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Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement

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MAKING FEDERAL INFORMATION TECHNOLOGY ACCESSIBLE: A CASE STUDY IN SOCIAL POLICY AND PROCUREMENT

By Christopher R. Yukins

Abstract

Section 508 of the Rehabilitation Act requires that all information technology bought by the federal government be accessible to persons with disabilities. That goal, simple to state, has been enormously complex to implement. In imposing a social initiative on the procurement system, Congress has left a huge number of issues unresolved – including, most critically, who is to pay for the initiative. This article reviews the issues raised by Section 508, and traces common patterns that emerge when, as with Section 508, social goals are implemented through a large, complex, and deeply entrenched procurement system. The article traces the impact of established constituencies, inside and outside the government, both in slowing Section 508's progress and in filling gaps left by Congress and the regulators. The article suggests that, as the U.S. procurement system grows ever more streamlined in the coming years, the patterns and pitfalls of Section 508 – and of other social initiatives – will become an increasingly prominent part of the procurement system.

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I. Introduction

Being unable to access information technology in many ways means being shut off from the surrounding world. After all, information technology has changed our lives. For most people, instant access to information is the norm: by email, web access, or wireless, we are connected, and we are vastly more productive. In less than a generation, this enormous leap forward has completely redrawn the social landscape. To compete effectively for jobs, resources and advancement – and for the simpler personal pleasures of the information age, such as instant news, or electronic messages with old friends – individuals must be able to access information technology.

To a large extent, though, persons with disabilities cannot share in the information revolution.[1] Most hardware and software products were designed for end users with certain minimum capabilities. For example, to operate most off-the-shelf computers, the user must be able to read the display screen. For the blind and for millions of others with disabilities, the IT landscape – really, the modern competitive landscape – is neither fair nor level.[2]

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[1] For a discussion of the vital importance of information technology access in the lives of those with disabilities, see, for example, the congressional findings underlying the Assistive Technology Act of 1998, Public Law No. 105-394, § 2, 112 Stat. 3655 (1998); *see also* William Matthews, *Increasing Access*, FEDERAL COMPUTER WEEK, July 9, 2001 (available at http://www.fcw.com/fcw/articles/2001/0709/tec-labbx-07-09-01.asp) ("According to White House officials, computer use and Internet access for people with disabilities is half that of people without disabilities, and a PC configured with assistive technology can cost from $2,000 to $20,000.").

[2] According to an October 2000 study from the U.S. Department of Commerce, IT access by those with disabilities falls far below that of those without. For example, "Internet access and computer use vary by disability status. . . . And while just under 25% of people without a disability have never used a personal computer, the situation is quite different for those who have a disability. Close to 60% of people who have at least one type of disability have never used a computer." U.S. DEPARTMENT OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, *Falling Through the Net: Toward Digital Inclusion*, Pt. III (Oct. 2000), (*available at* http://www.ntia.doc.gov/ntiahome/fttn00/Falling.htm#61).

Section 508 of the Rehabilitation Act, amended in 1998, was Congress' attempt to level that playing field.[3] To encourage information technology manufacturers to develop products that are accessible to persons with disabilities, Section 508 requires federal agencies to ensure that any "electronic information technology" ("EIT") they purchase, maintain, use, or develop is accessible to people with disabilities, unless an undue burden would be imposed on the agency or other limited exceptions apply.

Some observers rate Section 508 an unqualified success. Because of the huge role the federal government plays as the largest consumer in the IT market, Section 508 has driven accessibility to center stage. More companies worry about accessibility than ever before, because they covet the federal government's procurement dollars. The resulting advances in accessibility have, in turn, spilled over into the commercial marketplace. Arguably, that is precisely what Congress intended and envisioned for Section 508.

In practice, however, Section 508 seems less successful. The regulations that define accessibility are fantastically complex, and Section 508 has not enjoyed a smooth transition into the procurement system. Although many agencies (and IT vendors) have worked hard to implement accessibility, many others have quietly resisted the additional costs and burdens that accessibility imposes.

Section 508's failings can be traced to conflicts between the visions or policy goals that frame the statute. For disability advocates, Section 508 is a means to an end: by rendering all IT in the federal market accessible, those advocates hope to make all IT,

[3] The current version of Section 508, 29 U.S.C. § 794d, is available at the government's primary Section 508 website, www.section508.gov, at http://www.section508.gov/index.cfm?FuseAction=Content&ID=14, and in the Appendix to this article.

across the commercial marketplace, fully accessible. For many others, though – including many in Congress -- Section 508's reach was to be much more modest. For them, the statute merely requires that federal IT be as accessible to those with disabilities as it is to those without. Accessibility, for them, was merely leveling the playing field. These competing visions can be summarized as follows:

- *Improving Accessibility Across the Marketplace:* The more radical or "*extra-remedial*" approach treats Section 508 as a vehicle for accessibility across society. The idea is to force the federal government – the IT's market's biggest customer – to demand accessibility, thus spreading the benefits of accessibility to customers outside the federal sphere.
- *Improving Accessibility Within Federal Sphere:* Conversely, the "*intra-remedial*" approach accepts Section 508 on its face. Federal IT must be accessible, nothing more.

In enacting Section 508, Congress never had to decide whether the legislation is "intra-remedial" or "extra-remedial." Had Congress faced that issue squarely and addressed the costs of an "extra-remedial" effort, the consensus behind the legislation likely would have collapsed. Instead, Congress skirted the issue, avoided divisive debate, and passed legislation that left key issues – including liability, responsibility, costs, and goals – unresolved.

These unresolved issues impede Section 508's progress. One important roadblock, for example, stems from accessibility's role in the procurement evaluation process. Ideally, procurement professionals would integrate accessibility into their standard, scored assessments of technical factors in any IT purchase. The disability-

rights community, however, resists this approach. Making accessibility just another scored element – one of many – could mean, in practice, that agencies would trade off accessibility for other features. This would likely dilute the "extra-remedial" impact of Section 508. Accordingly, many in the disability-rights community favor a "binary" approach, in which accessibility is a threshold (or "pass/fail") requirement – a criterion that cannot be hedged, or traded away for other qualities. The conflict between the two approaches has distracted agencies, and kept them from exploring a more nuanced approach, one in which agencies could used scored accessibility to press for better technology without forcing important competitors out of the market.

Unresolved issues such as these also teach broader lessons, for Section 508 is only one among many socioeconomic programs lodged in the United States' procurement system. Too often, the procurement community is uniquely *in*competent to implement social and economic goals. Left alone, contracting officers simply do not know how much accessibility to demand in an IT system,[4] or for that matter, how many women-businesses should be used, or how much diversity we should expect in the contractor workforce. A contracting officer able to resolve business issues – how much more to spend, for example, to speed a procurement – typically lacks the tools necessary to

[4] Indeed, an economic assessment that accompanied the Section 508 rules specifically recognized that the federal procurement system, left to itself, is highly unlikely to procure truly accessible information technology:

> Procurement regulations give Federal purchasers different incentives than private purchasers. Unless accessible features are included in product specifications, they do not have value and may not be paid for. If purchasing a product with accessible features costs more, procurement regulations would direct purchasing officials to purchase the less expensive product. Incorporating accessibility standards in the FAR corrects an existing regulatory disincentive to procure accessible products.

U.S. ARCHITECTURAL & TRANSPORTATION BARRIERS COMPLIANCE BOARD, *Electronic and Information Technology Accessibility Standards - Section 508 of the Rehabilitation Act Amendments of 1998: Economic Assessment* § 1.3 (EOP Foundation, Washington, D.C., Mar. 15, 2000).

address social or economic problems. Therefore, clear direction must come from Congress, or from agencies (such as the Department of Labor, or the Small Business Administration) that shape social and economic programs in the procurement system.

With Section 508, the system stumbled. Congress failed to enunciate a clear mandate for Section 508. A hazy mandate translated into murky – and hugely expensive – procurement regulations. In turn, those rules spawn waste and inefficiency. Section 508's lesson is that implementing social goals through the procurement system is inherently difficult and expensive. Without clear direction, achieving that goal becomes nearly impossible.

The discussion below proceeds in two parts. Part II reviews the legislative history of Section 508. As the history reflects, the costs and true purpose of Section 508 were hardly noted by Congress, at least in public debate. Part III then follows the initiative through the regulatory process. That process was marked by long delays, as various interest groups helped draft accessibility standards. The standards were finally published by the administrative board tasked by Congress, and a separate set of implementing rules for procurement were published in the Federal Acquisition Regulation. Part IV then steps back to assess some of the lingering issues under Section 508, in an effort to glean some lessons learned. As that discussion reflects, while Section 508 has some idiosyncratic lessons, it also teaches broader lessons, more generally applicable to any effort to effect a social or economic policy through the procurement system. It is these lessons, it seems, that may help to shape future procurement reforms.

II. Legislative History of Section 508

Section 508 grew out of a "sister" statute, Section 504 of the Rehabilitation Act.[5] Section 504, like the Americans with Disabilities Act ("ADA"), calls for accommodations for *individuals* with disabilities. Section 508, in contrast, calls for accommodating *all* persons with disabilities: the goal is to ensure that every piece of information technology bought or maintained by the federal government is accessible, across a very wide range of potential disabilities.[6]

The ADA never reached this far. The ADA calls for "reasonable accommodations" for individuals with disabilities. As a practical and legal matter, however, the ADA (at least to date) has not been read to mean that all IT must be accessible.[7] Although the Justice Department has interpreted the ADA to mean that certain public accommodations must make their communications accessible,[8] and the

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[5] 29 U.S.C. § 794.

[6] As the Justice Department has acknowledged, how the enforcement schemes of the Rehabilitation Act overlap and intersect is still not fully clear. *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, INFORMATION TECHNOLOGY AND PEOPLE WITH DISABILITIES: THE CURRENT STATE OF FEDERAL ACCESSIBILITY, at I-3 (Apr. 2000) [hereinafter "*Information Technology and People with Disabilities*"] (recommending that the President direct the Department of Justice, "in consultation with the Office of Personnel Management, the EEOC, and the Access Board, to issue guidance to agencies clarifying the relationship among sections 501, 504, and 508 of the Rehabilitation Act").

[7] *See generally* Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALBANY LAW J. SCIENCE & TECH. 205 (2000); Jeffrey Scott Ranen, Note: *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389 (Spring 2002) (arguing that "the 'public accommodations' provision of Title III of the Americans with Disabilities Act applies to the Internet"). In an October 2002 opinion, the U.S. District Court for the Southern District of Florida ruled that the ADA does not require an airline's website to be accessible. *See* Access Now, Inc. v. Southwest Airlines Co., No. 02-21734-CIV (S.D. Fla. Oct. 18, 2002), *available at* http://www.flsd.uscourts.gov/viewer/viewer.asp?file=/cases/opinions/02CV21734d24.pdf.

[8] In a constituent response letter provided to Senator Tom Harkin, the Justice Department wrote:

> The Americans with Disabilities Act (ADA) requires State and local governments and places of public accommodation to furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities, unless doing so would result in a fundamental alteration to the program or service or in an undue burden. 28 C.F.R.§ 36.303; 28 C.F.R. § 35.160. Auxiliary aids include taped texts, Brailled materials, large print materials, and other methods of making visually delivered material available to people with visual impairments.

Department of Education has taken the position that the ADA requires universities to be proactive in ensuring equal access to electronic communications,[9] courts have been reluctant to apply the ADA broadly to information technology.[10] The current version of Section 508 arguably marks, therefore, the leading edge of accessibility in information technology in the United States.[11]

In its earlier forms, however, Section 508 stood in the shadows of the ADA, which has had a much broader impact across U.S. society.[12] Section 508 followed in the

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> Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.

U.S. Department of Justice, Letter to Senator Tom Harkin (Sept. 9, 1996), *available at* http://www.usdoj.gov/crt/foia/cltr204.txt.

[9] *See* Constance S. Hawke & Anne L. Jannarone, *Emerging Issues of Web Accessibility: Implications for Higher Education*, 160 WEST EDUCATION LAW REPORTER 715, 717-18 (Mar. 14, 2002) (discussing Department of Education letters to universities).

[10] *See generally* Justin D. Petruzzel, Note: *Adjust Your Font Size: Websites Are Public Accommodations Under the Americans with Disabilities Act,* 53 RUTGERS U.L. REV. 1063 (2001) (arguing that the ADA's Title III should be read to mean that websites, as "public accommodations," must be accessible); Cassandra Burke Robertson, *Providing Access to the Future: How the Americans with Disabilities Act Can Remove Barriers in Cyberspace*, 79 DENVER U.L. REV. 199 (2001) (arguing that ADA should be read to require private websites to be accessible); c*f.* Doe v. Mutual of Omaha,179 F.3d 557, 558-59 (7th Cir. 1999) (suggesting, in *dictum*, that websites must be accessible under the ADA: "Title III of the Act, in section 302(a), provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" by the owner, lessee, or operator of such a place. . . . The core meaning of this provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do."). In July 2000, the National Federation for the Blind (NFB) and America Online (AOL) entered into a settlement agreement under which the NFB agreed to dismiss, without prejudice, its lawsuit under the ADA alleging that AOL's services were inaccessible, and AOL agreed to make greater efforts at accessibility. *See* National Federation of the Blind/America Online Accessibility Agreement (July 26, 2000), *available at* http://www.nfb.org/Tech/accessibility.htm; *see also* Cassandra Burke Robertson, *supra*, at 203 (discussing background to AOL suit).

[11] *See* Jane K. Winn, *Electronic Commerce Law: 2001 Developments*, 57 BUS. LAW. 541, 558 (Nov. 2001) ("In light of the absence of concrete legal standards in this area, the [Section 508 accessibility standards] may become a *de facto* benchmark for evaluating the accessibility of Web sites maintained by private parties, even though the regulation by its express terms does not apply to private parties.").

[12] Notably, though, the ADA itself grew out of the Rehabilitation Act, which ensured accommodations for federal workers long before the ADA imposed those many of the same accessibility requirements on the private sector. Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMPLE L. REV. 471, 475 (1991) ("A key rationale used to support the ADA was that it essentially

footsteps of Section 504 of the Rehabilitation Act, which banned discrimination and thus (the regulations and the courts had made clear) demanded reasonable accommodation for those with disabilities.[13] Section 508 was originally added to the Rehabilitation Act in 1986,[14] but that original provision merely called for guidelines for electronic accessibility.[15] Those requirements were strengthened in 1992, but even then the legislation did not mandate accessibility for all federal information technology, but instead relied on agency guidelines to encourage accessibility.[16] These efforts to

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extended into the private sector an existing federal statute. This existing provision . . . of the Rehabilitation Act of 1973, prohibits discrimination against an otherwise qualified individual with handicaps, solely on the basis of that handicap, within any program or activity receiving federal funds, the executive agencies, and the United States Postal Service.").

[13] *See, e.g.,* School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987) ("Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee."); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. CIV. R.-CIV. LIBS. L. REV. 413 (1991).

[14] The Rehabilitation Act of 1973, Public Law No. 93-112, originally did not contain Section 508's electronic accessibility requirements. *See* H.R. CONF. REP. NO. 500, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2143.

[15] *See* H.R. CONF. REP. NO. 955, 99th Cong., 2d Sess., at 71 (1986) (discussing Senate's addition of Section 508 guideline requirements to Rehabilitation Act), *reprinted in* 1986 U.S. CODE CONG. & ADM. NEWS 3471, 3545. As amended, Section 508 then read (in pertinent part) as follows:

> (a) ELECTRONIC EQUIPMENT ACCESSIBILITY. -- Title V of the Act is amended by inserting after section 507 the following new section:
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> "ELECTRONIC EQUIPMENT ACCESSIBILITY
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> "SEC. 508. (a)(1) . . . The Secretary, through the National Institute on Disability and Rehabilitation Research and the Administrator of General Services, in consultation with the electronics industry, shall develop and establish guidelines for electronic equipment accessibility designed to insure that handicapped individuals may use electronic office equipment with or without special peripherals.
> "(2) The guidelines established pursuant to paragraph (1) shall be applicable with respect to electronic equipment, whether purchased or issued.
> "(3) The initial guidelines shall be established not later than October 1, 1987, and shall be periodically revised as technologies advance or change.
> "(b) Beginning after September 30, 1988, the Administrator of General Services shall adopt guidelines for electronic equipment accessibility established under subsection (a) for Federal procurement of electronic equipment. Each agency shall comply with the guidelines adopted under this subsection.
> "(c) For the purpose of this section, the term 'special peripherals' means a special needs aid that provides access to electronic equipment that is otherwise inaccessible to a handicapped individual.".

Pub. L. No. 99-506, § 603 (1986).

[16] The 1992 legislation revised Section 508 to read, in substance:

encourage accessibility in the federal agencies, by and large, failed[17] because they lacked real means of enforcement.[18]

> "SEC. 508. ELECTRONIC AND INFORMATION TECHNOLOGY ACCESSIBILITY GUIDELINES.
>
> "(a) Guidelines.-The Secretary, through the Director of the National Institute on Disability and Rehabilitation Research, and the Administrator of the General Services Administration, in consultation with the electronics and information technology industry and the Interagency Council on Accessible Technology, shall develop and establish guidelines for Federal agencies for electronic and information technology accessibility designed to ensure, . . . that individuals with disabilities can produce information and data, and have access to information and data, comparable to the information and data, and access, respectively, of individuals who are not individuals with disabilities. Such guidelines shall be revised, . . . to reflect technological advances or changes.
>
> "(b) Compliance.-Each Federal agency shall comply with the guidelines established under this section.".

Rehabilitation Act Amendment of 1992, Public Law No. 102-569, § 509, 106 Stat. 4344, *available at* http://thomas.loc.gov/cgi-bin/query/C?c102:./temp/~c102Rqjzd1.

[17] *See, e.g.,* Julie Carroll, *Section 508: An Overview for Disabled Consumers*, BRAILLE FORUM, Vol. XL, No. 6 (American Council of the Blind, Dec. 2001) ("First enacted in 1986, Section 508 originally consisted of general, non-binding guidelines regarding government procurement of accessible technology. Only a few federal agencies considered accessibility features when making procurement decisions. This did not create sufficient demand to influence systemic changes in product design.").

[18] The Electronic and Information Technology Access Advisory Committee (EITAAC) later described this failure in the earlier versions of Section 508:

> [The earlier versions of] Section 508 directed Federal agencies to comply with the electronic equipment accessibility guidelines issued by the GSA. Although a few Federal agencies did initiate efforts to comply with the mandates of Section 508, the decade following the passage of this legislation showed little consistency amongst these agencies, with the vast majority all but ignoring its directives. A significant problem seemed to be the lack of an enforcement mechanism in Section 508. Without any teeth, the very existence of Section 508 went virtually unnoticed by many segments of the Federal government.

ELECTRONIC AND INFORMATION TECHNOLOGY ACCESS ADVISORY COMMITTEE, FINAL REPORT (May 12, 1999) [*hereinafter* "EITAAC Final Report"], *available at* http://www.access-board.gov/sec508/commrept/eitaacrpt.htm. In October 1987, pursuant to the 1986 legislation, the Department of Education and the General Services Administration (GSA) published guidelines for accessibility, guidelines which were published by the General Services Administration as Bulletin C-8 on January 1, 1991 (*available at* http://trace.wisc.edu/docs/taacmtg_aug96/sec508.htm), *see* EITAAC Final Report, *supra*, at _____, and which were incorporated into the Federal Information Resources Management System (FIRMR), *id.* Bulletin C-8 called for government agencies to ensure equal access to persons with disabilities. FIRMR, *supra,* ¶ 10.b, *available at* http://trace.wisc.edu/docs/taacmtg_ aug96/sec508.htm. The General Services Administration published a model contract provision during this period, a provision that called for contractors, acting voluntarily, to identify their accessible information technology. The model clause read as follows:

> (b) The offeror is encouraged to identify in its offer, and include in any commercial catalogs and pricelists accepted by the Contracting Officer, office equipment, including any special peripheral, that will facilitate electronic office equipment accessibility for

It was not until 1998, therefore, that Congress carried the Rehabilitation Act's Section 508 to the forefront of accessibility law, and far beyond the requirements of the ADA.[19] On their face, the 1998 amendments to Section 508 require only that federal IT be accessible. Many of those who urged the 1998 amendments to Section 508, however, had a much broader plan: to use the power of the federal procurement to make all information technology, across the marketplace,[20] accessible to persons with disabilities.[21] As one advocate for the blind recalled:

> handicapped individuals. Identification should include the type of disability accommodated and how the users with that disability would be helped.

GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION; *Implementation of Public Law 99-506*, 56 Fed. Reg. 29442, 29443 (1990).

[19] For an extended comparison of the ADA and Section 508's much broader requirements, see *Review and Report on the Applicability to the Legislative Branch of Section 508 of the Rehabilitation Act of 1973, as Amended*, submitted by the Board of Directors of the Office of Compliance Pursuant to Section 102(b) of the Congressional Accountability Act of 1995, 2 U.S.C. 1302(b), secs. III – IV (Nov. 13, 2001) [hereinafter "Office of Compliance 2001 Report"], *reprinted in* 147 CONG. REC. S12539, S12549-50; the report is also available through the congressional Office of Compliance, at http://www.compliance.gov/reports-studies/sec102b/sec102b-interim_11-01.html.

[20] For an argument that the IT industry should be moving, proactively, to make its products fully accessible, see William E. Kennard & Elizabeth Evans Lyle, *With Freedom Comes Responsibility: Ensuring That the Next Generation of Technologies Is Accessible, Usable and Affordable*, 10 COMMLAW CONSPECTUS 5 (2001).

[21] *See, e.g.,* John J. Pavlick, Jr. & Rebecca Pearson, *Implementing the New 508 Accessibility Standards for the Disabled*, PROCUREMENT LAWYER, at 1 (American Bar Ass'n, Spring 2001) ("The new accessibility rules are a bold attempt by Congress to change the entire information technology community by requiring the federal government to procure only equipment that provides disabled individuals the same access to electronic information technology as nondisabled individuals."); Jennifer Jones, *Users with Disabilities Push High-Tech Limits*, INFOWORLD, Sept. 1, 2000 (Section 508 rules "are intended to provide incentives that will compel the technology industry to embark voluntarily on more initiatives to make technology accessible to those with disabilities. Better yet, the federal government, Congress, and others would like to see vendors dovetail accessibility initiatives with mainstream product development. And that's what many active in the area of accessibility are expecting."); Latresa McLawhorn, *Recent Development: Leveling the Accessibility Playing Field: Section 508 of the Rehabilitation Act*, 3 N.C. J.L. & TECH. R. 63, 65-66 (Fall 2001) ("As the largest technology consumer in the United States, the federal government hopes to motivate the electronic and information technology industry to design and manufacture more accessible technology products. . . . As a result, vendors who refuse to take the necessary steps to make their products accessible will risk being cut off from the huge government market."). Commentators described a "push/pull" strategy in broadening access to IT: the "push" provided by government regulation (such as Section 508) mandating accessibility, with the economic "pull" provided by potential IT customers with disabilities. *See* Peter David Blanck & Leonard A. Sandler, *ADA, Title III and the Internet: Technology and Civil Rights*, 24 MENTAL & PHYSICAL DISABILITY L. REPORTER. 855 (Sept./Oct. 2000).

> [W]hen news about Section 508 of the Rehabilitation Act seemed to be popping up in every media outlet and company board room, I planned to write about 508 and the optimistic expectations we, as people who are blind, have for its impact on our lives. Because of the market-share that the regulations of 508 represent, we may find that our fax machines talk to us, that printers which communicate with the screen-readers on our PCs are cheap enough for us to buy, that those text-to-speech cell phones make their way into our pockets and backpacks. The possibilities are exciting.[22]

The comments that followed the revised Section 508's progress through Congress reflected – at points – that broader goal. Indeed, though Section 508 began with a relatively narrow focus, it broadened as it proceeded through the legislative process.

The current Section 508 amendments originated in the 105th Congress, in a flurry of proposed legislation. On April 9, 1997, Representative Anna Eshoo introduced legislation which would have required agencies to certify that they were complying with the federal accessibility guidelines published under the earlier versions of Section 508.[23] The preamble to that legislation made it clear that the purpose of the bill was narrow and focused: to ensure that the "145,000 Federal employees with disabilities," who comprised fully "7.5 percent of the Federal workforce," would have access to information technology at the workplace. The House bill noted that, though the prior version of Section 508 required "Federal agencies to comply with Federal guidelines to ensure that

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[22] Penny Reeder, *Editorial: A Momentary Distraction,* THE BRAILLE FORUM, Vol. XL, No. 2 (American Council of the Blind Aug. 2001), *available at* http://www.acb.org/magazine/2001/bf082001.html); *see also* Penny Reeder & Sharon Lovering, *1999 Convention Highlights*, THE BRAILLE FORUM, Vol. XXXVIII, No. 5 (American Council of the Blind, Nov. 1999) ("In response to questions from the audience, the presenters said that no one should expect Microsoft or any other manufacturer of software products to make improvements unless its in their best interest to do so from a marketing point of view. Both Cook and Charlson hold out great hope that the government's enforcement of Section 508 will provide the marketplace incentive for Microsoft and others to make their products accessible.").

[23] FEDERAL ELECTRONIC AND INFORMATION TECHNOLOGY ACCESSIBILITY COMPLIANCE ACT, H.R. 1255, 105th Cong., 1st Sess. (introduced Apr. 7, 1997); *see also* 143 Cong. Rec. E616 (Apr. 9, 1997) (extension of remarks by Rep. Eshoo) ("[I]t is imperative to Federal employees with disabilities for Federal agencies to purchase information technology that gives them a chance to do their jobs instead of cutting them off from full participation in the work force.") (remarks upon introduction of H.R. 1255). A companion bill to H.R. 1255 was introduced on May 16, 1997 by Senator Christopher Dodd, as S. 761 in the 105th Congress.

electronic and information technology used by such agencies is accessible to individuals with disabilities," because "there is no enforcement mechanism in such Act to provide for compliance," agencies "have an uneven record of offering accessible technologies to their employees with disabilities."[24]

When he introduced companion legislation in the Senate, however, Senator Christopher Dodd, a main proponent of a strengthened Section 508, made it clear that he hoped that improving the accessibility of federal information technology would carry collateral benefits for all Americans with disabilities:

> Barriers to information and technology must be broken down. By giving Federal employees with disabilities the opportunity to utilize technological advancements, we provide them hope and encourage self-sufficiency.
>
> Additionally, . . . these new efforts will encourage the private sector to adopt similar procedures. Let the Federal Government provide a good example to the private sector in its efforts.
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> * * * *
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> Nationally, there are 49 million Americans who have disabilities. It is critical, . . . that given the rapid introduction of new technologies, persons with disabilities not be allowed to fall behind. The more we can do to promote their equality, independence, and dignity, the better.[25]

The provisions that became the current amendments to Section 508 began in a Senate bill, S. 1579.[26] The Senate Labor and Human Resource Committee's report on the

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[24] H.R. 1255, 105th Cong., 1st Sess. § 2; S. 761, 105th Cong., 1st Sess. § 2.

[25] 143 Cong. Rec. S4660 (May 16, 1997) (comments of Senator Dodd upon introduction of S. 761, Federal Electronic and Information Technology Disability Compliance Act of 1997).

[26] *See* Office of Compliance 2001 Report, *supra* note ____, secs. III – I, *reprinted in* 147 Cong. Rec. S12539, S12549-50; *id.* at _____, *reprinted in* 147 Cong. Rec. at S12549-50. As introduced as part of S. 1579, Section 508 was in broad terms very similar to the current version of Section 508, though there were some important differences. S*ee* S. 1579, 105th Cong., 2d Sess. (as introduced in the Senate). Unlike the final legislation, the initial bill included a definition of "electronic and information technology" (EIT), to include "any equipment, software, interface system, operating system, or interconnected system or subsystem of equipment, whether or not accessed remotely, that is used in the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception

proposed legislation described the purpose behind Section 508; as the report reflected, the committee's core goal was to remedy problems *within* the government:

> Section 508 requires each Federal agency to procure, maintain, and use electronic and information technology that allows individuals with disabilities the same access to information technology as individuals without disabilities. The Access Board is required to issue regulations establishing the performance criteria necessary to implement the requirements of this section. However, the committee intends that agency compliance with section 508 begin upon enactment of the Rehabilitation Act Amendments of 1998. In order to ensure immediate agency compliance with section 508, the committee directs the Federal Acquisition Regulations Council, the Office of Management and Budget, and other Federal agencies, upon enactment of this bill, to modify procurement policies and directives, as appropriate, to reflect the requirements of section 508. . . .
>
> Agencies must assess their compliance with section 508 and report their findings to the Access Board. The committee intends for the Access Board to provide guidance to assist agencies in conducting their assessments. The committee believes that the `Requirements for Accessible Software' developed by the Department of Education should be used by the Access Board as one standard against which agencies could measure their performance in the area of software.[27]

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of data or information," and "any related service (including a support service) and any related *resource*. *Id*.(a) The final legislation, in contrast, left it to the Access Board to define EIT. *See* 29 U.S.C. § 794d(a)(2).

Although the initial legislation required that each "Federal agency shall procure, maintain, and use electronic and information technology that allows, regardless of the type of medium of the technology, individuals with disabilities to produce information and data, and have access to information and data, comparable to the information and data, and access, respectively, of individuals who are not individuals with disabilities," this requirement was strengthened in the final legislation. The final version of Section 508 made it explicitly clear that access to federal information technology was to be afforded to two distinct classes of users: federal employees, and those members of the public who access federal information technology from outside the government.

The final legislation also reflected substantial tightening of the regulations to be issued under Section 508. Although the original Senate version of the bill called for the Access Board to issue accessibility standards and to issue orders to ensure compliance with those standards, the final legislation went much farther. The final version of Section 508 explicitly provided for *procurement* rules to be issued through the Federal Acquisition Regulation, and for enforcement under standard procedures – including civil actions – under the Rehabilitation Act. This moved enforcement authority out of the Access Board, potentially into the district courts.

[27] REHABILITATION ACT AMENDMENTS OF 1998, S. REP. NO. 166, 105TH CONG., 2D SESS., AT __ (Mar. 2, 1998) (to accompany S. 1579), *available at* http://thomas.loc.gov/cgi-

As Congress' monitoring agency for workplace compliance later noted, the committee report showed that "this legislation stemmed primarily from the need to 'reestablish and realign the national workforce development and training system to make it more user-friendly and accessible.' . . . Thus, the legislation was primarily perceived as a vocational rehabilitation and training matter."[28] With specific regard to Section 508, however, Congress' internal compliance agency stressed that "the particular purpose of the proposed amendments to section 508 was to 'require each Federal agency to procure, maintain, and use electronic and information technology that allows individuals with disabilities the same access to information technology as individuals without disabilities.'"[29]

What the early legislative reports did *not* reveal, however, was the likely scope and cost of the Section 508 remedial effort. When he introduced the reform bill that included Section 508, S. 1579, in January 1998, Senator Mike DeWine did not mention the Section 508 requirements. Instead, he focused on other workforce improvements that the proposed amendments to the Rehabilitation Act would bring.[30] In his introductory statement, Senator James Jeffords explained that Section 508's provisions reflected input

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bin/cpquery/T?&report=sr166&dbname=cp105&. A resolution passed that summer by the American Council for the Blind noted that Senate staff had played a key role in strengthening the legislative language, to require that all information technology purchased by federal agencies be accessible. *See* American Council for the Blind, Resolution 98-16 (July 11, 1998), *available at* http://www.acb.org/resolutions/res98.html.

[28] Office of Compliance 2001 Report, *supra* note ___, at _____ (citing S. REP. NO. 155, at 2), *reprinted in* 147 Cong. Rec. S12539, S12549-50.

[29] *Id.* at ____(citing S. REP. NO. 155, at 58), *reprinted in* 147 CONG. REC. S12539, S12549-50.

[30] 144 CONG. REC. S126 (Jan. 28, 1998); *see also id.* at S170 (statement of Senator Bill Frist (R-TN) ("The main goal of the reauthorization, which has previously been discussed in detail today by Senators DeWine and Jeffords is to increase opportunities for individuals with disabilities to prepare for, secure, maintain, and regain employment.").

from Senator Christopher Dodd, but he did not cite the costs of Section 508.[31] Nor did the committee report on S. 1579 even mention the costs of accessibility under Section 508, which later were estimated at over $1 billion.[32] As Senator Jeffords explained when the legislation was introduced, Congress' core goal was to address the "bottom line for individuals with disabilities -- more jobs, better jobs."[33] Accessibility of federal information technology was simply part of that broader goal.

The legislation passed by the Senate was ultimately incorporated into a separate bill, H.R. 1385, which became Public Law No. 105-220, the Workforce Investment Act of 1998; Section 508 was included in Title IV of that legislation, which was named the Rehabilitation Act Amendments of 1998. While the version of H.R. 1385 that was originally introduced in the House in April 1997 did not contain the revised Section 508,[34] the version originally passed by the House included a requirement that agencies certify that they had complied with government guidelines for the accessibility of information technology.[35] The bill ultimately adopted in conference, however, after the Senate incorporated the terms of its S. 1579, included the much more stringent requirement that all information technology purchased by the federal government be

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[31] 144 CONG. REC. S168 (Jan. 28, 1998) (statement by Senator Jim Jeffords) ("With guidance from Senator Dodd, we strengthened the provisions in title V of the Act pertaining to the accessibility of electronic and information technology for individuals with disabilities by designating that the Access Board to write regulations and by requiring the Office of Management and Budget to oversee Federal agencies' compliance with such regulations."); *see also id.* at S170 (Jan. 28, 1998) (statement by Senator Tom Harkin ("Of particular interest to me and to Senator Dodd are the changes to Section 508 of the Act which pertain to electronic and information technology accessibility. This bill strengthens the provisions regarding procurement by Federal agencies of technology that is accessible to individuals with disabilities.").

[32] S. REP. NO. 155, *supra note* ___, at 39 (estimated costs review by Congressional Budget Office).

[33] 144 CONG. REC. S168 (Jan. 28, 1998).

[34] For a copy of H.R. 1385 as introduced, see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h1385ih.txt.pdf.

[35] Section 2264 of the bill, as passed by the House, called for this compliance. *See* http://thomas.loc.gov/cgi-bin/query/D?c105:3:./temp/~c105URAg5R::

equally accessible to persons with disabilities. These were the key elements of Section 508, as it was finally passed[36]:

- Federal employees with disabilities, and individuals with disabilities who seek federal information or services, are to have the same (or at least comparable) access to federal information technology, when compared to their counterparts who do not have disabilities. Access, in other words, is to be on a level playing field.

- Agencies need not provide a level playing field, though, if doing so will cause an "undue burden" – though the agencies must then provide alternative means of access.

- The Architectural and Transportation Barriers Compliance Board (the "Access Board"), which regularly drafts standards for accessibility under the ADA and other, similar statutes,[37] was tasked with drafting accessibility standards under Section 508.[38]

- The Access Board standards were to be incorporated into the Federal Acquisition Regulation ("FAR"), to guide procurement of accessible information technology.

- The General Services Administration ("GSA") and the Access Board are to provide other agencies with implementation assistance.

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[36] 29 U.S.C. § 794d.

[37] For a history of the Access Board's work, see http://www.access-board.gov/about/boardhistory.htm.

[38] The statute set deadlines for the Access Board standards, and for the follow-on amendments to the Federal Acquisition Regulation. Those deadlines ultimately could not be met, for a variety of reasons. *See, e.g.,* ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD, *Electronic and Information Technology Accessibility Standards: Notice of Proposed Rulemaking*, 65 Fed. Reg. 17346, 17347 (Mar. 31, 2000) [hereinafter "Proposed Access Board Standards"]. Under the original statute, final accessibility standards were to be published by February 7, 2000, and agencies were to comply with those standards by six months thereafter, *i.e.,* by August 7, 2000. After it became apparent that those due dates could not be met, Congress passed, as part of the Military Construction Appropriations Act for Fiscal Year 2001 (Public Law No. 106-246), a special provision delaying the *enforcement* date for the standards to six months after the standards' final publication. *See* Pub. L. No. 106-248, § 2406, 114 Stat. 598 (2000); H. REP. NO. 710, 106th Cong., 2d Sess. ___ (June 29, 2000) (conference report on section 2406 of Military Construction appropriations bill), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr710&dbname=cp106&. Under that amending legislation, the Access Board standards were to become effective on June 21, 2001, six months after publication of the final standards. *See* 65 Fed. Reg. at 80,501.

- Individuals with complaints under Section 508 may file complaints through the administrative process established by Section 504 of the Rehabilitation Act.[39]

The statute did *not* clarify a number of critical issues that would, over the coming years, divide the procurement community. The statute did not set a framework for implementing Section 508, other than to set deadlines for implementation. The statute did not resolve whether this was to be *intra*-remedial or *extra*-remedial initiative: was the law intended to ensure that federal IT was accessible, or was it intended to drive accessibility across the broader commercial marketplace? Finally, the new Section 508 gave little, if any, guidance on how agencies were to handle exceptions to accessibility, such as when accessibility would impose an "undue burden."

Despite the legislation's defects, Section 508's enactment marked an important milestone for the disability community. A year after Section 508's passage, Representative James Langevin traced a hopeful arc, from accessibility in the federal government to accessibility across society:

> Section 508 of the Rehabilitation Act requires federal agencies' electronic and information technology ("IT") to be accessible to individuals with disabilities. . . . But the regulations do not apply to the legislative and judicial branches, state and local governments, or the private sector. If we truly are a government of, for and by the people, then every American must have access to it. . . . Web accessibility is not just for the 54 million individuals with disabilities or for the millions of elderly Americans with diminished vision, hearing and other senses, but for any one of us who might one day need this technology. . . . I hope that today's event marks the beginning of some exciting, new changes in Congress. [40]

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[39] 29 U.S.C. § 794. *See generally* Kathleen D. Henry, Note, *Civil Rights and the Disabled: A Comparison of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 in the Employment Setting*, 54 ALBANY L. REV. 123 (Fall 1989); Latresa McLawhorn, *Recent Development: Leveling the Accessibility Playing Field: Section 508 of the Rehabilitation Act*, 3 N.C. J.L. & TECH. R. 63, 67 (Fall 2001).

[40] 148 CONG. REC. E1125-03 (June 21, 2002) (statement of Hon. James Langevin).

For many, therefore, Section 508 is one more step in a broader march to accessibility.[41] That march began with the Rehabilitation Act, which banned federally funded activities from discriminating against employees with disabilities – and required reasonable accommodations for those persons. The Rehabilitation Act in turn led to the ADA, which imposed accessibility requirements on broad segments of the private sector.[42] The leading edge in accessibility – at least in information technology – then passed back to the Rehabilitation Act, with the passage of the 1998 amendments to Section 508. Although Section 508 ostensibly requires accommodations only in the public sector, its impact is likely to be felt across all IT, public and private.[43]

Because Section 508's history threads through the Rehabilitation Act, to the ADA, and back through the Rehabilitation Act to the private IT market, Section 508 carries the legal detritus of decades of legislation[44] – and the hopes of millions of persons

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[41] Congress returned to the Section 508 when it passed the E-Government Act of 2002, Pub. Law No. 107-347, 116 Stat. 2899, in late 2002. Section 101 of that act, 44 U.S.C. § 3601 *et seq*., established an Office of Electronic Government in the Office of Management & Budget, which is, among other responsibilities, to assist agencies in implementing Section 508 of the Rehabilitation Act. Section 202 of the E-Government Act, 44 U.S.C. § 3501 note, requires federal agencies to take Section 508 accessibility into account when implementing electronic government.

[42] *See generally* ROBERT L. BURGDORF, JR., *supra* note ___, at ___ (tracing history of ADA).

[43] In a 1999 report, Alan Dinsmore, senior governmental relations representative from the American Foundation for the Blind, and an advocate for persons with disabilities, described the hopes the community of persons with disabilities placed in Section 508:

> [T]he Access Board is currently working with consumer organizations, including the American Council of the Blind, to develop standards for accessible information technology. He reminded his listeners that the federal government is the largest purchaser of information technology. That technology must be accessible to individuals with disabilities who are federal employees, as well as other disabled individuals who are customers of federal services. What this all means is that companies "are going to take a very, very long look at developing accessible information technology if they want to do business with their biggest buyer."

Sharon Lovering, *They Came, They Listened, They Advocated*, THE BRAILLE FORUM, Vol. XXXVII, No. 10 (American Council of the Blind, Apr. 1999), *available at* http://www.acb.org/magazine/1999/bf0499.html.

[44] Section 508 borrows, for example, from the ADA, which says that employers must reasonably accommodate individuals with disabilities unless doing so would cause the employer "undue hardship," and which says that public facilities must accommodate persons with disabilities unless doing so would cause a "fundamental alter[ation]" to the facility. *See* James J. McCullough, Jonathan S. Aronie & Abram

with disabilities. Section 508 is, perhaps, at bottom, not a procurement statute, but rather a civil rights initiative, one that is best understood against the ever-evolving backdrop of disability law, rather than the more rigid confines of federal procurement law.[45] For many, it is the next step in a much broader civil rights movement for those with disabilities; for them, the federal procurement system is merely a means to an end.

III. Development of the Access Board Standards Under Section 508

A. The EITAAC Report

As passed in 1998, the amended Section 508 directed an independent standards-setting agency, the Architectural Transportation Barriers Compliance Board ("Access Board"), to develop minimal standards for accessible EIT to be procured by federal agencies.[46] Congress directed the Access Board to consult with agencies, industry and interested nonprofit organizations in shaping its standards. Accordingly, the Access Board established the Electronic and Information Technology Access Advisory Committee ("EITAAC"), which was comprised of 26 organizations and which reflected many of the various interested constituencies identified in Section 508.[47]

The EITAAC group fully recognized the long chain of disability-rights legislation that had preceded Section 508. The EITAAC final report specifically noted that "Section 508 of the Rehabilitation Act is the next logical step in the progression of these various

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J. Pafford, *Section 508 Accessibility: The "Undue Burden" Exception*, CONTRACT MANAGEMENT, at 30, 32 (Aug. 2001).

[45] This question – whether Section 508 is a procurement provision or a civil rights provision – may have profound implications for the extraterritorial application of the Section 508 requirements.

[46] As noted above, *supra* note ___, Congress amended the statutory deadline in 2000, to defer the effective date to six months after the Access Board standards were published. *See* Military Construction Appropriations Act for FY2001, Pub. L. No. 106-246, § 2406, 114 Stat. 598 (2000).

[47] *See* ELECTRONIC AND INFORMATION TECHNOLOGY ACCESS ADVISORY COMMITTEE (EITAAC), *Final Report*, Exec. Summ. (May 12, 1999), *available at* http://trace.wisc.edu/docs/eitaac_final_rpt/EITAAC_final_report.html.

federal civil rights laws."[48] The final report cited the other legislation – the Telecommunications for the Disabled Act,[49] the Hearing Aid Compatibility Act,[50] the Telecommunications Accessibility Enhancement Act,[51] the Telecommunications Act of 1996,[52] and the Americans with Disabilities Act[53] -- but recognized that none of the prior legislation had taken a broad approach to accessibility in federal IT. While the ADA had "made a considerable impact on our society," noted the report, within a few years after passage of the ADA "it became clear that the provisions of the ADA had not contemplated the huge technological revolution that was enveloping our country."[54] Thus the need for Section 508, according to the EITAAC report – to ensure that persons with disabilities would have equal access to technology in the federal government:

> Much of the earlier legislation focused on access to what has traditionally fallen into the field of "telecommunications." But our nation is now witnessing a rapid convergence of these traditional telecommunications technologies with new and advanced electronic and information technologies. As our Federal government becomes increasingly reliant on these convergent technologies, Section 508 will ensure that individuals with disabilities will be able to reap their many benefits.[55]

The EITAAC final report, published in May 1999, stressed that any standards to implement Section 508 had to be flexible, to accommodate rapid technological changes.[56] At the same time, though, the EITAAC report acknowledged the need for clear technical standards, so that those buying and selling information technology in the federal sector

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[48] EITAAC Report, supra note __, § 2.

[49] Pub. L. No. 97-410, 96 Stat. 2043 (1982) (codified as amended at 47 U.S.C. § 610 (___)).

[50] Pub. L. No. 100-394, 102 Stat. 976 (1988) (codified as amended at 47 U.S.C. § 610 (_____)).

[51] Pub. L. No. 100-542, 102 Stat. 2721 (1988) (codified at 40 U.S.C. § 762 (____)).

[52] Pub. L. No. 104-104, § 255, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. § 255 (___)).

[53] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101 *et seq*. (____)).

[54] EITAAC Report, supra note __, § 2.

[55] *Id.*

[56] *Id.*

would have clear guidelines under Section 508.[57] Conflicts between these dueling goals (flexibility and clarity) would, in many ways, undermine the Section 508 standards throughout the drafting process. The EITAAC final report commented on the need to balance the two goals,[58] and revealed EITAAC's proposed solution -- alternative methods for achieving accessibility:

> The EITAAC recognizes the need of Federal agencies and people with disabilities to benefit from advances in technology and understanding of human factors. The pace of technology advancements in E&IT is rapid and the level of innovation is high. . . . [A] static standard consisting of design specification and fixed checklists would tend to stifle innovation and to delay the availability of technology advancements . . . At the same time, clear and specific standards are necessary in order to ensure compliance. To balance these needs, the EITAAC recommended standards that explicitly address alternative technical approaches. These technical standards describe the required level of accessibility and the relevant accessibility features which are either available or under development at the time of publication. Manufacturers and providers should be encouraged to exceed these minimum requirements, and the procurement process should reward them for doing so. This will foster innovation and improvement in accessibility.[59]

Nowhere in its final report, however, did the EITAAC group suggest that a core purpose of Section 508 was to carry accessibility beyond federal procurement, and into the mainstream. Had the EITAAC report done so, the proposed standards might have taken very different directions, though there were certainly hints that the EITAAC

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[57] The EITAAC final report stated, in its executive summary:

> Manufacturers and providers of Electronic and Information Technology (E&IT) products need to be able to make design choices and R&D investments with a clear understanding of the criteria Federal procurement officials will use. Federal procurement officials in turn need to acquire E&IT based on verifiable accessibility. Federal enforcement officials need to be able to measure improvements in accessibility, in order to report progress to Congress, as required by law, and to take enforcement action where appropriate. People with disabilities, whether Federal employees or the general public, need to be able to rely on the Federal procurement system to promptly and effectively deliver accessible E&IT incorporating current technologies, including advances in accessibility.

Id.

[58] *Id.* § 4.1.2.

[59] *Id.*

members understood that the promise of Section 508 lay, ultimately, in the accessibility it would bring to the wider public.[60]

The EITAAC report differed from the final accessibility rules (which were not issued until many months later) in several telling ways.[61] Among other things, the EITAAC report suggested that federal websites should follow general commercial standards for accessibility.[62] This approach suggests a broader agenda for Section 508: if Section 508 is indeed to carry accessibility into the mainstream, the EITAAC report's recommended approach would have reinforced that goal, through a standardized approach to accessibility. The EITAAC report cited several national and international standards that formed a backdrop to the evolving Section 508 standards.[63] The EITAAC

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[60] The EITAAC final report did hint at the broader ramifications of federal accessibility, for, as noted, the EITAAC report painted Section 508 as part of a broader move towards civil rights for persons with disabilities. *See* EITAAC Final Report, *supra* note ___, § 2.

[61] One other difference stemmed from the range of disabilities to be addressed. In the EITAAC final report, the EITAAC members recommended that the Section 508 standards be used to make information technology accessible across a very wide range of disabilities, including language, learning and cognitive disabilities. EITAAC Final Report, *supra* note ___, § 5.1. Those disabilities, and other disabilities brought within the proposed standards by the EITAAC report, ultimately were not addressed by the Access Board's Section 508 standards. *See infra* notes ___-____ and accompanying text.

[62] This issue arose repeatedly during the rulemaking process. *See, e.g., Comment from Social Security Administration, Office of Program Support, to Proposed Rule* (May 26, 2002), *available at* http://216.218.205.189/sec508/comments-nprm/19.html, (asking whether appropriate to use market-standard "Bobby" software to gauge accessibility of federal websites under Section 508).

[63] The *EITAAC Report* stated, at § 4.2:

> Concurrent with the development of the EITAAC standards, multiple national and international standards have been developed and are continuing to emerge. The EITAAC has referred to some of these standards in section 5.3. Others are expected to be cited by the Access Board in technical assistance to Federal agencies. These standards and standard setting committees include, among others:
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> - World Wide Web Consortium [W3C] Web Accessibility Initiative [WAI] Guidelines (Web Content, User Agent, & Authoring Tool)
> - ISO TC 159: Software Accessibility
> - ISO TC 173: Technical systems and aids for people with disabilities
> - ANSI C63.19: Wireless Hearing Aid Compatibility
> - IEC TC 100: Ease-of-use of appliance controllers, to meet the needs of people with disabilities (Japan)
> - SOGITS N 1032 - EN for DG XIII: (European Standards)
> - Nordic Standards for Accessibility

report's Section 508 standards with regard to website accessibility specifically endorsed those commercial standards, and incorporated by reference the World Wide Web Consortium's "Web Content Accessibility Guidelines 1.0."[64]

Although the EITAAC final report said nothing explicitly about using Section 508 to carry accessibility to the wider population, the theme wound through EITAAC's deliberations. In a broadcast email exchange in January 1999, for example, two EITAAC members (including Douglas Wakefield, a key official at the Access Board) pressed hard for including the "principle of proportionality" in the Access Board guidelines. (The principle ultimately appeared in the EITAAC *Final Report.*) The EITAAC members argued that this principle – that no standard should "go beyond what is necessary"[65] – would ensure that the standards, if sufficiently moderate, would project beyond the sphere of federal procurement. "Since one of the goals of this effort is to influence products in a wider sphere," argued EITAAC member Stephen Berger, "I would suggest that we cite this principle in our report and test our final output by it. I believe that this kind of approach will make our efforts much more 'saleable' when it is discussed in other contexts."[66]

> These examples demonstrate the degree to which accessibility is receiving increasing attention and priority throughout the world. This heightened interest suggests further investments and advancements in accessibility technologies in many countries and across multiple scientific disciplines. As these advancements progress, the Access Board (or other appropriate body) should review and update the Federal accessibility standards to reflect the advancing State of the Art. Because E&IT is a global market, the use of international standards where appropriate will also benefit agencies and people with disabilities by reducing costs that would be associated with designing and developing different products to meet conflicting requirements in different markets.

Id.

[64] EITAAC Final Report, *supra* note __, § 5.3.3. (citing standards at http://www.w3.org/TR/WAI-WEBCONTENT).

[65] EITAAC Final Report, *supra* note __, § 4.3.3.

[66] *Available at* http://trace.wisc.edu:8080/mailarchive/eitaac-l/web/eitaac.9901/msg00067.html.

B. Access Board's Proposed Standards

Many of the same issues carried forward into the Access Board's proposed standards, which, published as a proposed rule on March 31, 2000, were built on the EITAAC recommendations.[67] Although the proposed rule built on the EITAAC recommendations, the proposed rule diverged in important ways from the EITAAC final report.

One important distinction involved the concept of "undue burden." Under the statute, agencies are not required to purchase accessible technology if doing so will cause an "undue burden." Section 508's statutory language offered little clarification on what would constitute an "undue burden," although, as some observers have suggested,[68] Congress could have meant that those enforcing Section 508 should draw upon the "undue burden" standard in the ADA, [69] or the "undue hardship" language of the ADA[70]

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[67] ACCESS BOARD, *Board Proposes Standards for Federal Electronic and Information Technology* (Mar. 31, 2000), *available at* http://www.access-board.gov/news/508nprmpublished.html.

[68] *See, e.g.*, Comments of Information Technology Association of America*, In re Notice of Proposed Rulemaking: Accessibility Standards for Electronic and Information Technology Covered by Section 508 of the Rehabilitation Act Amendments of 1998, Architectural and Transportation Barriers Compliance Board*, Docket No. 2000-01 (May 30, 2000).

[69] Title III of the ADA, 42 U.S.C. § 12182, prohibits discrimination by public accommodations. It states that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." "Discrimination" is defined by the ADA, *id*. § 12182(b) (2) (iii), to include "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, *unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden*."

[70] The ADA, 42 § 12111 (10), defines "undue hardship" to mean "an action requiring significant difficulty or expense," when considered in light of the factors set forth the statute. Those factors include the following:

> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--
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> (i) the nature and cost of the accommodation needed under this chapter;

and Section 504 of the Rehabilitation Act. The EITAAC final report attempted to elaborate on the undue burden standard, and suggested, among other things, that "undue burden" should be measured based upon the "type of the agency's operation, *including the composition and structure of the agency's work force*." Some might have read this language to mean that agencies should examine whether those agencies had, or were likely to have, persons with specific disabilities among their personnel. Taking this approach, however – scaling Section 508 back, to look to accommodations for individual employees rather than imposing government-wide IT accessibility – probably would have been vigorously opposed by the disability community.

The proposed rule abandoned that approach to the "undue burden" exception. Under the proposed rule (and the final standards), an agency is *not* supposed to consider its workforce – including the extent of any disabilities in its workforce – when weighing whether Section 508 accommodations would pose an "undue burden." Instead, the agency is to consider only the burden that accommodation would impose on the agency's financial resources. Thus, when considering whether an accommodation under Section 508 would cause "significant difficulty or expense," the agency is to "consider all agency

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> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
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> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. *See generally* Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391 (1995).

resources available to the agency or components," and to conclude from that whether purchasing accessible goods or services would, indeed, pose an "undue burden."[71]

For the "extra-remedial" purposes of Section 508, this was the right course. By making "undue burden" a difficult exception for agencies to prove, the Access Board in effect mandated broader accessibility, and made it more likely that Section 508's gains will carry beyond the federal sphere. And by not tying the "undue burden" standard to the actual workforce in place – in weighing costs and benefits of accommodations, agencies are *not* to consider whether any federal workers with disabilities will actually gain any immediate benefits – the rule reinforces Section 508's core goal, of universal accessibility.

From an administrative standpoint, however, this approach did not solve the central problem with the "undue burden" analysis (in fact, a central problem with Section 508 implementation in general): how agencies are to pay for accessibility. The rule assumes that an agency will be able to collect funds from other sources, within the agency, to pay for accessibility. Only if that fails, according to the Access Board, may an

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[71] The preambles to both the proposed and final rules explained that the definition of "undue burden" would, indeed, draw upon the law that had developed under the ADA and the Rehabilitation Act. The preamble to the final rule stated, in pertinent part:

> *Response*. The term undue burden is based on caselaw interpreting section 504 of the Rehabilitation Act (*Southeastern Community College v. Davis*, 442 U.S. 397 (1979)), and has been included in agency regulations issued under section 504 since the Davis case. See, e.g., 28 CFR 39.150. The term undue burden is also used in Title III of the ADA, 42 U.S.C. 12182 (b)(2)(A)(iii). The legislative history of the ADA states that the term undue burden is derived from section 504 and the regulations thereunder, and is analogous to the term "undue hardship" in Title I of the ADA, which Congress defined as "an action requiring significant difficulty or expense." 42 U.S.C. 12111(10)(A). *See*, H. Rept. 101-485, pt. 2, at 106. In the NPRM [Notice of Proposed Rulemaking], the Board proposed adoption of "significant difficulty or expense" as the definition for undue burden. No changes were made to that aspect of the definition in the final rule.

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD, *Electronic and Information Technology Accessibility Standards: Final Rule*, 65 Fed. Reg. 80,500, 80,506 (Dec. 21, 2000) [hereinafter "Final Access Board Standards"].

agency claim "undue burden." Although the preamble to the final rule modestly acknowledged that "[a]n agency's entire budget may not be available for purposes of complying with section 508,"[72] that is, in fact, a staggering understatement: in most cases, *none* of an agency's budget may be available for accessibility. Section 508, and the Access Board, thus left unanswered the hardest question posed by accessibility: who is to pay for it?

C. Economic Assessment of the Proposed Access Board Standards

The affordability issue became more acute when, shortly before the Access Board's proposed Section 508 rules were published, the Access Board published its economic assessment of the proposed requirements.[73] The economic assessment started from a somewhat unrealistic premise: that accessibility requirements could be explained through a simple balancing of economic costs and benefits.[74] The economic assessment predicted that Section 508 ultimately could cost hundreds of millions of dollars to implement – far more than the Congressional Budget Office had suggested in its review

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[72] 63 Fed. Reg. at 17351.

[73] U.S. Architectural & Transportation Barriers Compliance Board, *Electronic and Information Technology Accessibility Standards - Section 508 of the Rehabilitation Act Amendments of 1998: Economic Assessment* (EOP Foundation, Washington, D.C., Mar. 15, 2000), *available at* www.access-board.gov/sec508/508-reg-assess.html [hereinafter "Access Board Economic Assessment"]. The Access Board published a revised economic analysis in November 2000, to accompany the final rule. That final report (hereinafter cited as the "Access Board Final Economic Assessment") is available at http://www.access-board.gov/sec508/assessment.htm. As the final report explained, however, the revisions with the final rule brought no substantive changes to the original estimates. *Id*. introduction.

[74] As the Access Board explained in comments accompanying the final Section 508 standards, *see* 65 Fed. Reg. at 80,520, the Access Board commissioned the economic assessment in accordance with Executive Order No. 12,866, Regulatory Planning and Review (Sept. 30, 1993), *available at* http://www.archives.gov/federal_register/executive_orders/pdf/12866.pdf. Subparagraph 6(a)(3)(C)(i) of that Executive Order, signed by President Clinton, called on agencies to consider the health and anti-discriminatory benefits of potential regulations. For a sharp criticism of this approach as applied to the Section 508 regulations, see Carl Peckinpaugh, *The Section 508 Disconnect*, FEDERAL COMPUTER WEEK, Feb. 19, 2001, *available at* http://www.fcw.com/fcw/articles/2001/0219/pol-carl-02-19-01.asp.

of the 1998 legislation[75] – and that the federal government would, in comparison, gain relatively little economic advantage through the Section 508 reforms. Specifically, the economic assessment found:

- Implementing Section 508 accessibility requirements would have a total estimated cost to society of $177 million to $1.068 *billion*, annually.
- The federal government would enjoy productivity gains of *at most* $466 million[76] because of the greater access enjoyed by its employees with disabilities.[77]
- Depending on how Section 508 implementation unfolded, ultimately much of the federal cost might be redistributed across the commercial market.[78]

The economic assessment concluded that, on balance, it was "not possible to conclude that the benefits of the proposed standards are greater than the costs."[79] To rationalize the proposed requirements on economic grounds, therefore, the economic assessment had to

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[75] *See* REHABILITATION ACT AMENDMENTS OF 1998, S. REP. NO. 166, 105th Cong., 2d Sess., at 39 (Mar. 2, 1998) (Congressional Budget Office (CBO) February 26, 1998 cost estimate to accompany S. 1579), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=sr166&dbname=cp105&.

[76] Access Board Economic Assessment, *supra* note __, § ES.5.

[77] The economic assessment explained that, as of fiscal year 1997, according to the Equal Employment Opportunity Commission there were 167,902 federal employees with disabilities, of whom 28,672 persons had "targeted" disabilities. The "targeted" disabilities included deafness, blindness, missing extremities, partial paralysis, complete paralysis, convulsive disorders, mental retardation, mental illness, and distortion of limbs and/or spine. Access Board Economic Assessment, *supra* note ___, § 3.1.1.

[78] The economic assessment stated:

> The direct costs that were quantified for this assessment based on fiscal year 1999 data are shown in Table ES-1. The total estimated costs to society range from $177 million to $1,068 million annually. The Federal proportion of these costs is estimated to range between $85 million and $691 million. The ability of manufacturers, especially software manufacturers, to distributes these costs over the general consumer population will determine the actual proportion shared by the Federal government. Assuming that the addition of accessible features adds value to the products outside the Federal government, we expect these costs to be distributed across society thereby setting a lower bound cost to the Federal government of $85 million. If manufacturers do not distribute these costs across society, the upper bound of the Federal cost will increase to an estimated $1,068 million.

Id. § ES.4.

[79] *Id.* § ES.6.

reach beyond a mere dollars-based assessment, to draw in the civil rights gains that the Section 508 standards would bring:

> By incorporating the standards into the FAR, the Federal government will be placing a very high value -- limited only by the undue burden provision -- on accessibility. By doing so, the potential exists that the government may purchase more accessibility than necessary to maximize economic efficiency. However, the civil rights benefits are difficult to capture using traditional economic techniques, as they represent improvements in equity considerations rather than improvements in efficiency.[80]

The Access Board noted this "civil rights" aspect of the proposed Section 508 requirements, and argued that "[a]ccessibility to electronic information and technology is an essential component of civil rights for persons with disabilities."[81]

The Access Board, echoing the economic assessment, also specifically cited the "spillover" benefits that Section 508 would bring to information technology outside the federal government – the "extra-remedial" impact discussed above. "The final standards may also have benefits for people outside the federal workforce, both with and without disabilities, as a result of spillover of technology from the Federal government to the rest of society."[82]

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[80] *Id.* § ES.2. The Access Board's economic assessment elaborated on the inability of traditional cost/benefit analysis to capture civil rights benefits, as follows:

> Not all government policies are based on maximizing economic efficiency. Even when the market is operating efficiently, there may be groups or individuals who remain "under-served." In these instances it may be socially desirable to provide for more equitable distributions of social welfare to those populations that receive less than their "fair" share of goods and services at the market equilibrium. Congress has decided that making Federal electronic information and technology accessible is a socially preferred choice and is an essential component of civil rights for individuals with disabilities. Traditional economic analysis is ill equipped to make judgments about fairness or equity. Instead, we tend to rely on political processes to make decisions about redistribution of wealth based on equity considerations. While benefit-cost analysis is not dispositive in making equity-based decisions, it can inform the policy makers as they make redistribution decisions.

Id. § 1.3.

[81] Access Board Final Rule, *supra* note ___, 65 Fed. Reg. at 80,522 (preamble).

[82] *Id.*, 65 Fed. Reg. at 80,522. The economic assessment elaborated on this point:

> Improvements made to products to comply with the standards are likely to carry over into the non-Federal market improving access and productivity for workers with and without disabilities in the

Because the "civil rights" benefits of the Section 508 standards – the equity inherent in making information technology accessible for all – are so intangible, this "spillover" benefit[83] may ultimately be the cornerstone to Section 508. As the economic assessment made plain, Section 508 makes no sense in terms of a simple dollars-and-cents cost/benefit analysis; other, less direct, benefits have to be taken into account to rationalize the rule, and the salient indirect benefit seems to be the accessibility gains for those *outside* the government.

Those gains in accessibility come at considerable cost to the private sector, however. The Access Board's final economic assessment[84] reviewed those prospective costs to manufacturers, vendors and customers in the private sector:

> The standards do not directly impose any requirements on businesses . . . because they are not required to sell their products to the Federal government. Businesses that choose to market their products to the Federal government must ensure that their products comply with the standards. For many businesses, this may simply involve a review of the product *vis a vis* the standards to confirm compliance. For others, this could require redesign . . . to add accessible features before it can be sold to the Federal government. Presumably these costs can be passed on to the Federal government (and other consumers) in the form of higher prices. An increase in the price of electronic and information technology can result in a decrease in demand for these products.[85]

Although the Access Board's economic assessment acknowledged that accessibility will increase costs, the Board's assessment assumed that those costs "can be

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> non-Federal workforce. The result is a potential standardization and mainstreaming of products that improve the productivity of all employees as opposed to being limited to individuals in the Federal workforce.

Access Board Economic Assessment, *supra* note __, § 5.2.

[83] *See* Access Board Economic Assessment, *supra* note ___, § 5.3.6.

[84] *See* Access Board Final Economic Assessment, *supra* note __, § 4.2. The initial assessment, published in March 2000, gave a more detailed account of the potential costs to the private sector. The initial assessment noted, for example, that by forcing vendors to raise prices to cover the costs of compliance, the government could in effect reduce demand and thus reduce producer surplus. Access Board Economic Assessment, *supra* note __, § 4.2.

[85] Access Board Final Economic Assessment, *supra* note _____, § 4.2.

passed on to the Federal government (and other consumers) in the form of higher prices." That conclusion, however, assumes essentially inelastic demand, or (more to the point) that a competitive marketplace will not force vendors to absorb the additional costs of Section 508 compliance – and neither is a safe assumption in the current IT marketplace. In the current, "soft" market for IT, it is much more likely that vendors will be forced to absorb Section 508's costs, as vendors struggle to maintain market share.

Although Section 508 shifts substantial costs to the private sector, and does so at least in part because the standards will have the "spillover" benefit of increased accessibility in the commercial information technology market, ironically the standards themselves may impede that "spillover" effect. Because the standards do not, in several instances, conform to standards evolving in the private sector, the accessibility gained in federal information technology ultimately may not fully "spill over" into the private sector.

D. The Final Access Board Standards

The final standards, which were published on December 21, 2001 and became effective on February 20, 2001,[86] apply to all federal electronics and information technology (EIT), including:

- Software, including operating systems
- Web pages and Internet-based applications
- Telecommunications equipment
- Video and Multimedia equipment
- Office equipment, such as kiosks and copiers
- Desktop and portable computers[87]

[86] As the prefatory material to the final rule noted, the effective date of the standards (February 20, 2001) was far less material than the first date the standards could be *enforced*, *i.e.*, June 21, 2001. 65 Fed. Reg. at 80,501.

The final standards reflected scores of interested parties' comments on the proposed standards,[88] but left a number of difficult issues, discussed below, unresolved.

E. The Implementing FAR Procurement Rule

On April 25, 2001, the FAR Council issued a rule amending the Federal Acquisition Regulation ("FAR") to incorporate the Access Board's standards into the procurement process. The Access Board standards would apply to all contracts awarded after June 25, 2001, all task and delivery orders issued after June 25, 2001 on any *existing* Indefinite Delivery/Indefinite Quantity ("IDIQ") contracts, and all orders placed on the General Services Administration ("GSA") schedules contracts after June 25, 2001. The Section 508 standards would not, however, apply to:

- Procurements of national security systems; this exception applies only to actual weapons and intelligence systems, however, and is not a blanket exception for standard systems, such as payroll systems, that might be used by the Department of Defense or intelligence agencies.

- Information technology located in areas frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment (sometimes referred to as the "back room" exception[89]).

- Information technology used by a contractor in its own workplace if the information technology will not ultimately be furnished to the government; in essence, this exempted contractors from complying with Section 508 on their own equipment.

- Information technology procured from the commercial market costing less than $2500.[90]

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[87] For detailed reviews of key requirements under the final standards, *see, e.g.,* Software Information & Industry Association, *New Regulations Place Constraints on the Development of Software and Content* (2001), *available at* www.siia.net/sharedcontent/govt/issues/ecommerce/508Analysis1-10-01.pdf.
[88] *See* 65 Fed. Reg. 80,500, 80,500 (Dec. 21, 2000). The comments on the proposed standards are available at http://216.218.205.189/sec508/comments-nprm/list.htm.
[89] *See* http://webservices.hq.af.mil/508/Legal.htm.

- Where requiring accessibility on a specific purchase would impose an "undue burden" on the procuring agency.

- Procurements for commercial items[91] if there is no commercially-available product that complies with Section 508.

The FAR rule, and the final Access Board standards, left a number of critical policy issues unresolved. [92] In some instances, those issues point up problems peculiar to Section 508, such as the lack of congressional direction. In other instances, Section 508's lingering problems are emblematic of similar problems under other socioeconomic programs that have, for better or worse, been implemented through the U.S. procurement system.

IV. Lingering Issues Under the Section 508 Standards – and Their Lessons

A. Divergent Accessibility Requirements: A Regulatory Splitting Tail

One key lingering issue under Section 508 stems from the technical standards themselves. In many ways, the standards simply adopted accessibility standards that were already evolving in the private sector. There were, however, a number of points at which the Access Board's standards departed from broadly accepted standards. Where

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[90] Although this exception for "micro-purchases" was originally to end, or "sunset," by January 2003, in late 2002 the government issued an interim rule to extend the exception. The government reasoned that the administrative costs of applying Section 508 to relatively small purchases of information technology would far outweigh the benefits of accessibility, especially when the market had not yet developed means of easily identifying accessible information technology. *See* 67 Fed. Reg. 80,321 (Dec. 31, 2002). The interim rule, which became final by notice of July 24, 2003, 68 Fed. Reg. 43,872 (July 24, 2003), extended the "micro-purchase exception" to October 1, 2004.

[91] "Commercial item" is a term of art under federal procurement law; such items generally include goods and services that are broadly available in the commercial marketplace, and federal procurement rules provide for more efficient, streamlined contracting for such goods and services. *See* FAR 2.101 (definition of "commercial item"); FAR Part 12 (generally governing sales of commercial items).

[92] One commonly overlooked problem was how to document the complicated analyses required by Section 508. The Defense Information Systems Agency (DISA) compiled a checklist to do just that, which is available at http://www.disa.mil/acq/contracts/encor/toguide/pdf/encor_toatt1.pdf.

that occurred, the fault lines that emerged revealed key weaknesses in the Section 508 initiative, and in any attempt to implement social policy through the procurement system.

With regard to at least one vitally important area – Internet websites – the Access Board's standards deviated explicitly from mainstream standards for accessibility. From early on, advocates for the disabled sharply criticized the Access Board for this approach. In comments to the Access Board on the proposed rules, an international standards group for Web access, the World Wide Web Consortium ("W3C") Web Accessibility Initiative ("WAI"), wrote, for example:

> In diverging from evolving consensus on Web accessibility, the provisions in the NPRM [Notice of Proposed Rulemaking] have the effect of fragmenting the industry standard rather than harmonizing with voluntary consensus industry standards as advised by a U.S. Government directive. Should the proposed provisions go into effect as is, Sec. 508 would not only fail to take advantage of supporting provisions for accessibility in Web-based authoring tools, browsers, accessibility checkers, and existing training materials; but also complicate implementation of accessibility features in these products, potentially increasing the cost of compliance.[93]

And a disabled-rights advocacy group, the American Foundation for the Blind, wrote very critically of any effort to diverge from commercial standards:

> We urge the Board particularly to consider how software developers will view web accessibility should the Board promulgate regulations regarding web pages which differs from the guidelines negotiated among industry, consumer advocacy organizations, and other web professionals in the WAI [Web Accessibility Initiative]. . . . [T]his makes the job of the authoring tools developer far more difficult because it requires support for contradictory rules. We do not expect developers will adopt a process of facilitating compliance with either the W3C [World Wide Web Consortium] or with 508 regulations. Far more likely . . . is the profoundly disappointing scenario of developers simply ignoring the needs of people with disabilities because those speaking on their behalf can't even agree on what is needed. We submit this is contrary to the spirit and intent of Sec.

[93] *Comments of Web Accessibility Initiative, W3C, at* http://216.218.205.189/sec508/comments-nprm/list.htm.

> 508. We also hope and believe that this is a result the Board would not want to be responsible for creating as it is a legacy to be avoided.[94]

Despite these criticisms, the Access Board's final rule did not revert to the commercial standards to web accessibility. The Access Board adhered to its own standards, even though those idiosyncratic standards would, by all accounts, substantially complicate implementation.[95]

The Access Board's decision to reject commercial standards ran directly contrary to the emerging norms in U.S. procurement law, which look to commercial standards to guide federal procurement.[96] By resorting to mainstream standards, the Access Board probably would have reduced implementation costs, and could well have made it easier to carry accessibility from the federal sphere to the commercial market. If federal

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[94] *Comments of the American Foundation for the Blind to the Architectural and Transportation Barriers Compliance Board re: Notice of Proposed Rulemaking on Electronic and Information Technology Accessibility Standards, available at* http://216.218.205.189/sec508/comments-nprm/89.htm.

[95] The Access Board, in explaining why it did not adopt international website accessibility standards, responded to its critics as follows:

> Comment. A number of comments were received from the WAI and others expressing concern that the Board was creating an alternative set of standards that would confuse developers as to which standards should be followed. WAI was further concerned that some of the provisions and preamble language in the NPRM were inaccurate. On the other hand, a number of commenters, including the ACB and several members of the EITAAC, supported the manner in which web access issues were addressed in the proposed rule.
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> * * * *
>
> The Board has as one of its goals to take a leadership role in the development of codes and standards for accessibility. We do this by working with model code organizations and voluntary consensus standards groups that develop and periodically revise codes and standards affecting accessibility. The Board acknowledges that the WAI has been at the forefront in developing international standards for web accessibility and looks forward to working with them in the future on this vitally important area. However, the WCAG 1.0 were not developed within the regulatory enforcement framework. At the time of publication of this rule, the WAI was developing the Web Content Accessibility Guidelines 2.0. The Board plans to work closely with the WAI in the future on aspects regarding verifiability and achievability of the Web Content Accessibility Guidelines 2.0.

65 Fed. Reg. at 80,510.

[96] Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 PUB. CON. L.J. 249 (1998); Steven Schooner, *Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice*, *in* PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION, ch. 8 (Sue Arrowsmith & Martin Trybus, University of Nottingham eds., 2003) (also available at *http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=283370*).

webmasters were to craft accessible websites to a common, commercial standard, their skills and their products would be much more "portable" to the broader commercial market. To the extent, though, that the Access Board's idiosyncratic standards isolated federal accessibility from the rest of the market, the federal standards failed in their "extra-remedial" goal. Having divergent federal standards for web accessibility likely meant, ultimately, that less accessibility will "carry over" to the mainstream market.

The idiosyncratic web standards also offer an excellent lesson in why clear direction from above is so critical when, as here, socioeconomic goals are implemented through a complex, bureaucratic system. Had Congress clearly enunciated its "extra-remedial" goals – to carry accessibility to the broader commercial market – the implementing regulators would have had much less leeway to adopt idiosyncratic standards. By failing to enunciate a clear "extra-remedial" goal, Congress likely avoided a divisive debate over the prospective costs of this initiative, but Congress left the initiative to be shifted, over time, from its optimal "extra-remedial" path.

The divergent federal web standards also offer an excellent example of how *not* to tack a socioeconomic initiative onto the federal procurement system. The federal procurement system is inherently complex and inefficient. As a result, new initiatives added to the procurement process should be simple, focused, and easily adaptable. By diverging from established rules for web accessibility, the Section 508 standards violated that principle, and, in some small measure, disrupted the advance to accessibility.

A practical example shows why. One of the standard tools for judging the accessibility of websites is the "Bobby" program, which is now owned by Waltham,

Massachusetts-based Watchfire Corporation.[97] The "Bobby" program is regularly used across the commercial and government spheres to check websites for accessibility.[98] The program "spiders" through a remote website, and determines if the site's attributes are accessible to those using assistive technology to "read" the site.[99] The "Bobby" program predated the Access Board standards, and so "Bobby" had to be adapted to the divergent federal standards once they were finalized. The "Bobby" programmers created two tracks, one for Section 508, and one for the standards promulgated by the Web Accessibility Initiative ("WAI"). Now, when websites are checked for accessibility using the "Bobby" tool, the user must process the site through either the "Section 508" test or the "WAI Content Accessibility Guidelines" test. In practice, this means that if a website is "corrected" to meet the Section 508 standards, it will not necessarily meet the mainstream test for accessibility. This leads to obvious inefficiencies, and impairs progress in both the commercial and government spheres.[100]

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[97] *See* http://www.watchfire.com/products/desktop/bobby/default.asp.

[98] *See, e.g.,* Patricia Daukantas, "Bobby 5.0 Explains Section 508 Errors," *Government Computer News,* June 2, 2003, *available at* http://www.gcn.com/22_13/tech-report/22234-1.html.

[99] *See* http://www.watchfire.com/resources/bobby-overview.pdf.

[100] Confusion about how to apply the federal accessibility standards in general has been a major obstacle to implementation. As one trade journal noted in a 2003 report:

> Initially, the greatest barriers stemmed from a lack of agency awareness about their new responsibilities under the Section 508 law. Now, even though more agencies understand their obligations, because they do not know how to comply with the mandate, they are held back. This is leaving advocacy groups disappointed, according to those familiar with the program.
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> "The task proved to be so large and the knowledge required so specialized that things aren't working as ideally as we'd like," said Curtis Chong, president of computer science, National Federation for the Blind. "It's really great that we've got this law, but things just haven't really changed."

Margaret A.T. Reed, *Agencies Still on the Learning Curve*, *Fed. Com. Week*, Aug. 11, 2003, *available at* http://www.fcw.com/fcw/articles/2003/0811/cov-508-08-11-03.asp.

This problem arose only because the Section 508 standards diverged from their commercial counterparts. The divergence created confusion, in part because some states use the mainstream (WAI) standards, rather than the Section 508 standards, to guide their own accessibility efforts.[101] The problem illustrates what happens when a split standard is tacked onto the procurement system: it is a splintering "tail" on the procurement system, which creates uncertainties, inefficiencies and additional costs.

B. Buying the "Best" Accessibility -- A Sweeping Socioeconomic Requirement Runs Headlong Into a Rapidly Streamlining Procurement System

For the procurement system, one of the biggest practical problems with the Section 508 standards is that the standards are too often too aspirational, and thus impractical. By their terms, for example, the standards require agencies to buy the "best" accessible technology, if there is no fully compliant technology available. Specifically, the standards provide:

> (b) When procuring a product, each agency shall procure products which comply with the provisions in this part when such products are available in the commercial marketplace or when such products are developed in response to a Government solicitation. Agencies cannot claim a product as a whole is not commercially available because no product in the marketplace meets all the standards. *If products are*

[101] *See* Technical Assistance Project, *Policy Information Pipeline: Activities of the States Regarding Current and Planned Section 508 Activities* (May 2002) (chronicling states' varying initiatives to implement Section 508 and/or WAI standards), *available at* http://128.104.192.129/taproject/policy/initiatives/508/508Stateactions.htm. James Thatcher, a well-known consultant in the field, has created a chart showing the differences between the Access Board and Web Accessibility Initiative (WAI) standards. *See* http://www.jimthatcher.com/sidebyside.htm. For a draft mapping comparison of how the standards converge and diverge, *see* http://www.w3.org/WAI/GL/508/508-UAAG.html; *see also* Comment on WAI/Section 508 differences, Mar. 27, 2003, http://lists.w3.org/Archives/Public/w3c-wai-ig/2003JanMar/0986.html ("Of course we all know the WAI Recommendations are the honey produced by a host of bees working in a symbiotic relationship, the 508 [standards] the product of a committee possibly those who set out to specify a horse and designed a camel:).")

> *commercially available that meet some but not all of the standards, the agency must procure the product that best meets the standards.*[102]

What this goal means is anyone's guess,[103] for the Access Board standards provide no guidance on how to gauge relative compliance. This hopeful goal also runs directly contrary to basic procurement principles – which generally require agencies to purchase the "best value," based upon a broad array of balanced, objective criteria – and opens the door to possible bid protests.[104]

The "best accessibility" requirement thus demonstrates a key weakness in the Section 508 standards: though the standards speak in the hopeful, mandatory voice of the civil rights community, in practice the standards must work through the precise language of the procurement system. This conflict (discussed further below with regard to loopholes in the standards) is especially acute here because the hopeful standards raise, in essence, the risk of a protest in every procurement. Where, as have, a socioeconomic initiative sets a goal that can never meet – under the current pass/fail scoring system for accessibility, it is unrealistic to expect a procurement official to determine, conclusively and objectively, whether a given piece of IT is indeed the "most" accessible – the socioeconomic initiative has failed.

On one hand, proponents of the socioeconomic initiative must recognize that the procurement system demands precise, objective measures, to ensure that procurements are fair, competitive and transparent. Until the socioeconomic initiative can speak in

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[102] 36 C.F.R. § 1194.2(b), *Application* (emphasis added).

[103] This issue of partial compliance has been a recurring issue in the formulation of the Section 508 standards. In May 30, 2000 comments on the proposed rule, for example, the Software & Information Industry Association noted: "It is unclear, for example, whether products that are only partially compliant may be considered at all for purchase. If a product is only 80% compliant, can it be considered at all for federal purchase?" *See* http://216.218.205.189/sec508/comments-nprm/70.htm

[104] *See* John J. Pavlick, Jr. & Rebecca Pearson, *supra* note ____, at 19-20.

those terms – can advance through the precise machinery of the procurement system – the socioeconomic program threatens to undermine the procurement system. Here, for example, although there have been almost no bid protests in the area,[105] almost any procurement could be stalled for weeks, if not months, by a protest from the losing bidder that its information technology was the "best," from an accessibility standpoint.

At the same time, the proponents must recognize that procurement decisions are normally shaped by a number of goals, generally expressed through price and quality, which must be balanced against one another when the agency makes a "best value" purchase decision.[106] That normal careful balancing breaks down, however, under the Access Board standards, which seem to say that an agency *must* buy the product that is "most" accessible, even if that means buying a product that would otherwise not prevail in a "best value" decision. Guidance published by an interagency committee on Section 508 stated, in explaining this standard:

> *E.2. Where an agency uses a best value "trade-off" source selection process, may it trade off applicable technical provisions of the Access Board's standards where an offer provides strong technical merit, strong past performance, or a lower price*?

[105] In mid-April 2004, the General Accounting Office publicly released its decision in what was apparently the first published federal bid protest opinion regarding Section 508, *CourtSmart Digital Systems, Inc.*, Comp. Gen. Nos. B-292995.2, B-292995.3 (Feb. 13, 2004).

[106] FAR 15.101 describes the "best value continuum":

> An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

Id. As FAR 15.101-1 notes, an agency will often want to "trade off" prices against quality, by paying, for example, a higher price for higher quality, if that better suits the agency's requirements.

> [Answer:] The Access Board's technical provisions are mandatory requirements that must be met . . . .
>
> Where no offered products meet all of the technical provisions, the Access Board's standards require an agency to "procure the product that best meets the standards" (see 36 CFR 1194.2(b)). This may be the product that meets the most applicable technical provisions, but alternatively could be one that meets fewer technical provisions but which better addresses the accessibility needs of the intended end users.[107]

The guidance acknowledges that "[b]est value trade-offs are still possible (and in fact required) if the products being compared meet the technical provisions" of the Section 508 standards. The guidance cautions, though, that if one product *fully* meets the Access Board standards and another product only partially meets those standards – but is otherwise superior – "the agency could not make trade-offs between the proposals that fully meet the applicable provisions and those that only partially meet them."[108]

As one observer noted, this extraordinary instruction "suggests that for best value procurements, Section 508 compliance could function as a super-evaluation factor that trumps or otherwise obviates the trade-off process in favor of Section 508

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[107] *Frequently Asked Questions*, *at* www.section508.gov/index.cfm?FuseAction=Content&ID=75).

[108] *Id.* In what is apparently the only federal bid protest decision involving Section 508, *CourtSmart Digital Systems, see supra* note ___, the General Accounting Office addressed a solicitation which, though somewhat muddled, ultimately said: "Please note that if the government determines . . . that one (or more) quotations are significantly more [section] 508 compliant than the others, it will only consider for award the quotation (or quotations) that provide the most [section] 508 compliant product." *Id.* Against the backdrop of regulations that require agencies to consider *only* "compliant" products, if any are indeed available, GAO read this solicitation to mean that the agency would weigh Section 508 capabilities *only* among fully "compliant" products; "non-compliant" products would not be considered. *Id.* ("Given the mandatory nature of section 508 compliance, the Access Board's regulations and guidance, and the RFQ provisions that label this a matter of technical acceptability and contemplate pre-award testing for compliance, we think that the only reasonable interpretation of the RFQ provision relied on by [the agency] here, calling for a comparative evaluation of section 508 compliance in some cases, is that the agency would select a quotation that exceeded the minimum section 508 standards over a quotation that merely met the standards, and that in cases where no quotation was fully compliant with the section 508 accessibility standards, the agency would select the quotation that best met the section 508 standards.").

compliance."[109] In other words, the standard conceivably could, in some IT procurements, sweep all other procurement considerations away, in favor of a single goal: accessibility.

Notably, though, this type of conflict between socioeconomic goals and cost and quality concerns – or even conflict amongst socioeconomic goals – is nothing new in federal procurement. The system is regularly roiled by struggles of this type, for procurement primacy between, for example, blind vendors and other persons with disabilities,[110] or by special considerations for federal prison industries,[111] or for "Buy American" protections for U.S. industry.[112] The Section 508 standards are not, therefore, unique in placing themselves above all other goals, even those of cost and quality. All of these competing priorities have long placed an enormous burden on the system, in terms of costs, complexity, and ultimately irreconcilable conflicts between the government's many procurement goals. None of this is new.

What *is* new, however, is the prominence that socioeconomic initiatives will gain in the procurement system. The socioeconomic initiatives (including the Section 508 initiative) are rising in prominence not in their own right, but because the other requirements of the procurement system are steadily dropping away. As traditional "constraints" in federal contracting fall away and federal contracting grows ever more

[109]Sheila C. Stark, *Feature Comment: The FAR Rule on EIT Accessibility Under Section 508 – Nine Months Later*, 44 GOV. CONTRACTOR (West Group) ¶ 149 (Apr. 17, 2002).
[110] *See, e.g.,* NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001).
[111]*See, e.g., DoD Proposed New Rule Governing FPI Purchases*, 45 GOV. CONTRACTOR (West Group) ¶ 218 (May 21, 2003).
[112] *Defense Contractors, DoD Oppose House Buy American Amendments,* 45 GOV. CONTRACTOR (West Group) ¶ 278 (July 16, 2003).

streamlined due to statutory and regulatory reform,[113] the remaining socioeconomic requirements will become an ever more important part of the contracting puzzle. That is already manifest, for example, in subcontracts for commercial items: they have been stripped of almost all "traditional" federal contract terms, and now must carry only five "required" federal terms – all of which are socioeconomic requirements.[114]

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[113] *See, e.g.,* Steven Kelman, The *Unfinished Agenda*, GOVERNMENT EXECUTIVE, Sept. 2003, at 72-73.

[114] FAR 44.403 calls for the standard clause at FAR 52.244-6 for commercial-item subcontracts; that clause, in turn, provides as follows:

> Subcontracts for Commercial Items (Apr 2003)
>
> (a) *Definitions.* As used in this clause--
>
> > "Commercial item" has the meaning contained in the clause at 52.202-1, Definitions.
> >
> > "Subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor at any tier.
>
> (b) To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under this contract.
>
> (c) (1) The Contractor shall insert the following clauses in subcontracts for commercial items:
>
> > (i) 52.219-8, Utilization of Small Business Concerns (Oct 200) (15 U.S.C. 637(d)(2)(3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceed $500,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.
> >
> > (ii) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).
> >
> > (iii) 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (Dec 2001) (38 U.S.C. 4212(a));
> >
> > (iv) 52.222-36, Affirmative Action for Workers with Disabilities (Jun 1998) (29 U.S.C. 793).
> >
> > (v) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (APR 2003) (46 U.S.C. Appx 1241 and 10 U.S.C. 2631) (flow down required in accordance with paragraph (d) of FAR clause 52.247-64).

As the socioeconomic initiatives become an increasingly obvious part of federal contracting, there will likely be less tolerance for the costs and a closer calculus of the burdens those initiatives impose, against their benefits. The assumptions that underlie those programs – for example, that small businesses require specially fostering in our procurement system – may fail under sharper scrutiny. As a result of these shifts, and the "baring" of socioeconomic initiatives in the system, proponents of socioeconomic initiatives may need to do a better job of making these initiatives succeed, with minimum disruption, in the broader procurement system.

In the Section 508 context, this may force the standards-writers to compromise, and to reconcile the Section 508 standards with the normal "best-value" strategy in federal procurement. One way to do this would be make accessibility one of many "scored" factors, to be considered much as any other technical strength would be in an IT procurement. As noted above, this "integrated" approach could pose a danger to Section 508, for it would threaten to bury accessibility in other technical and cost goals. At the same time, though, if done correctly this approach could further Section 508's goals, perhaps much better than the current "pass/fail" approach to accessibility.

Under the current approach, the Access Board standards generally give no credit to "better" products; technically speaking, a product either meets the accessibility standards or it does not. Vendors thus have no incentive to invest their products with

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> (2) While not required, the Contractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.
>
> (d) The Contractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract.

more than the minimal requisite accessibility. With a more supple scoring system, however – one that recognized a continuum of accessibility – vendors would have much stronger incentives to enhance accessibility above the minimal levels called for by the Access Board standards.

A scored system for assessing accessibility could, therefore, in the long run encourage continual, incremental improvements in accessibility. At the same time, by abandoning the current "binary" system that demands accessibility at any price (and at whatever loss in quality), the proposed "scoring" system would resolve the glaring conflict in the procurement system left by the Access Board's standards. Clearly, over the long run accessibility alone cannot trump price or quality in every procurement. The proposed "scored" system would be a solution to the current, unsustainable "pass/fail" system.

C. Undue Burden – The Need for Direction from Congress

Another critical unresolved issue stems from the "undue burden" exception. Under Section 508, as noted, an agency need not make its IT accessible if doing so would constitute an "undue burden." Undue burden is defined as "significant difficulty or expense," and is measured by gauging the burden of compliance against the resources available to the program for which the supply or service is being acquired.[115] As was noted above, the proposed accessibility standards diverged from the EITAAC report by looking only to the sponsoring agency's resources – and not affected employees' needs –

[115] 65 Fed. Reg. 80,506 (Dec. 21, 2001). Thus, a smaller agency with fewer resources might be able to show that compliance with Section 508 would constitute an undue burden, while a larger agency with more resources to commit to the particular procurement could not. *Id.*

in measuring "undue burden." The final rule took the same approach,[116] and the FAR rule defers to existing disability case law to further define undue burden.[117]

Some view the "undue burden" exception as an unworkable standard. While the term is analogous[118] to the "undue hardship" provision used in title I of the Americans with Disabilities Act ("ADA"),[119] as the Access Board has at least partly acknowledged,[120] the contexts within which the term operate are fundamentally different. Under the ADA, the undue hardship provision may be used as a *defense* to existing allegations of discrimination.[121] In contrast, under Section 508 the provision serves as an *exception* – it exempts federal agencies from Section 508 if they will suffer an "undue burden," but it requires that any affected agency make an undue burden determination before information technology is ever purchased, and before accessibility issues ever arise.[122] As a matter of legal tactics, therefore, an agency may be reluctant to raise the "undue burden" exception, because the agency is at the *beginning* of the procurement

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[116] 65 Fed. Reg. at 80,506.

[117] 66 Fed. Reg. 20,894 (Apr. 25, 2001).

[118] In its comments on the proposed Section 508 standards, the National Association of the Deaf explicitly cited the analogy between Section 508 and the ADA:

> The NAD [National Association of the Deaf] believes this definition appropriately models other uses of undue burden in previous Acts. The [Access] Board acknowledges in its NPRM [Notice of Proposed Rulemaking] that the term "undue burden" is also used in Title III of the Americans with Disabilities Act. (ADA), 42 U.S.C. 12182 (b)(2)(A)(iii). The legislative history of the ADA states that the term "undue burden" is derived from Section 504 and the regulations thereunder, and is analogous to the term "undue hardship" in Title I of the ADA, which Congress defined as "an action requiring significant difficulty or expense." 42 U.S.C. 12111(10)(A). See H. Rept. 101-485, pt. 2, at 106 (Board NPRM Section-by-Section Analysis, Undue Burden Definition).

Comments of National Association of the Deaf on Notice of Proposed Rulemaking (May 30, 2000), *available at* http://216.218.205.189/sec508/comments-nprm/64.htm.

[119] *See* ROBERT L. BURGDORF, JR., *supra* note __, at 463 ("'[U]ndue hardship' [under the ADA] is a concept that varies according to the impact of particular proposed accommodation on a particular business, with more accommodation being required of larger entities with more resources.").

[120] 65 Fed. Reg. at 80,506.

[121] *Id.*; *see* 1 HENRY H. PERRITT, AMERICANS WITH DISABILITIES ACT HANDBOOK 145 (3d ed. 1997)

[122] 29 U.S.C. § 794d(a)(4).

process; unlike an ADA defendant, which has every incentive to throw up defenses (including "undue burden"), an agency may be reluctant to raise a claim of "undue burden" and thus invite attack early in the procurement process.

The legal standard is further muddied by the practical pressures on the agencies. Under Section 508 the onus is on the federal agency to procure accessible technology, and to show that it would otherwise suffer an "undue burden."[123] Given the rapidly changing nature of technology, federal agencies may be reluctant to categorize an accessibility feature as an "undue burden" unless a vendor can present significant evidence that all existing (and soon to be developed) technologies are either unavailable or so costly that compliance would be nearly impossible.[124]

Additionally, because the undue hardship provision under the ADA is directed at accommodations within the employment context, most of the factors listed in title I of the ADA undue hardship provision are not directly applicable to section 508.[125] Only one ADA factor – the financial resources of the covered facility or entity – is directly relevant to the Section 508 "undue burden" analysis, because that information is necessary to a determination of "significant difficulty or expense."[126]

To further complicate the issue, most judicial "undue hardship" or "undue burden" analyses offer little guidance on *how* to measure undue burden. Generalizations about what constitutes undue burden are vague and often depend upon the facts in each

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[123] *Id*.
[124] See MICHAEL FAILLACE, DISABILITY LAW DESKBOOK § 5:6, at 5-25 (2000).
[125] 65 Fed. Reg. 80,506 (Dec. 21, 2001) (observation by Access Board).
[126] *Id*.

case.[127] For example, an accommodation that is "unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business" is considered an undue burden.[128] That type of standard leaves little real guidance for procurement professionals applying Section 508, for *any* accommodation for IT accessibility might, by some lights, be considered "unduly costly" or "unduly . . . disruptive."[129]

Congress, of course, could have clarified the "undue burden" standard. For example, Congress could have directed agencies to assess "undue burden" by looking only to the resources appropriated for the procurement at issue, or (more broadly) to the resources appropriated to the contracting component, or (perhaps most broadly) to all of the resources available to the entire customer agency. The Access Board, as noted, ultimately decided to take the middle path, and to rule that "undue burden" should be measured by reference to the resources of the "agency component." Although that decision was grounded in the language of Section 504,[130] the path chosen was arguably simply an administrative compromise,[131] and was not driven by either the *intra-remedial*

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[127] Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 432 (1995); Michael Lee, *Searching for Patterns and Anomalies in the ADA Employment Constellation: Who is a Qualified Individual with a Disability and What Accommodations Are Courts* Really *Demanding?*, 13 THE LABOR LAW. 149, 151 (noting that "what constitutes a significant difficulty or expense is open to wide interpretation").

[128] U.S. DEPARTMENT OF JUSTICE & U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMERICANS WITH DISABILITIES ACT HANDBOOK I-44 (1992).

[129] One commentator remarked: "In choosing the phrases 'undue burden' and 'significant difficulty or expense,' it seems to me that the drafters of the revisions committed a fatal flaw. Such terms, without anchoring objective and measurable definitions, fail to provide any standard by which these terms can be objectively judged." Comments of Ed Exum, President, NAGE/SEIU (local), on Proposed FAR Rule (Jan. 21, 2001), *available at* http://www.section508.gov/index.cfm?FuseAction=Content&ID=27.

[130] 65 Fed. Reg. at 80,506.

[131] The Access Board used Section 504's standard, and said that the agency must look to the resources available to the relative "agency component" when weighing undue burden. *Id.* Section 504(a) states:

(full accessibility within government IT) or *extra-remedial* (accessibility across all IT, across the economy) goals of Section 508.

Clarifying "undue burden" (either in 1998, or later) would have focused attention on the central, unstated issue in the congressional debate on Section 508: the cost of accessibility. As was discussed above, Congress had, it seems, no clear sense of what Section 508 would cost; it was not until the Access Board published its economic assessment that any official body acknowledged that Section 508 could quite easily cost over a billion dollars to implement. By ignoring the question of cost, Congress was able to pass much more sweeping socioeconomic legislation. In a pattern familiar across socioeconomic programs,[132] Congress has not set aside *any* special resources to

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> Section 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations
>
> (a) Promulgation of rules and regulations
>
> No otherwise qualified individual with a disability in the United States, as defined in section 706 (20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date of which such regulation is so submitted to such committees.

29 U.S.C. § 794.

Paragraph (b) of Section 504, 29 U.S.C. § 794(b), however, defines only a "program or activity"; it does not explain *why* the agency should bound its financial inquiry – its weighing of "undue burden" – to stay within the limits of the procuring program or activity.

[132] FAR Part 19 is, in fact, arguably a catalogue of unfunded socioeconomic requirements. Under FAR Part 19, procuring agencies must accommodate a wide variety of small business programs, including those for all small businesses (FAR Subpart 19.5), small disadvantaged businesses under the Small Business Administration's "Section 8(a)" program (FAR Subpart 19.8), and historically underutilized business zone (HUBZone) businesses (FAR Subpart 19.13). In addition, agencies must accommodate, *inter alia*, policies for assisting women-owned businesses, statutory domestic preferences ("Buy American" requirements, for example), policies on energy- and environmentally-conscious procurement, and a wide array of equal

implement Section 508. By not funding the initiative, Congress has never had to confront Section 508's costs, but has certainly impaired the initiative's success.[133]

Had Congress defined "undue burden" more precisely – or, turning the question 'round the other way, had Congress specified what resources are available to achieve accessibility – the "undue burden" analysis would not have been left sprawling and open. As it stands, the uncertain definition of "undue burden" means that agencies are reluctant to exercise the exception, and contracting officials have broad discretion to apply the exception arbitrarily – or to fail to apply it, when reasonably they should. At the same time, though, the vague definition raises a real obstacle to Section 508's enforcement. Prospective offerors which might otherwise protest the procurement of inaccessible technology, or persons with disabilities who might otherwise challenge such procurements, face a real tactical risk due to the sprawling exception; they know that, even were they to present a strong protest or claim, the agency, facing defeat, might resurrect the elastic "undue burden" exception. Congress' reluctance to address "undue burden," fully and frankly, thus left a dangerously vague exception, one that chills enforcement.

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opportunity requirements and labor standards enforced by the Department of Labor. *See generally* JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS, ch. 10 (The George Washington University Law School, 3d ed., 1998).

[133] *See, e.g.,* Patricia Daukantas, *Section 508 Needs a Boost*, GOV. COMP. NEWS, June 20, 2003 ("On the second anniversary of the Section 508 deadline for IT accessibility, panelists on a national webcast said that enforcement and industry support are waning. . . . Section 508's status as an unfunded mandate makes it difficult for agencies to support, said consultant Mike Paciello, president of the Paciello Group LLC of Nashua, N.H."), *available at* http://www.gcn.com/vol1_no1/accessibility/22542-1.html. In a survey publicized in late 2002 – well over a year after the Section 508 standards became effective – one researcher found that few of the federal websites surveyed were, in fact, accessible. *See* Patricia Daukantas, *Survey Says Sites Still Lack Accessibility*, GOV. COMP. NEWS, Sept. 9, 2002 ("Of 148 federal Web sites sampled recently by a university professor, fewer than two dozen fully complied with Section 508 rules."), *available at* http://www.gcn.com/21_27/accessibility/19906-1.html.

D. Allocating Risks Under Section 508 – The Costs of Uncertainty

Resolving the "undue burden" puzzle means answering an even more basic riddle: who should pay for Section 508? The Rehabilitation Act, as was pointed out above, provides no funding for IT accessibility. The Act states only that federal information technology must now be accessible; aside from saying that agencies need not suffer an "undue burden" in implementing Section 508, the law never says who must pay for that accessibility -- accessibility which may cost in the billions of dollars.

In the short term, the answer is easy: per the Access Board's standards under Section 508, agencies *must* buy accessible technology to fulfill their requirements, unless doing so would cause an "undue burden." Clearly, therefore, the statute and its implementing regulations contemplate that the government will bear the costs of buying the most accessible IT – which is likely to be more costly than IT that is not accessible.

In reality, however, the private sector has borne and will bear much of the costs of implementing Section 508. Although the Congressional Budget Office originally saw *no* additional costs arising as a result of Section 508,[134] in fact the Access Board has estimated that Section 508 will cost society hundreds of millions of dollars to implement.[135] Some observers have been sharply critical of the government for

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[134] REHABILITATION ACT AMENDMENTS OF 1998, S. REP. NO. 105-166, at 39 (Mar. 2, 1998).

[135] *See supra* notes __-___ and accompanying text. One consulting firm estimated that making a website or application accessible would cost a "few hundreds dollars in the simplest case to dozens of thousands for a complicated system." Web-Space-Station.com, *Section 508 Retrofit and Design*, *at* http://508.web-space-station.com/index.html. For a return-on-investment analysis of various remediation strategies, see http://www.508wizard.com/product_roi.html.

underestimating the costs so drastically, and have argued that the initial government estimates were simply unrealistically low.[136]

In the longer term, however, the allocation of costs is even less clear. Assume that it emerges at some point – a year or two after purchase, say, and due to a complaint from a person with disabilities – that IT the government has purchased is not, in fact, fully accessible under the Access Board standards. Who, then, should bear the risk of that failure?

The easy answer from the government would probably be that the contractor (which probably assured the government that the vendor's technology was accessible) should bear this risk. The government would likely argue that the contractor, as the manufacturer and/or supplier of the IT, is in the best position to mitigate this risk, and so should bear it.

Though that argument – simply placing the risk on the certifying contractor – is intuitively attractive, there is a deeper set of issues here. Contractors may argue that, in close cases, they should not bear the risk of a failure in accessibility because of the porous standards for accessibility. Determining what is, and is not, "accessible" under the Access Board standards is complex, at best – and impossible, where the standards are at their most opaque.

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[136] *See* Carl Peckinpaugh, *The Section 508 Disconnect*, *supra* note ___; John M. Williams, *Here Comes Section 508 – Like It or Not*, BUSINESS WEEK, June 7, 2000, *available at* http://www.businessweek.com/bwdaily/dnflash/june2000/nf00607a.htm; *see also* Christopher J. Dorobek, *Agencies Fear Sect. 508 Costs*, GOV. COMP. NEWS, Apr. 17, 2000, *available at* http://www.gcn.com/vol19_no8/news/1733-1.html.

Contractors are likely to point, too, to the sprawling goals of Section 508. Section 508 is not meant to accommodate *a specific individual* with a *specific disability*; instead, Section 508 mandates accessibility for *all individuals* with *all disabilities* – or at least all the disabilities that were captured by the Access Board standards. Contractors are likely to argue that they simply cannot afford to bear the risk of making IT accessible across such a broad a range of disabilities (and assistive technologies). Finally (and relatedly) contractors are likely to argue that Section 508 sprawls so broadly because it is, ultimately, a civil rights initiative – and it is simply inappropriate to force the costs of a civil rights initiative on contractors.

By leaving the costs and risks of Section 508 compliance essentially unassigned, Congress impeded Section 508's progress. Because Congress failed to provide clear direction, both contractors and agencies have engaged in diversionary, obfuscating tactics in an attempt to head off liability. The lesson is clear: to reduce costs and barriers in implementing a socioeconomic initiative, Congress (or the regulators) should clearly allocate responsibility and liability.

E. "Equivalent Facilitation" -- A Revealing Loophole in the Law

Another, related issue stems from a significant loophole in the law. That loophole arises out of Subpart C of the Access Board standards, which discusses "equivalent facilitation." Under that Subpart, a contractor may meet the Section 508 requirements by providing technology that provides some – but not necessarily complete – accessibility.

Although it was not intended as such,[137] Subpart C and "equivalent facilitation" may open a loophole that swallows much of Section 508.

"Equivalent facilitation" was never intended to undermine Section 508.[138] The purpose of allowing equivalent facilitation is simple: to leave a door open to emerging technologies which may allow equivalent – and better – accessibility.[139] As a technical and legal matter, however, the equivalent facilitation provisions in the Access Board standards may be read to mean that providing *any* support for assistive technology suffices for accessibility under the Access Board standards. Although any vendor trying to take shelter within this loophole risks scrutiny by a customer agency, and a possible protest by a competitor,[140] it is a tempting loophole for vendors that otherwise lack the resources to achieve accessibility.

In its responses to comments on its final rule, the Access Board was adamant that the concept of "equivalent facilitation" was *not* intended to gut the standards. "Equivalent facilitation," the Access Board noted, "is not a 'waiver' or variance' from the

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[137] Commentators and the Access Board have generally *not* seen "equivalent facilitation" as an exception – or loophole – to the other accessibility requirements. *See*, *e.g.*, Latresa McLawhorn, *Recent Development: Leveling the Accessibility Playing Field: Section 508 of the Rehabilitation Act,* 3 N.C. J.L. & TECH. R. 63, 88 (Fall 2001) (equivalent facilitation "is . . . an alternative means of compliance, which is not to be considered a waiver of the rules, 'but a recognition that future technologies may be developed,' and that existing technologies could be used in a way not envisioned by the regulations to provide the same functional access").

[138] *See* 65 Fed. Reg. at 80,506.

[139] Wireless networking technology may, for example, provide a shortcut to accessibility. As a technical matter it can be very difficult to make printers fully accessible to persons with disabilities. If, however, those persons can move fluidly through an enterprise (such as a federal agency) using a wireless network to access (otherwise inaccessible) printers through fully accessible laptops, the wireless technology – using "equivalent facilitation" – will have solved enormous problems of accessibility. *See, e.g.,* Stephen Lawson, *Bluetooth May Help the Disabled Use Printers*, INFOWORLD, Dec. 7, 2000 (discussing use of wireless technology).

[140] *See* John J. Pavlick, Jr. & Rebecca Pearson, *supra* note __, at 25 ("An agency's determination whether the contractor's EIT in fact provides equivalent facilitation would be very fact intensive and would be subject to dispute by the company who asserted it, as well as by competitors who contend that such alleged facilitation does not result in substantially equivalent or greater access.").

requirement to provide accessibility, but a recognition that future technologies may be developed, or existing technologies could be used in a particular way, that could provide the same functional access in ways not envisioned by these standards."[141]

As a legal matter, however, the Access Board's own guidance may have driven open an expansive gap in the law. The analysis begins with the Access Board's standards at Title 36, Code of Federal Regulations, Section 1194.5. Section 1194.5 specifically states that nothing in the standards "is intended to prevent the use of designs or technologies as alternatives to those prescribed in this part provided they result in substantially equivalent or greater access to and use of a product for people with disabilities." The law is, in other words, open to "equivalent facilitation."

The analysis then spans to Subpart C of the standards, Section 1194.31, which defines various "functional performance criteria."[142] Under one approach, those criteria

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[141] 65 Fed. Reg. at 80,506.

[142] Section 1194.31, "Functional Performance Criteria," reads as follows:

> (a) At least one mode of operation and information retrieval that does not require user vision shall be provided, or support for assistive technology used by people who are blind or visually impaired shall be provided.
>
> (b) At least one mode of operation and information retrieval that does not require visual acuity greater than 20/70 shall be provided in audio and enlarged print output working together or independently, or support for assistive technology used by people who are visually impaired shall be provided.
>
> (c) At least one mode of operation and information retrieval that does not require user hearing shall be provided, or support for assistive technology used by people who are deaf or hard of hearing shall be provided.
>
> (d) Where audio information is important for the use of a product, at least one mode of operation and information retrieval shall be provided in an enhanced auditory fashion, or support for assistive hearing devices shall be provided.
>
> (e) At least one mode of operation and information retrieval that does not require user speech shall be provided, or support for assistive technology used by people with disabilities shall be provided.
>
> (f) At least one mode of operation and information retrieval that does not require fine motor control or simultaneous actions and that is operable with limited reach and strength shall be provided.

could be read simply as a backdrop to the detailed technical standards set forth in Subpart B (Sections 1194.21 through 1194.26). Thus, for example, the detailed web design standards in Section 1194.22 (the requirement, for example, that "web pages shall be designed so that all information conveyed with color is also available without color") might be read as *buttressed* by the general accessibility requirements set forth in Section 1994.31 (such as the requirement that at least "one mode of operation and information retrieval that does not require user vision shall be provided, or support for assistive technology used by people who are blind or visually impaired shall be provided").

In fact, however, the government has issued guidance that seems to interpret Subsection C (functional performance criteria) not as a *buttress* to Subsection B (the technical standards) but as a possible *surrogate* for those standards. In the response to comments that prefaced the final standards, the Access Board noted that "[i]n effect, compliance with the performance criteria of § 1194.31 is the test for equivalent facilitation."[143] This suggested that a contractor could comply under *either* the demanding technical requirements of Subpart B (Sections 1194.21-1194.26), *or* under the much more liberal "functional performance" criteria of Subpart C (Section 1194.31). This opened a substantial loophole in the requirements.

At roughly the same time the final standards became enforceable in June 2001, the Board published guidance that further strengthened this loophole. The Access Board published guidance in the form of Frequently Asked Questions ("FAQs"), to assist federal agencies, contractors, and members of the public in applying the final standards.

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36 C.F.R. § 1194.31.

[143] 65 Fed. Reg. at 80,506-80,507.

The FAQS indicated that agencies are first to evaluate a product under the technical specifications set out in Subpart B, and Subpart C – the Subpart governing "functional performance" criteria – is to be used if the product is not covered under Subpart B. However, the FAQS further indicated that a product will comply with Section 508 if that product meets the standards set out in either Subpart B (normal technical standards) or Subpart C ("functional performance"), and federal agencies should not be constrained by the strict technical specifications in Subpart B.[144] Specifically, the FAQs stated:

> FAQ B.3.ii:
>
> [QUESTION:] Is *there a preference for a product that strictly meets the technical provisions of Subpart B over a product that provides the same or greater accessibility through equivalent facilitation* [which, per the guidance quoted above, could be met by the functional performance criteria in Subpart C]?
>
> [ANSWER:] No. Purchase of either EIT product would satisfy an agency's obligations under section 508. Award should be made to the source whose offer is most advantageous to the Government based on the agency's source selection criteria (which would include cost or price and may include quality.[145]

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[144] In a recorded interview, Doug Wakefield, who has primary responsibility for implementing the Section 508 standards for the Access Board, addressed the need to maintain this technical flexibility using the functional performance requirements. See Information Technology Association of America, *Section 508 Webcast: Exemptions, Exceptions, and the Responsibilities of Agencies and Vendors* (Nov. 14, 2001), *available at* http://www.itaa.org/events/312.htm.

[145] *Section 508 Acquisition FAQ's: Acquisition of Electronic and Information Technology Under Section 508 of the Rehabilitation Act - Questions and Answers (Update: January 2002)* [hereinafter "Section 508 Acquisition FAQ's"], *available at* http://www.section508.gov/index.cfm?FuseAction=Content&ID=75#b. The government provided the following explanation with the FAQs:

> This document is a consolidation of acquisition-related questions that have been posed by agencies, contractors, and members of the disability community regarding section 508 of the Rehabilitation Act. The responses to these questions are intended to promote a better understanding of the requirements of section 508 and its implementing regulations, including the collaboration that is anticipated within agencies in the acquisition of EIT.
>
> The document is purely informational. It neither creates new policies nor changes existing policies. Agency personnel must consult appropriate officials within their agencies for formal advice.

This means that contractors (or agencies) could, at least in theory, bypass the Access Board's highly demanding technical standards (Subpart B) by providing technology that met the much simpler standards in Subpart C. Thus, for example, even if a website could not meet all the detailed standards for websites under Section 1194.22 (Subpart B), the website could, under this analysis, pass muster under Section 1194.31 (which appears to require only, at a minimum, that "support for assistive technology used by people who are blind or visually impaired shall be provided"). Under this analysis, the rule's imprecision permits a contractor to argue that its technology passes muster if it provides *any* "support for assistive technology." Accordingly, a website might pass muster if it could provide *any* support for blind-reading assistive programs, such as JAWS, even if the website as a whole was not accessible (and thus did not comply with the demanding technical standards of Subpart B).

The loophole may simply be an oversight, or (the Access Board might argue) the loophole may not exist at all – the Access Board might not agree with this reading of the rule at all. Whether real or apparent, what is important about the loophole is that it may be inevitable: when, as here, the government attempts to impose a socioeconomic initiative on a rapidly evolving area of technology, if the rules implementing that

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> This web document, which is being hosted by the General Services Administration, was developed after review by an inter-agency steering committee comprised of agencies with lead responsibilities for the implementation of section 508. The steering committee was established to further facilitate the effective implementation of section 508.
>
> This "living" document may be further updated as necessary to address additional questions and further promote a common and effective understanding of section 508 requirements. . . .

Id.

initiative are sufficiently flexible to accommodate advancing technology, it may be inevitable that loopholes emerge from that flexibility.

There may be another reason for the loophole: the regulatory inefficiencies inherent in driving a socioeconomic initiative through the procurement system. The procurement system is built on the legal language of contracts. Language in procurement is, by necessity, narrow and precise. By contrast, an aggressive socioeconomic initiative (especially one with *extra-remedial* ambitions) rests on language (and principles) that may be expansive and far less carefully defined. When the two worlds collide – when the expansive socioeconomic initiative meets the crabbed demands of the procurement system – the marriage of the two may be less than elegant and precise. Here, that may explain why the Section 508 rules seem to leave such a gaping loophole for less than fully accessible technology.[146]

There may, finally, be yet another reason why the loophole *remains* in the rules, even if it was initially simply an oversight: the loophole may provide the agencies with an escape hatch, as well. Congress, as noted, has forced the Section 508 requirements down on the agencies without any special funding, and, in many ways, without clear

[146] Other guidance provided by the government suggests that the loophole may, ultimately, successfully shift liability from the vendors to customer agencies. In response to another Frequently Asked Question (FAQ), the government noted:

> [FAQ] B.3.iv Who makes the determination that a product meets equivalent facilitation?
>
> [ANSWER:] The vendor may assert that its product meets or exceeds the level of accessibility required by a particular standard through equivalent facilitation. The agency must determine whether a standard is met through equivalent facilitation in accordance with agency guidance and in consultation with, if necessary, the agency 508 coordinator and/or other agencies with technical expertise in accessible EIT, such as the Access Board. If an agency violates section 508 because the product did not, in fact, meet a standard through equivalent facilitation, the agency may still be liable.

Section 508 Acquisition FAQs, *supra* note __, B.3.iv.

direction. Agencies facing budget pressures, or other more immediate demands, may need the loophole left by Subpart C, or by the "undue burden" exception, or otherwise. In the long term, therefore, it may be inevitable that loopholes such as this one emerge in the regulations, not because the agencies don't see them, but because there is, practically speaking, no other way to accommodate Congress' unfunded demands.

F. No Guiding Contract Language – Impasse and Uncertainty

Another lingering problem stems from a simple, but important gap in Section 508's implementation: the absence of standard contract language to use in implementing Section 508. Although the FAR provides contracting officials with guidance on how to implement Section 508,[147] there is no standard FAR contract language to implement the statute. This means, in turn, that agencies and contractors have had to incur additional costs and burden, sorting out terms to describe their allocations of risk or, worse yet, by bearing unallocated risk.

As the Department of Justice noted in its April 2000 report on accessibility, few agencies had by early 2000 developed standard contract language available regarding accessibility.[148] Although the Department of Education had developed model language,[149] most agencies had not, though the Justice Department strongly recommended that each agency "incorporate appropriate procurement language that

[147] FAR Subpart 39.2.

[148] U.S. DEPARTMENT OF JUSTICE, *supra* note _____, at 1-5.

[149] *Id.* at 1-5 & App. B (Department of Education contract language).

specifically addresses accessibility for persons with disabilities in all EIT RFP's (requests for proposals) and contracts."[150]

Government commentators repeatedly urged that the FAR drafters publish standard contractual language, which would be included as part of every federal IT procurement, to implement Section 508.[151] In their comments on the FAR rule, officials from the Treasury Department were sharply critical of the FAR drafters' failure to

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[150] *Id.* at 1-5.

[151] Officials from the Treasury Department wrote, for example:

> The omission of a FAR 52 clause is a major mistake! One must be offered in the FAR in order to have government-wide consistency, limited confusion, and reduced legal risks and liabilities. As an example, Treasury Office of Procurement has reviewed several Section 508 clauses developed by different federal entities and found all to be inadequate. This typifies the magnitude of the problem.
>
> The Access Board's Section 508 compliance final standards will require redesign of EIT that is provided by an estimated 11,000 contractors. Having inconsistent contract requirements whether in the SOW or in the quality assurance or the inspection end will only cause contractors greater expense and ultimately, the Government. So, standard clause language would expedite a consistent approach throughout the FAR-regulated community in the procurement of EIT. Letting each agency develop its own would only create confusion in the contractor community, delay the effective implementation of Section 508 compliance, and cost the taxpayer litigation costs that would be better spent developing improved accessibility solutions. Even the IAA community requested the FAR Council to develop standardized FAR clauses regarding Section 508 compliance.

Department of the Treasury Response to FAR Case 1999-607, Proposed Rule on Implementation of Section 508 of the Rehabilitation Act of 1973, as Amended (Mar. 22, 2001) (emphasis added) [hereinafter "Treasury Department FAR Comment"], *available at* http://www.section508.gov/index.cfm?FuseAction=Content&ID=31; *see also* Comments of Mary Parks, General Services Administration ("Although I hear the reasoning behind the lack of a FAR clause for section 508, the lack of guidance for Contracting Officer's is disturbing. . . . The guidance that a standard clause would give Contracting Officers is needed. We do not feel that it is in the government[']s best interest to have each agency, or individual contracting officer doing their own thing when it applies to Section 508.") (Mar. 23, 2001), *available at* http://www.section508.gov/index.cfm?FuseAction=Content&ID=34; Comments of Tyuana L. Butler, Bureau of Alcohol, Tobacco & Firearms, Department of Treasury (Mar. 23, 2001) ("Agree with just about everyone else that there needs to be a FAR clause, which creates a standard accessibility requirements. Standard clause language would ensure a consistent approach throughout the FAR regulated community in the procurement of IT supplies and services, while letting each agency develop their own would only create confusion in the contractor community, delay the effective implementation of Section 508 compliance, and cost the taxpayer litigation costs that would be better spent developing improved accessibility solutions."), *available at* http://www.section508.gov/index.cfm?FuseAction=Content&ID=37.

provide more specific contract language. "[W]e are very concerned," wrote the Treasury Department's representative, "at the insufficiency of the rule in addressing implementation of the Electronic and Information Technology Accessibility Standards. . . . The general impression that this rule conveys is that there was an abdication of guidance responsibility, thereby, leaving federal agencies without guidance as to how to implement."[152]

Officials from many agencies sought procurement direction that would shift compliance risk to the vendors (by requiring the vendors to certify that their products and services complied with Section 508) or to third parties (through a third-party certification process). The officials sought to shift this burden because they felt simply incapable of enforcing Section 508 on their own.[153]

Industry strongly opposed any requirement that vendors certify their goods and services, or that the government establish a system for third-party certification. Industry

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[152] Treasury Department FAR Comment, *supra* note _____.

[153] Treasury Department officials, in their comments on the proposed FAR rule, wrote:

> Section 508 and the proposed FAR final rule require federal agencies to purchase only EIT equipment that meets the Access Board's accessibility standards. Since Section 508 and the proposed FAR changes do not require vendors to certify that their EIT products and services meet the accessibility standards, federal agencies must do so. *Clearly, government buyers (purchasing agents and contracting officers) do not have the technical expertise to evaluate EIT product compliance with the approximately 8-pages of technical standards developed by the Access Board. Nor do government project officers and end-users of EIT products/services typically have the ability to evaluate these items*. Government evaluation of EIT products/services will significantly increase acquisition time. All proposals received in response to government requests for quotations (RFQ) and solicitations will have to be evaluated for compliance with EIT accessibility standards. For example, a qualified government employee will have to evaluate the six quotations received in response to a RFQ soliciting several computers (costing over $2,500) for compliance with the accessibility standards. This process could add days to the acquisition. For larger EIT acquisitions, such as a financial management system, evaluation of proposals for compliance may require a team of government employees and would take several days.

Treasury Department FAR Comment, *supra* note ___.

argued that requiring third-party certification would substantially increase product development times, and could inadvertently expose vendors' closely held intellectual property.[154] Imposing third-party certification also would have increased vendors' costs – vendors probably would have had to pay for certification – and could, in practice, have substantially complicated vendors' negotiations with agencies over Section 508 compliance.[155] One of the leading industry groups on the issue, the Information Technology Association of America ("ITAA") strongly opposed such a standard clause,[156] apparently on the assumption that industry's transactions costs in negotiating

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[154] The Information Technology Association of America commented:

> ITAA . . . would oppose proposals to revise the FAR to make third-party or self certification a mandatory requirement. Aside from the legal prohibitions against those approaches, the approaches would impede innovation and provide no value with respect to whether a product or service addresses compatibility with the agency's existing infrastructure and its use of specific assistive technologies. With respect to third-party testing, that approach would also significantly increase product development cycles and would raise serious intellectual property issues. The lack of Section 508 conformity testing criteria further demonstrates the failings of self certification and third-party testing approaches.

Information Technology Association of America, *Press Release: ITAA Says Special FAR Section 508 Clause Not Needed* (Aug. 26, 2002), *available at* http://www.itaa.org/news/pr/PressRelease.cfm?ReleaseID=1030396159.

[155] The contractors, agencies and politicians were, and continue to be, directly engaged in a continuing debate over how to allocate risk for compliance with Section 508. As Section 508 gathered momentum in late 2001, for example, agencies began drafting and requiring agency-specific clauses which would, on their face, shift Section 508 risks to contractors. *See* William Matthews, *A Legal Tangle: Litigation Worries over Accessibility Law Spark Agency/Contractor Disputes*, FED. COMP. WEEK, Nov. 5, 2001, *available at* http://www.fcw.com/fcw/articles/2001/1105/cov-tangle-11-05-01.asp. In response to agencies' efforts to impose those contractual provisions of their own on contractors, and to require third-party testing for compliance, Representative Tom Davis of Virginia pointed out, in a letter to Administrator Steven Perry of the General Services Administration, that it is agencies, not vendors, that are responsible for complying with the Section 508 standards. *See* William Matthews, *Davis: Feds Shift 508 Responsibilities*, FED. COMP. WEEK, Mar. 6, 2002, *available at* http://www.fcw.com/fcw/articles/2002/0304/web-davis-03-06-02.asp.

[156] The Information Technology Association of America commented:

> Reflecting on the implementation of Section 508, most interested parties would agree that the implementation was not working very well when Section 508's requirements first went into effect. Perhaps this is understandable, given everyone's general lack of understanding at that time of Section 508 and the FAR's Section 508 rule. We note that, at that time, few vendors had implemented the Voluntary Product Accessibility Template, which has since become a valuable market research tool for products. In any event, agencies were using a variety of contractual provisions to implement Section 508, many of which unfairly shifted virtually all of the risk of

individual agency clauses would be lower than the prospective liability that a standard, government-wide clause could force on industry. The ITAA argued that without a standard clause, agencies had more flexibility in imposing Section 508 requirements:

> Many of these advantages are not available in a standard contract clause. Perhaps the most significant benefit provided by the current FAR approach is that it has the effect of requiring agencies to carefully consider and determine what its accessibility needs really are. An agency is less likely to consider issues concerning which specific standards should apply, the effect on existing infrastructure, and compatibility with assistive technology if the agency merely inserts a standard clause.[157]

Ultimately, the FAR drafters deferred the question for further regulatory review,[158] and in June 2002, the FAR Councils published a request for comments on possible approaches

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> noncompliance to vendors or failed to identify the specific accessibility standards that applied to the procurement. Some agencies, for example, issued broad requirements for vendors "to comply with Section 508," with no other detail. Other agencies coupled an open-ended approach with certification requirements, which we view as inconsistent with 41 U.S.C. § 425(c) (Prohibition on Certification Requirements) and FAR 1.107 (Certifications). In reaction to these inappropriate actions on the part of some agencies, the ITAA initially took the position in its letter to David Drabkin dated June 22, 2001, that the FAR Council adopt a government-wide Section 508 clause.
>
> The ITAA has now concluded, however, that a standard Section 508 clause is no longer necessary. Nor would one constitute the best approach for supporting stakeholder interests. Over the past year procurement and vendor personnel have become more familiar with Section 508's requirements and the FAR's approach to implementing Section 508. Stakeholders are much more educated now thanks to the efforts of the FAR Councils, the Section 508 Steering Committee, the Access Board, GSA, agency Section 508 coordinators, and industry personnel. The Frequently Asked Questions guidance located at www.section508.gov has been very helpful in clarifying the Government's approach to implementing Section 508. The outreach activities of the Section 508 Steering Committee, Access Board, and GSA also have been very helpful. Associations that represent individuals with disabilities have played a key role in helping Government and industry personnel understand accessibility needs. Moreover, industry's adoption of the Voluntary Product Accessibility Template for products has greatly assisted agencies with their market research function. As a result, implementation of Section 508 has progressed significantly.

Comments of ITAA on FAR Case 2001-033, Section 508 Contract Clause (Notice) (Aug. 26, 2002), *available at* http://www.itaa.org/software/sec508/letters/508letter.pdf.

[157] *Id.* at 3, *available at* www.itaa.org/software/sec508/letters/508letter.pdf.

[158] The FAR notice of the final rule stated, in relevant part:

> Some commentors asked for a clause, pointing out that unless the FAR prescribes a clause, agencies may produce different clauses, resulting in inconsistent coverage across the Government. Some procurement offices want a clause to help address their lack of experience with the Access

to Section 508's contractual issues. Specifically, the drafters of the FAR asked for suggestions on whether a specific clause should be required, or whether instead the government should simply publish additional nonbinding guidance.[159]

The process now remains in limbo. The lack of progress is due, in part, to a basic disagreement on how risks should be allocated for Section 508 compliance. Congress left those risks uncertain, and nothing in the procurement system clearly allocates Section 508's risks to either agencies or industry. Compounding that legal uncertainty is political gridlock – industry is reluctant to press for a standard "Section 508" clause, and the agencies remain uncertain on how to proceed. As a result, after more than two years, there is no standard provision to allocate risks between the parties, and this will almost certainly impair any future efforts to enforce Section 508's requirements.

> Board standards. No clauses were in the January proposed rule. The FAR Council is carefully considering whether clauses are needed and welcomes comments on this issue that would inform a potential rulemaking.

66 Fed. Reg. at 20,895, *available at* http://www.section508.gov/index.cfm?FuseAction=Content&ID=13.

[159] The FAR Councils' notice stated:

> The Councils are seeking the following input to help them determine the best approach to promote more consistent and effective implementation of Section 508.
>
> 1. Need for additional guidance. The Councils ask that respondents discuss whether additional acquisition guidance to implement Section 508 is needed at this time. Respondents are encouraged to discuss potential advantages and disadvantages.
>
> 2. Form of guidance. To the extent additional guidance is desired, the Councils ask respondents to identify if such guidance should be in the form of a FAR clause, a solicitation provision, other FAR coverage, or non-regulatory guidance. If a clause is desirable, respondents are encouraged to identify the types of EIT purchases on which a clause should focus (e.g., all EIT purchases, EIT services only). The non-regulatory guidance may be in the form of reference material or frequently asked questions on the web site at http://www.section508.gov. Respondents are encouraged to discuss potential advantages and disadvantages of the form of guidance they suggest and why they believe other forms of guidance would be less beneficial or not appropriate.
>
> 3. Content of guidance. The Councils invite respondents' ideas regarding what should be included in the guidance.

67 Fed. Reg. 43,523 (June 27, 2002). As of this writing, that regulatory process remained open.

The drafters of Section 508, like other proponents of socioeconomic initiatives, seem not to have foreseen that their program, if it is to be implemented through the procurement system, must overcome (or at least steer through) all of that system's complicated political, economic and regulatory constituencies. To coalesce those entrenched constituencies, the initiative should clearly allocate contractual risk and map a course for implementation through the contracting system. The alternative – impasse and uncertainty – only creates additional costs and burdens.

G. Compliance Checklists – Filling Regulatory Gaps

Now that the Section 508 standards are in effect, there is an ongoing debate among manufacturers, disability organizations, and government officials, on what procedures should be used to ensure effective implementation. Some have suggested that independent organizations should evaluate EIT products to determine if they are compliant with Section 508, and others, as noted, have suggested that a standard FAR clause in EIT contracts would be sufficient to ensure compliance.

Without a standard contract clause or third-party compliance testing, however, industry and the agencies have had to devise solutions to implement Section 508, in the context of a complex and demanding procurement system. One very popular tool that has emerged is the "Voluntary Product Accessibility Templates" ("VPATs"), which were drafted and sponsored by the Information Technology Industry Council ("ITI").[160]

[160] The Access Board specifically cited the ITI's cooperation in implementing Section 508 in U.S. ARCHITECTURAL & TRANSPORTATION COMPLIANCE BOARD, *Section 508 of the Rehabilitation Act: One Year Later*, 8 ACCESS CURRENTS, No. 3, at 4 (May/June 2002). These VPAT checklists were encouraged from early on, as the Section 508 standards evolved. Vendor questionnaires were endorsed, for example, by the EITAAC group's report, in May 1999. *EITAAC Report*, *supra* note ___, § 4.1.1 ("In every case, the agency is responsible for compliance with Section 508. To meet this obligation, agencies should address

The VPAT format is a straightforward matrix, built around the Access Board standards, a matrix which the ITI developed in conjunction with government.[161] The VPAT is, in essence, a simple questionnaire. In the VPAT, each relevant Access Board standard must be assessed for "Supporting Features" and "Remarks and Explanations." For example, the VPAT provides as follows with regard to technical standards for software applications and operating systems:

Section 1194.21 Software Applications and Operating Systems - Detail Voluntary Product Accessibility Template[162]		
Criteria	**Supporting Features**	**Remarks and explanations**
(a) When software is designed to run on a system that has a keyboard, product functions shall be executable from a keyboard where the function itself or the result of performing a function can be discerned textually.		

The VPAT is notably *not* a simple binary questionnaire; it does not seek out simple "yes" or "no" answers. Instead, it takes a much more nuanced approach – one that affords industry much better protection, for it allows industry to avoid the liability that a simple "yes" or "no" might impose. And, consistent with the loopholes in the regulations discussed above, the industry directions for the VPAT questionnaire specifically

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accessibility in determinations of need and include accessibility within the scope of market research as defined in the Federal Acquisition Regulations (FAR). The EITAAC recommends a written questionnaire format which permits suppliers to indicate the technical approaches and features in their products and services that are applicable to the adopted standards.").

[161] INFORMATION TECHNOLOGY INDUSTRY COUNCIL, *Voluntary Product Accessibility Template - Best Practices for Electronic & Information Technology Vendors* ("In 2001, ITI partnered with the U.S. General Services Administration (GSA) to create a simple, Internet-based tool to assist Federal contracting and procurement officials in fulfilling the new market research requirements contained in the Section 508 implementing regulations. The result: the Voluntary Product Accessibility Template, or VPAT."), *available at* http://www.itic.org/policy/508/Sec508.html. The government's Section 508 website has specifically endorsed the industry VPAT process. *See Section508.gov – Buy Accessible for Product Vendors, at* http://www.section508.gov/index.cfm?FuseAction=Content&ID=99.

[162] Information Technology Industry Council, *Voluntary Product Accessibility Template, available at* http://www.itic.org/policy/508/vpat.html.

encourage vendors to be creative in assessing the accessibility of their products. The VPAT instructions state:

1. For each standard in the applicable area(s), determine if your product meets or supports the standard.
    - If your product appears to meet or support the standard, then you have the option of providing examples of features that are accessible or of specific accessibility features that exist.
    - If your product appears to not meet the standard, remember that Section 508 allows for products to meet the Access Board Standards in innovative, non-traditional ways. Your product can meet the standard by providing an innovative solution, as long as the feature performs in the same manner as it does for any other user. This is called "functional equivalency."[163]

In many ways, VPATs were simply an extension of the regulatory drafting process. Industry established the VPATs as soon as Section 508 was implemented, and these questionnaires quickly filled a gap in the contracting process. The VPATs allow savvy vendors to present information on Section 508 compliance concisely, and, thanks to careful caveats, with relatively little exposure to liability. Although the VPATs filled only one part of the contracting gap – they work, in essence, as a *statement of work* regarding Section 508 compliance – industry was able to point to these VPATs as an excuse for avoiding a potentially much more damaging contract clause on the unanswered *liability* questions.

The VPATs offer broader lessons for socioeconomic initiatives in the procurement process. They show that industry is able to move swiftly to fill gaps in the regulatory scheme (and in the contracting process), to reduce transaction costs and to mitigate industry's potential exposure to liability. Industry's efficient response in the

[163] ITI, *Voluntary Product Accessibility Template - Best Practices for Electronic & Information Technology Vendors, available at* http://www.itic.org/policy/508/Sec508.html.

procurement process may, or may not, further the underlying socioeconomic goal. Here, the VPATs may further the government's *intra-remedial* goals of improving IT accessibility within the government, and, by facilitating accessibility, may further the economy-wide *extra-remedial* goals. By the same token, though, by helping to shelter vendors from potential liability, and by thus dulling vendors' incentives to make their goods and services accessible, the VPATs may undercut Section 508's *extra-remedial* goals.

Before any socioeconomic initiative is carried into the procurement arena, its proponents must recognize that the initiative is running headlong into a very sophisticated, mature market. The chief actors in that market – the agencies and the large, well-established vendors – have very strong business and administrative relationships, which often stretch back over decades. Industry can and will protect its interests in that marketplace, and a socioeconomic initiative may be diverted (or diluted) as it passes through a highly sophisticated government marketplace. Where, as here, contractors and agencies share a goal that diverges from those of the socioeconomic proponents – contractors and agencies want to buy and sell information technology, quickly and inexpensively – the socioeconomic goals may get lost as the federal marketplace churns forward efficiently.

H. Enforcement of Section 508: An Uncertain System Slows Progress

Proponents of Section 508 and IT accessibility face another obstacle: a very uncertain enforcement system.[164] As was discussed above, the Section 508 standards

[164] *See*, *e.g.*, Sheila C. Stark, *The Role of § 508 in Federal Procurement*, 02-03 BRIEFING PAPERS, at 8 (West Group, Feb. 2002).

remain murky. Section 508's proponents could regain lost ground if there were a strong procedural mechanism to challenge proposed procurements, to sort out the standards for compliance and enforcement. That challenge mechanism, however, remains incomplete.

Although Section 508 erected a process for complaint *after* inaccessible information technology is in place, what is not clear is who has standing to complain *before* inaccessible information technology is accepted by the government. The Justice Department has issued guidance that clearly concedes that disappointed offerors, if they believe a winning offeror has offered inaccessible information technology to the government, may protest the award.[165] A harder question, however, is whether users of that technology – whether singly, or collectively – will be able to protest any such prospective award.[166] If users with disabilities (or their representatives) cannot protest, they will have to await the remedial process contemplated by statute for the time *after* award.

Ultimately, of course, Section 508's success may well depend upon long-term enforcement, if it emerges that agencies have bought information technology that does not meet Section 508's standards. Notably, the Justice Department is *not* charged with enforcing Section 508.[167] Instead, under Section 508 an individual with disabilities (whether a member of the public or a federal employee) may file an administrative

[165] *Information Technology and People with Disabilities*, *supra* note __, at 2. As of this writing, there had been no published decisions involving protests of procurements under Section 508, at either the U.S. General Accounting Office or the U.S. Court of Federal Claims. Anecdotal evidence in the industry suggests that vendors are avoiding challenging the accessibility of competitors' offerings under Section 508 because those vendors are concerned that their own products or services may be found lacking under the Section 508 accessibility standards. Potential protesters, in other words, are loath to cast the first stone, for they know that almost no product or service on the market is truly fully accessible.

[166] For protests before the General Accounting Office, to have standing generally the prospective protester must be an actual or prospective offeror. *See* 31 U.S.C. § 3551(2).

[167] *Information Technology and People with Disabilities*, *supra* note __, at 1-2.

complaint or a private lawsuit against a federal agency alleging non-compliance with Section 508's accessibility requirements for EIT.[168] A court may use its discretion to award the prevailing party a reasonable attorney's fee as part of the costs.[169] The administrative complaint process is the same as that used for Section 505 of the Rehabilitation Act,[170] and it provides injunctive relief and attorney's fees to the prevailing party, though without compensatory or punitive damages.[171]

Furthermore, an employee with a disability may file suit against an offending federal agency to enforce the accessibility requirements.[172] Monetary damages may be available if the employee can prove an intentional attempt on behalf of the federal agency to procure inaccessible EIT; however, the most likely remedy is injunctive relief.[173]

Section 508 is silent, however, on the issue of intervention[174]; this leaves uncertain the role an affected contractor might play in any litigation stemming from the contractor's IT sales to the government. One commentator has argued that while Section 505 procedures do not clearly permit interested parties to intervene on behalf of the

[168] 29 U.S.C. § 794d(f)(2) (2000).

[169] 29 U.S.C. § 794a(b).

[170] *See* 29 U.S.C. § 794d(f)(2). The process requires the individual to file a complaint no later than 180 days from the date of discrimination. The agency must then conduct an investigation, and if it discovers a violation, it must attempt to resolve the issue informally. Once a resolution is reached, and the violator and complainant informed, the agency may hold a formal hearing to determine the existence of the violation and the appropriate remedy. 28 C.F.R. §§ 42.107-42.109.

[171] 29 U.S.C. § 794a(b).

[172] 29 U.S.C. § 794d(f)(3). The applicable "procedures, remedies, and rights" are the same as those set forth in section 505(a)(2) and 505(b) of the Rehabilitation Act, which refer to the remedies and procedures in place to enforce title VI of the Civil Rights Act of 1964. 29 U.S.C.A. § 794d(f)(3).

[173] *See* 42 U.S.C. § 2000d-2 (2000); Alexander v. Sandoval, 121 S. Ct. 1511, 1516 (2001) (indicating that private individuals may sue to enforce title VI and obtain both injunctive relief and damages, but that § 601 of title VI prohibits only *intentional* discrimination).

[174] *See* 29 U.S.C. § 794d (2000).

defendant agency, "a vendor whose EIT are the source of the complaint [under Section 508] should be permitted to intervene to protect its significant interest in the action."[175]

Nor is it clear whether, before filing suit, an individual would have to exhaust his or her administrative remedies. Section 508 does not explicitly require an individual to exhaust the administrative process before filing a lawsuit, and the Department of Justice has indicated that an individual need not exhaust the administrative process before filing suit.[176] Some argue, however, that the wording of the statute "strongly suggests that Congress intended that the administrative process be exhausted prior to filing a lawsuit."[177] Since most courts have not imposed an exhaustion requirement under Section 504 of the Rehabilitation Act, it is less likely that the courts would impose such an exhaustion requirement on those seeking relief under Section 508.[178]

What are the lessons of Section 508's enforcement scheme? Where, as here, both the legal standards and the procedural structure are not clearly drawn, enforcement will be slowed. The Section 508 initiative, as with other socioeconomic programs,[179] is also hobbled by an enforcement scheme that is scattered across a number of potential

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[175] Michael F. Mason and Rex C. Lint, *Section 508 of the Rehabilitation Act: An Overview and Analysis of the Government's Duty to Purchase Accessible Electronics and Information Technology Goods and Services*, 73 FED. CONT. REP. (BNA) No. 22 (May 30, 2000), *available at* http://www.hhlaw.com/publications/html/fcr.html.

[176] *See generally* 29 U.S.C.A. § 794d; *see also Information Technology and People with Disabilities, supra* note ____ (indicating that individuals may choose to sue either in federal court or file an administrative complaint).

[177] Michael F. Mason and Rex C. Lint, *supra* note ___, at ___.

[178] *See* 1 HENRY H. PERRITT, *supra* note __, at 342; *see also* Freed v. Consolidated Rail Corp., 201 F.3d 188, 191-94 (3d Cir. 2000) (explaining rationale for not imposing exhaustion requirement under Section 504 of Rehabilitation Act).

[179] The Department of Labor, for example, is charged with enforcing a number of employment-related socioeconomic initiatives that are carried out through the procurement system, *see, e.g.,* John Cibinic, Jr. & Ralph C. Nash, Jr., *supra* note __, at 464-66, and the Small Business Administration is directly involved in enforcement of small- and disadvantaged-business programs through the federal procurement system, *see, e.g.,* FAR Part 19.

plaintiffs and forums, from disabled persons to disappointed bidders, and from the General Accounting Office to the district courts.[180] On an optimistic note, though, the uncertainties in the enforcement scheme have (at least in the short term) helped to discourage litigation, which has created a "breathing space" for initial implementation; Section 508, observers agree, has avoided the litigation than often burdens other initiatives.[181] On balance, therefore, Section 508 teaches that a less coherent enforcement scheme can slow implementation, but also may forestall some of the mistrust and polarization that waves of litigation can otherwise bring to a socioeconomic initiative.

V. Conclusion

We return to where we began. Congress sought, through Section 508 of the Rehabilitation Act, to make information technology fully accessible to persons with disabilities, across society. Did Section 508 succeed? Partially. The initiative ran into typical political, economic, and administrative obstacles, many of which plague other socioeconomic initiatives that have been launched through the procurement system. The initiative's successes and failures, however, teach lessons for all socioeconomic initiatives in the procurement system.

The Section 508 initiative demonstrates, first, that government socioeconomic initiative will make the most progress when they mesh with parallel efforts in the private sector. The Section 508 standards for accessibility, though they rely in part on commercially acceptable standards, depart at several key points from the commercial

[180] The enforcement scheme is complicated by the dual role of the Justice Department, which is charged with assisting in the implementation of Section 508, but will not enforce it – and, in fact, will defend agencies should lawsuits be brought against those agencies for failing to comply with Section 508.

[181] *See* Dipka Bhambhani, *Section 508 Complaint Process Makes Lawsuits Unlikely*, GOV. COMP. NEWS, June 24, 2002, *available at* http://www.gcn.com/21_16/news/19076-1.html.

norms. Those points of divergence – the regulatory "splitting tail" – have created costs and confusion, and have impeded the spread of accessibility.

Those splits in the regulatory regime have come, in part, because Congress failed to give clear direction in enacting Section 508. The regulators would have had much clearer guidance, for example, had Congress explained whether Section 508 is strictly *intra-remedial* (intended only to further accessibility *within* the government), or is also *extra-remedial* (intended to remedy disability issues across society). Had Congress given more thought to Section 508's amendments in 1998, these basic questions could have been resolved at the beginning of the regulatory process.

Had Congress more closely examined Section 508, though, the members would almost certainly have been shocked by the enormous costs of making information technology accessible, and the legislation might well have failed. This is a common trade-off in socioeconomic initiatives – Congress enacts a laudable goal, and passes the hidden costs to the procurement system – and the political compromise yields common problems. Officials in the procurement system, and their contractor counterparts, are left scrambling to implement Congress' laudable, if not carefully considered, social goals.

Section 508's history also reveals another common pattern when Congress passes a socioeconomic goal to the procurement system: responsibility for achieving the goal is often divided between two groups of officials. The first group is in the "home" agency, which is charged with overseeing the social goal (here, the Access Board). The second group, the procurement officials, are scattered across the government. The huge differences between the two groups, in mission, outlook, and culture, inevitably create

tension and inefficiencies. In Section 508's case, for example, this division has yielded a legal standard – per the Access Board's rules, agencies must buy the "most" accessible goods and services, regardless of other agency needs'' – that is practically unattainable through the procurement system.

Hopelessly disruptive procurement standards are nothing new, of course, as they are natural to any procurement system with many voices and goals. What is new, however, is the procurement system itself, which is rapidly transforming. The U.S. procurement system is streamlining, shedding costs and constraints as it grows and improves. As the system streamlines, however, the socioeconomic program buried in the procurement system, with all their "clunky" inefficiencies, will protrude ever more visibly in the procurement process. As that occurs, there will be more attention paid to – and less patience for – inefficiencies forced by social goals.

Another issue that remains unresolved under Section 508 is the "undue burden" standard. Although Congress said that agencies need not make their information technology accessible if doing so would cause an "undue burden," Congress never explained how to gauge that burden. (Had Congress done so, Congress probably would have been forced to confront the costs of Section 508.) Regulators have compromised, and have tried to make sense of the "undue burden" exception by looking to the acquiring agency's resources in gauging whether accessibility would pose an "undue burden." That compromise is uncertain, though, for it does not specify *what* resources, exactly, agencies are to use when purchasing accessibility. Moreover, the compromise standard begs the central question in this and many other socioeconomic initiatives: through the

complicated dynamics of the procurement marketplace, who, ultimately, is to pay for accomplishing this social goal?

Congress' failure to answer that question, and to allocate costs and risks in a conscientious manner, teaches another common lesson: the Section 508 initiative, as with many other socioeconomic initiatives in procurement, is likely to be dogged by litigation and discord for years to come. The uncertain risks of a half-formed regulatory scheme will continue to create costs and inefficiencies as actors in the procurement process try to dodge uncertain, and potentially costly, risks and liabilities.

Those severe risks have, predictably, led to another common problem: loopholes. The regulatory scheme shows the strain of technical standards, a sweeping social goal, and an extremely complex procurement system, all bearing heavily against one another. The strain and torque of these colliding systems have, unsurprisingly, yielded substantial loopholes, safe harbors in which cost- and risk-averse contractors (and agencies) may take shelter. In the case of Section 508, one such loophole – the "equivalent facilitation" exception – may shelter information technology that is, in fact, much less accessible. What remains to be seen is whether Congress and the regulators close these loopholes – though that, in turn, would likely force open other gaps in the system.

This leads to the next lesson from Section 508: key players' deft success in forestalling reform. There is, for example, no standard contractual clause requiring accessibility in federal information technology, although these amendments to Section 508 passed over five years ago, and many in government have pleaded for such a clause. The absence of such a clause is arguably due, in part, to industry's success in dissuading

regulators from imposing a standard provision. The Section 508 initiative was launched into a procurement system with deeply ingrained communities of interest, and its own culture and agenda. The Section 508 socioeconomic initiative, like so many others, must adapt to the procurement system, and its political regime, in order to survive.

Beyond gaining political traction, proponents of Section 508 – and any social initiative passing through the procurement system – must understand that the federal procurement system is as mechanical as it is complex. Federal procurement is an endless stream of checklists and requirements, and that system has now enveloped Section 508. While the checklists used for Section 508 (the "Voluntary Product Accessibility Templates," or "VPATs") make Section 508 more efficient and achievable, proponents should recognize that systematizing a social goal here, as elsewhere, means surrendering some part of that goal. In the case of the VPATs, that trade-off comes in accessibility and enforcement: while the VPATs make it easier to assess accessibility, they also make it easier for vendors to explain away shortcomings in their goods and services. The VPATs, in sum, allow vendors to shirk some of the costs and risk of accessibility.

Finally, Section 508 teaches the danger of an uncertain enforcement scheme. The statute left unclear who has the right to enforce Section 508, and how. In the short term, this has chilled litigation, probably because the uncertainty cooled potential litigants' willingness to launch challenges under Section 508. In the long term, the uncertainties in the enforcement scheme may hamper the social initiative that Section 508 represents.

Despite these shortcomings, Section 508 has prompted real progress in accessibility, both in government and across society. And the Section 508 initiative

provides an intriguing case study of strategies that work (such as using the procurement system to leverage society-wide change) and strategies that fail (importing complex or idiosyncratic standards into an already overburdened procurement system). As the procurement system continues to grow more efficient over the coming years, and socioeconomic initiatives become ever more prominent parts of a streamlined system, the triumphs and failures of the Section 508 initiative may mark pathways for successful social policy in the federal procurement system.

APPENDIX:

TEXT OF SECTION 508

Section 508, 29 U.S.C. § 794d, provides as follows:

§ 794d. Electronic and information technology

(a) Requirements for Federal departments and agencies

(1) Accessibility

(A) Development, procurement, maintenance, or use of electronic and information technology

When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology--

(i) individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities; and

(ii) individuals with disabilities who are members of the public seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities.

(B) Alternative means efforts

When development, procurement, maintenance, or use of electronic and information technology that meets the standards published by the Access Board under paragraph (2) would impose an undue burden, the Federal department or agency shall provide individuals with disabilities covered by paragraph (1) with the information and data involved by an alternative means of access that allows the individual to use the information and data.

(2) Electronic and information technology standards

(A) In general

Not later than 18 months after August 7, 1998, the Architectural and Transportation Barriers Compliance Board (referred to in this section as the "Access Board"), after consultation with the Secretary of Education, the Administrator of General Services, the Secretary of Commerce, the Chairman of the Federal Communications Commission, the Secretary of Defense, and the head of any other Federal department or agency that the Access Board determines to be appropriate, including consultation on relevant research findings, and after consultation with the electronic and information technology industry and appropriate public or nonprofit agencies or organizations, including organizations representing individuals with disabilities, shall issue and publish standards setting forth—

(i) for purposes of this section, a definition of electronic and information technology that is consistent with the definition of information technology specified in section 1401(3) of Title 40; and

(ii) the technical and functional performance criteria necessary to implement the requirements set forth in paragraph (1).

(B) Review and amendment

The Access Board shall periodically review and, as appropriate, amend the standards required under subparagraph (A) to reflect technological advances or changes in electronic and information technology.

(3) Incorporation of standards

Not later than 6 months after the Access Board publishes the standards required under paragraph (2), the Federal Acquisition Regulatory Council shall revise the Federal Acquisition Regulation and each Federal department or agency shall revise the Federal procurement policies and directives under the control of the department or agency to incorporate those standards. Not later than 6 months after the Access Board revises any standards required under paragraph (2), the Council shall revise the Federal Acquisition Regulation and each appropriate Federal department or agency shall

revise the procurement policies and directives, as necessary, to incorporate the revisions.

(4) Acquisition planning

In the event that a Federal department or agency determines that compliance with the standards issued by the Access Board under paragraph (2) relating to procurement imposes an undue burden, the documentation by the department or agency supporting the procurement shall explain why compliance creates an undue burden.

(5) Exemption for national security systems

This section shall not apply to national security systems, as that term is defined in section 1452 of Title 40.

(6) Construction

(A) Equipment

In a case in which the Federal Government provides access to the public to information or data through electronic and information technology, nothing in this section shall be construed to require a Federal department or agency--

(i) to make equipment owned by the Federal Government available for access and use by individuals with disabilities covered by paragraph (1) at a location other than that where the electronic and information technology is provided to the public; or

(ii) to purchase equipment for access and use by individuals with disabilities covered by paragraph (1) at a location other than that where the electronic and information technology is provided to the public.

(B) Software and peripheral devices

Except as required to comply with standards issued by the Access Board under paragraph (2), nothing in paragraph (1) requires the installation of specific accessibility-related software or the attachment of a specific accessibility- related peripheral device at a workstation of a Federal employee who is not an individual with a disability.

(b) Technical assistance

The Administrator of General Services and the Access Board shall provide technical assistance to individuals and Federal departments and agencies concerning the requirements of this section.

(c) Agency evaluations

Not later than 6 months after August 7, 1998, the head of each Federal department or agency shall evaluate the extent to which the electronic and information technology of the department or agency is accessible to and usable by individuals with disabilities described in subsection (a)(1) of this section, compared to the access to and use of the technology by individuals described in such subsection who are not individuals with disabilities, and submit a report containing the evaluation to the Attorney General.

(d) Reports

(1) Interim report

Not later than 18 months after August 7, 1998, the Attorney General shall prepare and submit to the President a report containing information on and recommendations regarding the extent to which the electronic and information technology of the Federal Government is accessible to and usable by individuals with disabilities described in subsection (a)(1) of this section.

(2) Biennial reports

Not later than 3 years after August 7, 1998, and every 2 years thereafter, the Attorney General shall prepare and submit to the President and Congress a report containing information on and recommendations regarding the state of Federal department and agency compliance with the requirements of this section, including actions regarding individual complaints under subsection (f) of this section.

(e) Cooperation

Each head of a Federal department or agency (including the Access Board, the Equal Employment Opportunity Commission, and the General Services Administration) shall provide to the Attorney

General such information as the Attorney General determines is necessary to conduct the evaluations under subsection (c) of this section and prepare the reports under subsection (d) of this section.

(f) Enforcement

(1) General

(A) Complaints

Effective 6 months after the date of publication by the Access Board of final standards described in subsection (a)(2) of this section, any individual with a disability may file a complaint alleging that a Federal department or agency fails to comply with subsection (a)(1) of this section in providing electronic and information technology.

(B) Application

This subsection shall apply only to electronic and information technology that is procured by a Federal department or agency not less than 6 months after the date of publication by the Access Board of final standards described in subsection (a)(2) of this section.

(2) Administrative complaints

Complaints filed under paragraph (1) shall be filed with the Federal department or agency alleged to be in noncompliance. The Federal department or agency receiving the complaint shall apply the complaint procedures established to implement Section 794 of this title for resolving allegations of discrimination in a federally conducted program or activity.

(3) Civil actions

The remedies, procedures, and rights set forth in Sections 794a(a)(2) and 794a(b) of this title shall be the remedies, procedures, and rights available to any individual with a disability filing a complaint under paragraph (1).

(g) Application to other Federal laws

This section shall not be construed to limit any right, remedy, or procedure otherwise available under any provision of Federal law (including sections 791 through 794a of this title) that provides greater or equal protection for the rights of individuals with disabilities than this section.

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