

Little Recognized Act May Soon Result in Accessibility Regulations for IT Equipment

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On August, 7, 1998, the President signed into law the "Workforce Investment Act of 1998," whose significance may not have been fully appreciated at the time. This statute includes amendments to the Rehabilitation Act of 1973. These 1998 Amendments significantly expand and strengthen the electronic and information technology ("IT") access requirements for people with disabilities originally set forth in Section 508 of the Rehabilitation Act.

The prior version of Section 508 established non-binding electronic equipment accessibility guidelines to be issued by the General Services Administration. Although Section 508 directed agencies to comply with these guidelines, it is generally acknowledged that the guidelines were largely ignored by Federal agencies. By contrast, the 1998 Amendments will lead to binding, enforceable standards that will be incorporated into the Federal Acquisition Regulation ("FAR") and then be used by Federal agencies in their IT acquisitions. Thus, in the near future, the equipment IT contractors provide to the government may be required to be accessible to individuals with visual, hearing, physical and or other disabilities.

A. Overview of Requirements

In addressing the accessibility of IT to persons with disabilities, the 1998 Amendments establish the basic rule of "comparable access and use" to IT by persons with and persons without disabilities. In particular, amended Section 508 requires that each Federal department or agency ensure that the IT it "develops, procures, maintains or uses" provides "access and use of the information and data" to Federal employees and members of the public who have disabilities which is "comparable to the access and use" provided to those who do not have disabilities.

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In order to meet this comparability objective, the Act empowers a so-called "Architectural and Transportation Barriers Compliance Board" (generally referred to as the "Access Board") to issue and publish standards which (1) set forth a definition of "electronic and information technology" that is to be "consistent with the definition of information technology" in the Clinger-Cohen Act of 1996 and (ii) specify the "technical and functional performance criteria necessary to implement" the comparable access requirements.

The Clinger-Cohen Act defines "information technology" to include "any equipment or interconnect system or subsystem of equipment that is used in the automated acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information." This definition includes computer hardware, software, networks, and peripherals, as well as many electronic and communications devices, used in business offices.

The Access Board is required to consult with various Federal agencies, IT industry representatives and "appropriate public or non-profit agencies or organizations, including organizations representing individuals with disabilities" before issuing the standards. Among the Federal agencies explicitly listed in the statute as consulting references are the Departments of Defense, Commerce and Education, the General Services Administration, and the Federal Communications Commission.

B. Due Date for Standards

The Access Board is required to issue its standards by February 7, 2000. To meet the consultation requirements, the Access Board created an Electronic and Information Technology Access Advisory Committee ("EITAAC"), consisting of 26 organizations representing the various sectors identified in the 1998 Amendments, to advise it on the standards. The Committee's final report was delivered to the Board on May 11, 1999.

Our contacts with the Access Board indicate that the February 7, 2000, due date for standards may not be met. The Access Board is reportedly working on the notice of proposed rulemaking by which the standards will be issued for public comment. Although the Board expects to publish the notice soon, the precise date of publication will depend on review of the proposed standards by the Office of Management and Budget. Once the proposed standards are published, the Access Board expects that interested parties will have 45 days in which to submit comments, after which the Board will finalize the standards.

C. Amendments to the FAR

Thereafter, the Federal Acquisition Regulatory Council must revise the FAR to incorporate the standards as finally promulgated by the Access Board. Specifically, the 1998 Amendments mandate that, within six months after the Access Board publishes the standards, the FAR Council shall revise the FAR and each Federal department or agency shall in turn modify its "procurement policies and directives" to incorporate the standards.

However, if an agency determines in connection with a particular procurement that compliance with the standards will impose an "undue burden," the agency must include in the documentation supporting the procurement an explanation why compliance would create such a burden. Even then, the agency must provide individuals with disabilities with the information and data "by an alternative means of access that

allows the individual to use the information and data."

The Access Board is to "periodically review and, as appropriate, amend the standards" to reflect "technological advances or changes in electronic and information technology." Actually, agencies should already have been taking certain actions under the 1998 Amendments. By February of last year, agencies were supposed to have evaluated their then-current IT systems for accessibility to individuals with disabilities and submitted a report to the United States Attorney General containing the results of that evaluation. By February 7, 2000, the Attorney General must deliver a report to the President on the extent to which the IT of the Federal Government is accessible to individuals with disabilities. In addition, every two years thereafter, the Attorney General must report to the President and the Congress on Federal agency compliance with the requirements of the law, and on any actions on individual complaints.

D. Enforcement

The 1998 Amendments give enforcement rights to individuals with disabilities. These rights do not become effective until August 7, 2000, two years after the date of enactment of the 1998 Amendments and six months after the statutorily-mandated date for issuance of the Access Board standards. As of August 7, 2000, any individual with a disability may file a complaint alleging that a Federal department or agency fails to comply with the technology access standards in a procurement instituted after that date. Any such complaint should be filed with the agency alleged to be in non-compliance. The applicable complaint procedures are those otherwise established by the Rehabilitation Act in Section 504 to resolve allegations of discrimination on the basis of disability in Federally-conducted programs or activities. This complaint process authorizes injunctive relief and attorneys' fees to the prevailing party, but does not allow for compensatory or punitive damages. Individuals with disabilities may also file a civil action against an agency.

However, Section 508 does not apply to the private sector, either in terms of purporting to regulate the accessibility of IT sold in the private sector or in terms of establishing remedies or causes of action for persons with disabilities.

E. The EITAAC Report

As indicated above, EITAAC has submitted its 34-page final report to the Access Board recommending a set of standards for Federal procurement officers and commercial suppliers of IT that the Committee believes will meet the comparability rule of the 1998 Amendments for individuals with disabilities. The EITAAC characterizes its proposal as identifying "minimally acceptable standards" and "strongly encourage[s]" entities involved in the design, production and procurement of IT "to go beyond these standards to maximize the accessibility and usability of products by all individuals."

EITAAC's proposed standards apply to a broad range of IT, including technology used for communication, duplication, storage, presentation, control, transport and production. In EITAAC's view, this technology must be accessible and usable by as wide a range of people with disabilities as possible, including people with visual, hearing, physical or speech disabilities, language, learning or cognitive disabilities and combinations of disabling conditions.

EITAAC's recommended standards are arranged in two categories – so-called "generic standards" and "technology specific standards." The generic requirements are the higher level of requirements and apply to all IT. They are "performance standards in nature" and are written based upon the varieties of human needs for access found in the population. The technology specific standards apply only to IT that includes the "specified feature or function cited" and thus are more limited in scope than the generic standards. The following categories of IT are covered by the technology specific standards: keyboards, software, web-based information and applications, telecommunications, multimedia, information transaction machines, personal digital assistants, and cabling. EITAAC expects that standards in other specific areas will need to be developed.

According to the report, "[t]he pace of technology advancements in [IT] is rapid and the level of innovation is high" and thus that "a static standard consisting of design specification and fixed checklists would tend to stifle innovation and to delay the availability of technology advancements to people with disabilities." Counterbalancing that consideration, EITAAC also was of the view that "specific standards are necessary in order to ensure compliance." In an effort to balance these competing factors EITAAC's recommended standards address "alternative technical approaches." This means that the standards describe "the required level of accessibility and the relevant accessibility features which are either available or under development at the time of publication."

EITAAC acknowledges in its report that Section 508 is designed to be implemented through the Federal procurement process. In the Committee's view, compliance with Section 508 may be addressed by a combination of two approaches in the procurement regulation structure:

- A so-called "Representations" requirement, under which vendors would be required to declare, as a condition of the award of contract, that its proposed products and services comply with all statutory requirements, including Section 508. Such representations would be subject to applicable administrative and statutory penalties.
- A so-called "Evaluation" approach, which incorporates accessibility as one of the attributes examined and evaluated by the Government as part of the source selection decision.

F. Conclusion

Because of the central role of the Federal procurement process in implementing the amended Section 508 accessibility mandate, companies supplying IT to Government agencies should carefully analyze the standards to be proposed soon by the Access Board. These proposed standards could well become a benchmark for IT procurements after August 7, 2000, and thus will likely impact design choices and research and development investments by Government contractors. Interested parties should be prepared to review, analyze and comment on the proposed standards once they are published. The EITAAC report can be accessed at .

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