

WILMER, CUTLER & PICKERING

Washington ■ Baltimore ■ New York ■ London ■ Brussels ■ Berlin

June 1, 1999

TELECOMMUNICATIONS LAW UPDATES

Telecommunications Equipment and Services Must Be Accessible to People with Disabilities

Amid the lengthy struggles over implementation of the pro-competition provisions of the Telecommunications Act of 1996, a separate “market-opening” provision has received comparatively less attention from industry players and consumers. Section 255 of the Act requires manufacturers of telecommunications equipment, manufacturers of customer premises equipment, and providers of telecommunications services to ensure that their products and services are “accessible to and usable by individuals with disabilities, if readily achievable.” If accessibility for a covered product or service is not readily achievable, then the provider must make it “compatible” for persons with disabilities (through, for example, the use of add-on peripheral devices), if such compatibility is readily achievable. These requirements will have a direct effect on suppliers of a wide range of products and services, ranging from plain old telephone service to caller identification to pagers. Disabilities advocacy groups have proclaimed Section 255 to be the most significant disabilities legislation since the passage of the Americans with Disabilities Act (ADA) itself.

The Commission conducted a Notice of Inquiry on Section 255 shortly after passage of the Act, and issued its proposed rules for Section 255 more than a year ago. Its final rules are expected soon, perhaps by mid-summer. The Commission’s lengthy process of implementing this key provision of the Act may have lulled manufacturers and service providers into relative quiescence. Yet there are clear indications that the Commission will seek to exploit to the fullest its jurisdiction under Section 255, and will move to enforce its final rules vigorously.

Congress directed the Commission to work in conjunction with the Architectural and Transportation Barriers Compliance Board in developing guidelines for the accessibility of telecommunications equipment and CPE. The Board is the federal agency charged with developing guidelines for compliance with the ADA and other federal accessibility mandates. Section 255 imports the definition of “readily achievable” from the ADA: it means “easily accomplishable

and able to be carried out without much difficulty or expense.” The Commission has proposed to examine three factors in deciding whether it is “readily achievable” to add a feature to make a particular service or product accessible or compatible:

- whether the feature is technologically feasible;
- how expensive it would be to provide the feature;
- whether the feature is practical, given its expense.

Some of the delay in the Commission’s issuance of final rules is due to the number and complexity of some very contentious implementation issues. For example:

- Section 255 requires access for persons with disabilities to products and services used in “telecommunications.” The Commission has asked whether it could, consistent with Congressional intent, expand its current definition of telecommunications to include information services such as e-mail and voice mail, and software associated with telecommunications products and services.
- Section 255 accessibility and compatibility requirements appear to apply to each telecommunications CPE product. The Commission has asked, however, whether it can permit manufacturers to respond with *lines* of products, in which different products accommodate different disabilities, rather than attempt to design each product to accommodate many different disabilities.
- The Commission has proposed to make its rules applicable not only to facilities-based telecommunications providers, but also to resellers and aggregators.
- The Commission has proposed that foreign-manufactured equipment, as well as American-made, must comply with Section 255.

- The Commission has proposed to apply no standing requirement or time limits for the filing of a complaint under Section 255.

How the Commission designs its final enforcement scheme also will have a major impact on the industry and consumers. As the “heart” of its Section 255 rules, the Commission has proposed a “fast-track” complaint procedure:

- The consumer submits a complaint to the Commission.
- The Commission forwards the complaint to the manufacturer or service provider.
- The manufacturer or service provider has five business days to try to solve the problem — with extensions in some cases — and informally reports the results of its efforts to the Commission (and possibly the complainant in a form accessible to the complainant).
- If the problem remains unsolved, or if the Commission detects an “underlying compliance problem,” the Commission may refer the complaint to its informal complaint process or, in some cases, formal complaint process.
- Proposed penalties against noncompliant manufacturers and service providers include Section 503(b) forfeitures, revocation of licenses and permits, and damages.

Industry and consumer commenters have objected to various elements of the Commission’s proposed enforcement process. For example, without a standing or timing requirement for complaints, could a manufacturer or service provider be liable in damages to the *descendants* of a consumer who was

unable to use a telecommunications product or service? Is five days an unrealistically short period of time for companies to attempt to resolve consumer complaints? Does the Commission have authority to hear complaints and award damages, despite Congress’ mandate that Section 255 not “be construed to authorize any private right of action”?

While the scope and details of the final rules remain to be seen, Section 255 soon will be moving to the forefront of Commission activities. Chairman Kennard has made disabilities access issues a key part of the agenda of his tenure. He recently was appointed to the Presidential Task Force on Employment of Adults with Disabilities, on which occasion he noted that “[t]he ability to use telecommunications is essential to obtaining a job and performing it successfully. The telecommunications industry has the potential to significantly reduce the unemployment rate of adults with disabilities.” Disabilities advocacy groups will continue to push the Commission, the Administration, and Congress to make sure that as the nature of telecommunications itself evolves, the protections of Section 255 evolve accordingly. Moreover, the Commission sees itself in the next century “focus[ing] its resources on effective and swift enforcement,” and has announced to this end the creation of a central Enforcement Bureau dedicated to enforcing Congress’ and the Commission’s policies, including those mandating access to telecommunications for persons with disabilities.

Given the laudable goals of Section 255 and the Chairman’s personal commitment to make telecommunications work for persons with disabilities, the industry should expect broad Section 255 rules that have real force behind them. Just as smart companies began their “Y2K readiness” programs long before the millennium, telecommunications services and equipment providers already should be well into the process of considering their own “Section 255 readiness.”

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

Scott Blackmer	202-663-6167	SBlackmer@wilmer.com
Lynn Charytan	202-663-6455	LCharytan@wilmer.com
John Harwood	202-663-6333	JHarwood@wilmer.com
William Lake	202-663-6725	WLake@wilmer.com
Daniel Phythyon	202-663-6545	DPhythyon@wilmer.com
William Richardson	202-663-6038	WRichardson@wilmer.com

Telecommunications Law Updates also available at <http://www.wilmer.com>