In its comments, NCTA asserts that "the plain language [of the CVAA] shows that Congress did not require cable operators and other MVPDs to include closed captioning buttons on their remote controls."[124] It is unclear from NCTA's comments, however, how it proposes that MVPDs comply with the requirement that accessibility features be made accessible. Although we recognize that Congress intended to afford covered entities "maximum flexibility" in complying with our rules, we do not interpret this term to mean that covered entities have unlimited discretion in determining how to fulfill the purposes of the statute. To interpret their "flexibility" in such a manner could potentially undermine the very intent of Section 205, which is to ensure that navigation devices are accessible to individuals with disabilities. In any event, we seek comment on whether our single-step activation proposal with regard to closed captioning and video description provides the

[121] By "audible output of on-screen text menus or guides," we mean the "audio output" that must accompany on-screen text menus on apparatus under Section 204 and the "audibly accessible" text menus and guides that Section 205 requires. 47 U.S.C. §§ 303(aa)(2), 303(bb)(1),

[122] NAD Comments at 7.

[123] Pub. L. No. 111-260, § 205(b)(5), 124 Stat. 2751, 2775 (2010). As discussed above, we believe that the term "entity" in Section 205 can reasonably be interpreted to refer to MVPDs providing equipment to subscribers. *See* discussion *supra* ¶¶ 8-9. We seek comment on how to interpret Section 205's grant of "maximum flexibility" if the term "entity" in Section 205 is interpreted differently.

[124] NCTA Comments at 4. We assume that NCTA only addressed maximum flexibility in the context of MVPD accessibility obligations with respect to closed captioning because it does not believe that the term "accessibility features" used in Section 205 also includes video description. *See id.* at 3 n.10.

flexibility contemplated by the statute.[125] What other mechanism is reasonably comparable to a button, key, or icon that would satisfy this requirement where a navigation device is provided with a remote control? We seek comment on how the Commission can interpret "maximum flexibility" with regard to activation mechanisms and yet still effectuate the goals of the statute.

D. Making Accessible Devices Available "Upon Request"

50. Section 205 directs us to require that guides and menus be made accessible "upon request,"[126] 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."[127] We interpret this section to require covered entities to provide accessible navigation devices to requesting subscribers "within a reasonable time."[128] We also interpret Section 205's "upon request" language to apply to on-screen text menu and guide accessibility. Does this language also apply to the requirement that closed captioning and other accessibility features be activated via a mechanism that is reasonably comparable to a button, key, or icon?

51. We note that Section 205(b)(3) states that an "entity shall only be responsible for compliance with the requirements added by this section with respect to the navigation devices that it provides to a requesting blind or visually impaired individual."[129] We seek comment on how this provision should be read in conjunction with the requirement in Section 303(bb)(2) that pertains to accessing closed captioning capabilities.[130] Does Section 205(b)(3) of the CVAA apply to Section 303(bb)(2) of the Communications Act? A literal interpretation of Section 205(b)(3) would require that compliant closed captioning mechanisms need only be made available to requesting individuals who are blind or visually impaired. However, we note that this interpretation would lead to anomalous results as it is individuals who are deaf or hard of hearing who typically use closed captioning rather than individuals who are blind or visually impaired. Moreover, both Section 205(a), creating the requirement for on-screen text menus and guides for the display or selection of multichannel video programming to be audibly accessible, as well as Section 205(b)(4)(B), describing the provision of software and other solutions for making navigation devices accessible, only make reference to people who are blind and visually impaired with respect to requests that will be made under this section. Does the fact that these two sections focus on making navigation devices accessible to people with vision disabilities and do not reference people who are deaf and hard of hearing provide permissible justification for not making requests a pre-requisite to providing "a mechanism [that is] reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features" required under Section 303(bb)(2) of the Communications Act? In other words, was it Congress's intent for responsible entities to include the closed captioning mechanism on all applicable devices?

52. Alternatively, does the word "responsibility" in Section 205(b)(3) of the CVAA mean liability for money damages? Under that reading, could the Commission order a covered entity to comply with Section 205(b)(3) but only impose a forfeiture if a blind or visually impaired individual has

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[125] We note that we do not propose to mandate a button, key or icon to satisfy the requirements of the statute though, of course, such solutions would appear to be compliant.

[126] 47 U.S.C. § 303(bb)(1).

[127] Pub. L. No. 111-260, § 205(b)(3), 124 Stat. 2751, 2774 (2010).

[128] Pub. L. No. 111-260, § 205(b)(4)(B), 124 Stat. 2751, 2775 (2010).

[129] Pub. L. No. 111-260, § 205(b)(3), 124 Stat. 2751, 2774 (2010).

[130] 47 U.S.C. § 303(bb)(2) (directing 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.").

requested access to the closed-captioning capability? Or is Section 205(b)(3) of the CVAA designed to shield an entity from liability for equipment they did not distribute (e.g., if a consumer purchases a navigation device at retail, the consumer's MVPD is not responsible for the accessibility of that device)?

53. We also seek comment on whether a "request" could take any form (e.g., a phone call, an e-mail, or a request made in-person). How can we ensure that MVPDs have a sufficient supply of accessible equipment in inventory to meet anticipated demand for accessible devices? We also 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? We further seek comment on whether Section 205 requires MVPDs to provide accessible versions of all the classes of navigation devices they make available to subscribers, so that subscribers seeking accessibility features can choose among various price points and features. How would this provision apply to retail navigation devices if we conclude that retail navigation devices fall under the scope of Section 205? Finally, to the extent that Section 205 applies more broadly to other entities besides MVPDs, we seek comment on how these requirements should be implemented.

E. Alternate Means of Compliance

54. Section 204 of the CVAA states that an entity may meet the requirements of Section 204(a) "through alternate means than those prescribed by" the regulations that we adopt.[131] In implementing a similar provision in Section 203 of the CVAA, the Commission has allowed parties either to "(i) request a Commission determination that the proposed alternate means satisfies the statutory requirements through a request pursuant to Section 1.41 of our 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."[132] We tentatively conclude to adopt this approach in the instant proceeding. In addition, as the Commission has done in other contexts, rather than specify what may constitute a permissible "alternate means," we tentatively conclude that we will address any specific requests from manufacturers when they are presented to us.

F. Enforcement

55. We tentatively conclude that we should adopt the same complaint filing procedures that the Commission adopted in the IP-closed captioning context. Those procedures (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 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 as set forth below; and (vii) require covered entities to make contact information available to end users for the receipt and handling of written complaints.[133] Such complaints should include: (a) the complainant's name, postal address, and other contact information, such as telephone number or email address; (b) the name and contact information, such as postal address, of the apparatus or navigation device manufacturer or provider; (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

[131] Pub. L. No. 111-260, § 204(c), 124 Stat. 2751, 2774 (2010).

[132] *IP Closed Captioning Order*, 27 FCC Rcd at 831, ¶ 74; *Emergency Info Order* at ¶ 75.

[133] *IP Closed Captioning Order*, 27 FCC Rcd at 831-8, ¶¶ 75-91; *Emergency Info Order* at ¶ 78-79.

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;[134] and (h) if a Section 205 complaint, the date that the complainant made an accessibility request and the person or entity to whom that request was directed. We also propose that a complaint 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 by any reasonable means, such as the Commission's online informal complaint filing system, letter in writing or Braille, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that would best accommodate the complainant's disability. Because our rules are intended to make apparatus and guides accessible to individuals who are blind or visually impaired, we propose that if a complainant calls the Commission for assistance in preparing a complaint, Commission staff will document the complaint in writing for the consumer and such communication will be deemed to be a written complaint. We also propose that the Commission will forward such complaints, as appropriate, to the named manufacturer or provider for its response, as well as to any other entity that Commission staff determines may be involved, and that the Commission be permitted to 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. Finally, we seek comment on whether any revisions to FCC Form 2000C, the disability access complaint form are necessary, and if so, what revisions are needed?

G. Exemption for Small Cable Operators

56. Section 205 states that the Commission "may provide an exemption from the regulations for cable systems serving 20,000 or fewer subscribers."[135] We note that the use of "may" suggests that adoption of such an exemption is discretionary. Should the Commission adopt such an exemption? What would be the costs and benefits of permitting this exemption? Commenters should address the factors the Commission should consider in determining whether this exemption is appropriate. To the extent we do adopt such an exemption, what alternatives would subscribers with disabilities have in the areas that are served by MVPDs that are subject to the exemption? Instead of exempting such small cable systems completely, would it be appropriate to provide them more time with which to comply with the regulations? How should we interpret this provision if we require entities besides MVPDs to comply with the requirements of Section 205?

H. Timing

57. Section 205 of the CVAA provides that with respect to the navigation device rules we adopt that require a mechanism comparable to a button, key, or icon, "[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."[136] The CVAA also provides that with respect to the navigation device accessibility rules that we adopt, we 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."[137] The VPAAC recommends that we adopt these minimum phase-in periods, but that they run from the date of publication of the regulations in the Federal Register, rather than from the date of adoption.[138] We tentatively conclude that we should adopt the VPAAC's recommendation because the recommendation was developed via consensus with support from the industry that should have an understanding of how long the development process for these devices will take. If commenters advocate a longer phase-in

[134] *IP Closed Captioning Order*, 27 FCC Rcd at 859-60, ¶ 123; *Emergency Info Order* at ¶ 78-79.

[135] Pub. L. No. 111-260, § 20+5(b)(2), 124 Stat. 2751, 2775 (2010).

[136] Pub. L. No. 111-260, § 205(b)(6), 124 Stat. 2751, 2775 (2010).

[137] *Id*.

[138] *VPAAC Second Report: User Interfaces* at 15.

period, they should provide a detailed justification for why more time is necessary.

58. Section 204 does not provide a phased-in requirement with respect to digital apparatus, other than that a "digital apparatus designed and manufactured to receive or play back the Advanced Television System Committee's Mobile DTV Standards A/153 shall not be required to meet the requirements of the regulations" adopted under Section 204 until at least two years after the date the final rules are published in the Federal Register.[139] The *VPAAC Second Report: User Interfaces* suggests that the Commission make its rules regarding digital apparatus effective two years after publication of final rules in the Federal Register, consistent with the time frame given for compliance with both the ACS and IP closed captioning rules adopted pursuant to the CVAA.[140] We tentatively conclude that we should adopt this recommendation because the recommendation was developed via consensus with support from the industry that should have an understanding of how long the development process for these devices will take. Commenters advocating longer phase-in periods for the various components of the Section 204 rules or for any class of apparatus should provide a detailed justification for why more time is necessary.

I. Elimination of Analog Closed Captioning Labeling Requirement and Renaming Part 79

59. Finally, although this is not mandated by the CVAA, we take the opportunity to seek comment on a proposal to update our closed captioning apparatus rules. We tentatively conclude that we should remove the requirement that manufacturers label analog television receivers based on whether they contain an analog closed captioning decoder, as well as the requirement that manufacturers include information in the television's user manual if the receiver implements only a subset of the analog closed captioning functionality.[141] We find that this rule is no longer necessary. Our regulations required that by March 1, 2007, all televisions contain a digital television receiver[142] and, by extension, a digital closed captioning decoder.[143] Thus, all television receivers being sold today are required to implement the features of digital closed captioning, which are more extensive than the features required for analog closed captioning. We believe that there are no televisions being manufactured in or imported into the United States today that implement only a subset of the analog closed captioning functionality. Therefore, we do not see the need to require the labeling of television receivers that include analog tuners, nor do we see the need to maintain the requirement that user manuals indicate if a device does not support all of the aspects of the analog closed captioning standard. We seek comment on this analysis and on our proposal to eliminate the analog labeling requirement.

60. Second, we propose to rename Part 79 of the Commission's rules to better organize our rules. With the proposed addition of the user interface rules outlined above, Part 79 has expanded in scope beyond closed captioning and video description of broadcast and MVPD programming to more broadly encompass the accessibility of video programming, of which closed captioning and video description are a part. Therefore, we propose to rename Part 79 to the more general, "Accessibility of Video Programming." Additionally, we believe that dividing Part 79 into two subparts—one that includes rules that apply to video programming owners, providers, and distributors, and one that includes rules that apply to apparatus—will help readers browse our rules. Therefore, we propose to establish a

[139] Pub. L. No. 111-260, § 204(d), 124 Stat. 2751, 2774 (2010).

[140] *VPAAC Second Report: User Interfaces* at 15.

[141] *See* 47 C.F.R. § 79.101(m). The analog closed captioning rules were originally located in Part 15 of the Commission's rules, at 47 C.F.R. 15.119, but were moved for clarity and other purposes to Part 79 during the Commission's implementation of IP Closed Captioning as a result of the 21st Century Communications and Video Accessibility Act. *See IP Closed Captioning Order*, 27 FCC Rcd 787.

[142] *See* 47 C.F.R. § 15.117(i).

[143] 47 C.F.R. § 79.102.

Subpart A, entitled "Video Programming Owners, Distributors, and Providers," to contain those rules regarding the provision of various services, and a Subpart B, "Apparatus," to contain those rules pertaining to devices and other equipment used to receive, play back, or record video programming. We seek comment on these proposed changes.

IV. PROCEDURAL MATTERS

A. Ex Parte Presentations

61. The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[144] 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.

B. Initial Regulatory Flexibility Analysis.

62. The Regulatory Flexibility Act of 1980, as amended ("RFA"), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 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 Small Business Administration (SBA).

63. With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") under the Regulatory Flexibility Act[145] is contained in Appendix B. Written public comments are requested in the IFRA, and must be filed in accordance with the same filing deadlines as comments on the *Notice*, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this *Notice*, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this *Notice* and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the *Federal Register*.

[144] 47 C.F.R. §§ 1.1200 *et seq.*

[145] *See* 5 U.S.C. § 603.

C. Paperwork Reduction Act Analysis.

64. This document contains proposed new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

D. Comment Filing Procedures

65. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 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 St., 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.

- 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 or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

66. *Additional Information:* For additional information on this proceeding, please contact Brendan Murray of the Media Bureau, Policy Division, Brendan.Murray@fcc.gov, mailto:(202) 418-1573, or Adam Copeland of the Media Bureau, Policy Division, Adam.Copeland@fcc.gov, (202) 418-1037.

V. ORDERING CLAUSE

67. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 303(r), 303(aa), and 303(bb) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 303(aa), and 303(bb), and Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act, Pub. L. No. 111-260, §§ 204 and 205, this Notice of Proposed Rulemaking **IS ADOPTED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

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

Subpart B – Apparatus

4. Remove and reserve § 79.101(m):

§ 79.101 Closed caption decoder requirements for analog television receivers.

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(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. Add § 79.107 to read as follows:

§ 79.107. User interfaces and guides on digital apparatus.

(a) Effective [INSERT DATE], 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, shall design, develop, and fabricate those digital apparatus so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired. For the purpose of this section, the term apparatus does not include a navigation device, as such term is defined in section 76.1200 of the Commission's rules [*that is provided by an MVPD to a subscriber*].

(b) This rule shall be effective for any apparatus manufactured after the effective date in the United States or outside of the United States and imported for use in the United States, except that apparatus must only do so if it is achievable as defined in section 79.105(c).

(c)(1) *Achievable.* Manufacturers of apparatus may petition the Commission for a full or partial exemption from the user interface requirements of this section pursuant to § 1.41 of this chapter, which the Commission may grant upon a finding that the requirements of this section are not achievable, or may assert that such apparatus is fully or partially exempt as a response to a complaint, which the Commission may dismiss upon a finding that the requirements of this section are not achievable.

(2) The petitioner or respondent must support a petition for exemption or a response to a complaint with sufficient evidence to demonstrate that compliance with the requirements of this section is not "achievable" where "achievable" means with reasonable effort or expense. The Commission will consider the following factors when determining whether the requirements of this section are not "achievable:"

(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.

6. Add § 79.108 to read as follows:

§ 79.108. User interfaces and guides on navigation devices.

(a)(1) Effective [INSERT DATE], manufacturers of navigation devices (as defined by Section 76.1200 of this chapter*) provided by MVPDs to their subscribers* and the MVPDs that provide such devices shall ensure that the on-screen text menus and guides provided 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. MVPDs [*and other covered entities]* may comply with this requirement 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.

(2) With respect to navigation device features and functions
(i) Delivered in software, the requirements set forth in this rule shall apply to the manufacturer of such software; and
(ii) Delivered in hardware, the requirements set forth in this rule shall apply to the manufacturer of such hardware.

(b) This rule shall be effective for any apparatus manufactured after the effective date in the United States or outside of the United States and imported for use in the United States, except that the navigation device must only do so if it is achievable as defined in section 79.108(c)(2).

(c)(1) *Achievable.* Manufacturers of navigation devices may petition the Commission for a full or partial exemption from the accessibility requirements of this section pursuant to § 1.41 of this chapter, which the Commission may grant upon a finding that the requirements of this section are not achievable, or may assert that such navigation device is fully or partially exempt as a response to a complaint, which the Commission may dismiss upon a finding that the requirements of this section are not achievable.

(2) The petitioner or respondent must support a petition for exemption or a response to a complaint with sufficient evidence to demonstrate that compliance with the requirements of this section is not "achievable" where "achievable" means with reasonable effort or expense. The Commission will consider the following factors when determining whether the requirements of this section are not "achievable:"

(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 § 79.109 to read as follows:

§ 79.109 Activating accessibility features

(a) Effective [INSERT DATE], 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) and navigation devices (as defined by Section 76.1200 of this chapter) with built-in closed-captioning

capability shall ensure that closed captioning features are available through a method that is reasonably comparable to a button, key, or icon.

(b) Effective [INSERT DATE], 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 shall ensure that video description features are available through a method that is reasonably comparable to a button, key, or icon.

(c) This rule shall be effective for any apparatus manufactured after the effective date in the United States or outside of the United States and imported for use in the United States.

APPENDIX B

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] 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 *Notice of Proposed Rulemaking* ("*NPRM*"). 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 provided on the first page of the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

2. The Federal Communications Commission ("Commission") seeks comment in this *NPRM* on how to implement Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"). These sections generally require the Commission to adopt rules to require 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 people. Section 205 directs the Commission to require that "on-screen text menus and guides provided by navigation devices" be made accessible. The Commission seeks comment on the types of devices covered by Sections 204 and 205. Both of these sections also require that these devices provide a mechanism that is "reasonably comparable to a button, key, or icon designated for activating" closed captioning, video description, and accessibility features. The *NPRM* tentatively concludes that: (1) The requirement for the appropriate functions of the digital apparatus or navigation device to be accessible covers all "user functions" of such apparatus and devices, and that such functions do not include the debugging and diagnostic functions; (2) The Commission should not specify the technical standards for making those user functions accessible, consistent with the statute; (3) The Commission should handle alternate means of compliance and enforcement matters in the same way that the Commission implemented those matters in other CVAA contexts; and (4) The deadlines for compliance with these rules should be consistent with those proposed by a working group that focused on this topic. The Commission also seeks comment the most effective way to implement the requirement that closed captioning, video description, and accessibility features be activated through a mechanism reasonably comparable to a button, key, or icon is to require those features to be activated (and deactivated) in a single step; on how to interpret Section 205's direction that accessible navigation devices shall be provided "upon request;" on how to handle complaints and enforce the rules adopted pursuant to Sections 204 and 205 of the CVAA; and on whether to adopt an exemption from regulations adopted under Section 205 with respect to cable systems that serve 20,000 or fewer subscribers. Finally, in addition to the implementation of the CVAA, the NPRM proposes to modernize the Commission's apparatus rules by eliminating the outdated requirement that manufacturers label analog television sets based on whether they include a closed-caption decoder and rename Part 79 of the Commission's rules. The Commission seeks comment on all of these tentative conclusions and issues.

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[1] *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).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

3. Our goal in this proceeding is to enable disabled people to use their digital video devices more easily. The proposed revisions to our rules will help fulfill 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."

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 found in Sections 4(i), 4(j), 303(u) and (z), 330(b), and 713(g), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(u) and (z), 330(b), and 613(g).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] 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.[7] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of "Wired Telecommunications Carriers," which 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."[8] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[9] Census data for 2007 shows that there were 31,996 establishments that operated that year.[10] Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.[11] Thus,

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[4] 5 U.S.C. § 603(b)(3).

[5] 5 U.S.C. § 601(6).

[6] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in 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." 5 U.S.C. § 601(3).

[7] 15 U.S.C. § 632.

[8] U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers.

[9] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[10] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

[11] *See id.*

under this category and the associated small business size standard, the majority of such firms can be considered small.

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.[12] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[13] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[14] Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.[15] Thus, under this second size standard, most cable systems are small.

8. *Cable System Operators*. 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."[16] The Commission has determined that an operator serving fewer than 677,000 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.[17] Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.[18] 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,[19] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

9. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."[20]

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[12] 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 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[13] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[14] 47 C.F.R. § 76.901(c).

[15] Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

[16] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[17] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[18] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[19] 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).

[20] U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting," http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

The SBA has created the following small business size standard for Television Broadcasting firms: those having $14 million or less in annual receipts.[21] The Commission has estimated the number of licensed commercial television stations to be 1,387.[22] In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14 million or less.[23] We therefore estimate that the majority of commercial television broadcasters are small entities.

10. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[24] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

11. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.[25] These stations are non-profit, and therefore considered to be small entities.[26]

12. *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,"[27] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[28] Census data for 2007 shows that there were 31,996 establishments that operated that year.[29] Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.[30] Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation

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[21] 13 C.F.R. § 121.201, NAICS code 515120.

[22] *See FCC News Release*, "Broadcast Station Totals as of December 31, 2011," dated January 6, 2012, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311837A1.pdf.

[23] We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

[24] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 21.103(a)(1).

[25] *See FCC News Release*, "Broadcast Station Totals as of December 31, 2011," dated January 6, 2012, http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.

[26] *See generally* 5 U.S.C. §§ 601(4), (6).

[27] *See* 13 C.F.R. § 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 5, above.

[28] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[29] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

[30] *See id*.

("EchoStar") (marketed as the DISH Network).[31] Each currently offers subscription services. DIRECTV[32] and EchoStar[33] 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.

13. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules.[34] The second has a size standard of $25 million or less in annual receipts.[35]

14. The category of "Satellite Telecommunications" "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[36] Census Bureau data for 2007 show that 607 Satellite Telecommunications establishments operated for that entire year.[37] Of this total, 533 establishments had annual receipts of under $10 million or less, and 74 establishments had receipts of $10 million or more.[38] Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

15. The second category, *i.e.*, "All Other Telecommunications," comprises "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry."[39] For this category, Census data for 2007 shows that there were a total of 2,639 establishments that operated for the entire year.[40] Of those 2,639 establishments, 2,333 operated with

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[31] S*ee Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) ("*13th Annual Report*"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

[32] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

[33] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3. As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving "Sky Angel" service from DISH Network. *See id*. at 581, ¶ 76.

[34] 13 C.F.R. § 121.201, NAICS code 517410.

[35] 13 C.F.R. § 121.201, NAICS code 517919.

[36] U.S. Census Bureau, 2007 NAICS Definitions, 517410 Satellite Telecommunications.

[37] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table.

[38] *See id*.

[39] http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search.

[40] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

annual receipts of less than $10 million and 306 with annual receipts of $10 million or more.[41] Consequently, the Commission estimates that a majority of All Other Telecommunications establishments are small entities that might be affected by our action.

16. *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,"[42] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[43] Census data for 2007 shows that there were 31,996 establishments that operated that year.[44] Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.[45] Thus, under this category and the associated small business size standard, the majority of such firms can be considered small.

17. *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."[46] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[47] Census data for 2007 shows that there were 31,996 establishments that operated that year.[48] Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.[49] Thus, under this category and the associated small business size standard, the majority of such firms can be considered small.

18. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the

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[41] *See id*.

[42] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[43] *See id*.

[44] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

[45] *See id*.

[46] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[47] *See id*.

[48] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

[49] *See id*.

Instructional Television Fixed Service (ITFS)).[50] 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.[51] 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.[52] 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.[53] 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.[54] Auction 86 concluded in 2009 with the sale of 61 licenses.[55] Of the ten 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.

19. 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, "Wired Telecommunications Carriers" have been 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."[56] 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

[50] *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).

[51] 47 C.F.R. § 21.961(b)(1).

[52] 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.

[53] *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).

[54] *Id.* at 8296.

[55] *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).

[56] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.[57] For these services, the Commission uses the SBA small business size standard for Wired Telecommunications Carriers, which is 1,500 or fewer employees.[58] Census data for 2007 shows that there were 31,996 establishments that operated that year.[59] Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.[60] Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses.[61] 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.[62]

20. *Fixed Microwave Services.* Microwave services include common carrier,[63] private-operational fixed,[64] and broadcast auxiliary radio services.[65] They also include the Local Multipoint Distribution Service (LMDS),[66] the Digital Electronic Message Service (DEMS),[67] and the 24 GHz Service,[68] where licensees can choose between common carrier and non-common carrier status.[69] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[70] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[71] For the category of

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[57] *Id*.

[58] *See id*.

[59] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

[60] *See id*.

[61] http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp.

[62] 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).

[63] *See* 47 C.F.R. Part 101, Subparts C and I.

[64] *See* 47 C.F.R. Part 101, Subparts C and H.

[65] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[66] *See* 47 C.F.R. Part 101, Subpart L.

[67] *See* 47 C.F.R. Part 101, Subpart G.

[68] *See id.*

[69] *See* 47 C.F.R. §§ 101.533, 101.1017.

[70] 13 C.F.R. § 121.201, 2007 NAICS code 517210.

"Wireless Telecommunications Carriers (except Satellite),"[72] Census data for 2007 show that there were 11,163 firms that operated for the entire year.[73] Of this total, 10,791 firms had employment of 999 or fewer employees and 372 had employment of 1,000 employees or more.[74] Thus, under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

21. *Open Video Systems.* 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.[75] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[76] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[77] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[78] Census data for 2007 shows that there were 31,996 establishments that operated that year.[79] Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.[80] Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[81] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[82] 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, at least some of the OVS operators may qualify as small entities.

22. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. These establishments produce programming in their own facilities or acquire programming from external sources. The programming

(Continued from previous page)

[71] *See id*. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[72] 13 C.F.R. § 121.201, NAICS code 517210.

[73] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table. Available Census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[74] *See id*.

[75] 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

[76] *See* 47 U.S.C. § 573.

[77] U.S. Census Bureau, 2007 NAICS Definitions, http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

[78] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[79] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

[80] *See id*.

[81] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[82] *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[83] The SBA has developed a small business size standard for this category, which is: all such firms having $15 million dollars or less in annual revenues.[84] To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007 show that there were 659 establishments in this category that operated for the entire year.[85] Of that number, 462 operated with annual revenues of $9,999,999 million dollars or less.[86] 197 operated with annual revenues of 10 million or more.[87] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

23. *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."[88] 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.[89] 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.

24. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category "Wired Telecommunications Carriers." Under that size standard, such a business is small if it has 1,500 or fewer employees.[90] Census data for 2007 shows that there were 31,996 establishments that operated that year.[91] Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.[92] Thus, under this category and the associated small business size standard, the majority of such firms can be considered small.

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[83] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming," http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

[84] 13 C.F.R. § 121.201, 2007 NAICS code 515210.

[85] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table.

[86] *Id*.

[87] *Id*.

[88] 15 U.S.C. § 632.

[89] 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).

[90] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[91] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

[92] *See id*.

25. *Competitive Local Exchange Carriers, 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. The appropriate size standard under SBA rules is for the category "Wired Telecommunications Carriers." Under that size standard, such a business is small if it has 1,500 or fewer employees.[93] Census data for 2007 shows that there were 31,996 establishments that operated that year.[94] Of those 31,996, 1,818 operated with more than 100 employees, and 30,178 operated with fewer than 100 employees.[95] Thus, under this category and the associated small business size standard, the majority of such firms can be considered small. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

26. *Motion Picture and Video Production*. The Census Bureau defines this category as follows: This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.[96] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[97] To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.[98] Of these, 8,995 had annual receipts of $24,999,999 or less, and 100 had annual receipts ranging from not less than $25,000,000 to $100,000,000 or more.[99] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

27. *Motion Picture and Video Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[100] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[101] To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission

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[93] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[94] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table.

[95] *See id*.

[96] http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[97] 13 C.F.R. § 121.201, 2007 NAICS code 512110.

[98] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

[99] *Id.*

[100] U.S. Census Bureau, 2007 NAICS Definitions, http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

[101] 13 C.F.R. § 121.201, 2007 NAICS code 512120.

relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.[102] Of these, 434 had annual receipts of $24,999,999 or less, and 16 had annual receipts ranging from not less than $25,000,000 to $100,000,000 or more.[103] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

28. *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."104 The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were 919 establishments that operated for part or all of the entire year.[105] Of those 919 establishments, 771 operated with 99 or fewer employees, and 148 operated with 100 or more employees.[106] Thus, under that size standard, the majority of establishments can be considered small.

29. ***Audio and Video Equipment Manufacturing.*** The SBA has classified the manufacturing of audio and video equipment under in NAICS Codes classification scheme as an industry in which a manufacturer is small if it has less than 750 employees.107 Data contained in the 2007 Economic Census indicate that 491 establishments in this category operated for part or all of the entire year.[108] Of those 491 establishments, 456 operated with 99 or fewer employees, and 35 operated with 100 or more employees.[109] Thus, under the applicable size standard, a majority of manufacturers of audio and video equipment may be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

30. One proposed rule change discussed in the NPRM would affect reporting, recordkeeping, or other compliance requirements. This proposed rule change would eliminate the outdated requirement that manufacturers of analog television sets label devices with a notice about closed captioning features.

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[102] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

[103] *Id.*

[104] The NAICS Code for this service 334220. *See* 13 C.F.R § 121.201; http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

[105] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_31I1&prodType=table.

[106] *See id*.

[107] 13 C.F.R § 121.201, NAICS Code 334310.

[108] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_31I1&prodType=table.

[109] *See id*.

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

31. 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.[110]

32. We emphasize at the outset that, although alternatives to minimize economic impact on small businesses (such as the possible exemption from Section 205 regulations for cable systems that serve 20,000 or fewer subscribers) have been and are being considered as part of this proceeding, our proposals are governed by the congressional mandate contained in Sections 204 and 205 of the CVAA. The *NPRM* seeks comment on whether any alternatives to the proposed rules exist, and gives small entities wide latitude in the specific steps it will use to meet the rules—in other words, the proposed rules are entirely performance, rather than design, focused.[111] Individual entities, including smaller entities, may benefit from this provision because our proposed rules will do not specify how any entity must achieve accessibility, but rather encourage all entities (include small entities) to be creative and develop cost-effective methods to achieve accessibility.

33. Overall, in proposing rules governing accessible digital apparatus and navigation devices, we believe that we have appropriately considered both the interests of individuals who are blind, visually impaired, deaf, or hard of hearing and the interests of the entities who will be subject to the rules, including those that are smaller entities. Our proposed rules are consistent with Congress' goal of "updat[ing] the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming."[112] In seeking to achieve that Congressional goal, our proposed rules will not require small businesses to conform to any standard, and allow them to use any less expensive "alternative means of compliance" for cost savings. Moreover, elimination of the labeling requirement is another step that the Commission proposes to reduce costs for small businesses.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

34. None.

[110] 5 U.S.C. § 603(c).

[111] *NPRM*, ¶ 11-21.

[112] House Committee Report at 19; Senate Committee Report at 1.

APPENDIX C

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 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
COMMISSIONER AJIT PAI
APPROVING IN PART AND CONCURRING IN PART

Re: *Accessibility of User Interfaces, and Video Programming Guides and Menus,* MB Docket No. 12-108.

Today the Commission takes another step towards fulfilling the promise of the Twenty-First Century Communications and Video Accessibility Act. I support many of the proposals and tentative conclusions contained in this Notice of Proposed Rulemaking, which begins the process of implementing sections 204 and 205 of the Act, and I appreciate the willingness of my colleagues to incorporate many of my suggestions into this item.

While I am largely in agreement with my colleagues, I concur in part because I have a different view with respect to section III.A.1 of the NPRM, which addresses the categories of devices covered under sections 204 and 205. In particular, it would seem that the plain language of the statute precludes us from narrowing section 205 to cover only navigation devices provided by MVPDs and expanding section 204 to include navigation devices sold at retail along with other digital apparatus. Section 205 of the Act covers "navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations)."[113] And section 204 of the Act specifically provides that "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)."[114] Given this straightforward language, I have difficulty seeing how any equipment that qualifies as a navigation device under our rules could be exempt from section 205 and covered instead as an apparatus under section 204 of the Act. The text of section 205 and the specific navigation-device carve-out from section 204 appear to apply to all navigation devices, regardless of whether they are supplied by MVPDs or obtained by consumers in another manner.

That having been said, I look forward to studying the comments that will be submitted in response to this NPRM and will review the record with an open mind. By continuing to work together in a collaborative manner, I am optimistic that the Commission will be able to enact rules consistent with the text of sections 204 and 205 of the Act by the statutory deadline.

[113] *See* 47 U.S.C. § 303(bb)(1).

[114] *See* 47 U.S.C. § 303(aa)(4) (emphasis added).