

10. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order 12898 (59 FR 7629) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA determined that this Final Rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. EPA has assessed the overall protectiveness of designating the disposal sites against the criteria established pursuant to the MPRSA to ensure that any adverse impact to the environment will be mitigated to the greatest extent practicable.

11. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This Final Rule will be effective October 8, 2010.

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: August 31, 2010.

Jared Blumenfeld,
Regional Administrator, EPA Region IX.

■ In consideration of the foregoing, EPA amends part 228, chapter I of title 40 of the Code of Federal Regulations as follows:

PART 228—[AMENDED]

■ 1. The authority citation for part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

■ 2. Section 228.15 is amended by adding paragraph (l)(12) to read as follows:

§ 228.15 Dumping sites designated on a final basis.

* * * * *

(l) * * *

(12) Guam Deep Ocean Disposal Site (G-DODS)—Region IX.

(i) *Location:* Center coordinates of the circle-shaped site are: 13°35.500' North Latitude by 144°28.733' East Longitude (North American Datum from 1983), with an overall diameter of 3 nautical miles (5.6 kilometers).

(ii) *Size:* 7.1 square nautical miles (24.3 square kilometers) overall site.

(iii) *Depth:* 8,790 feet (2,680 meters).

(iv) *Use Restricted to Disposal of:* Suitable dredged materials.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to a maximum of 1 million cubic yards (764,555 cubic meters) per calendar year of dredged materials that comply with EPA's Ocean Dumping Regulations; disposal operations shall be conducted in accordance with requirements specified in a Site Management and Monitoring Plan developed by EPA and USACE, to be reviewed at least every 10 years.

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[FR Doc. 2010-22324 Filed 9-7-10; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 20

[WT Docket No.07-250; FCC 10-145]

Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC) adopts final rules governing wireless hearing aid compatibility that are intended to ensure that consumers with hearing loss are able to access wireless communications services through a wide selection of handsets without experiencing disabling interference or other technical obstacles.

DATES: Effective October 8, 2010, except for the amendments to § 20.19(f) which

contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these amendments. On June 6, 2008 (73 FR 25566, May 7, 2008), the Director of the Federal Register approved the incorporation by reference of a certain publication listed in this final rule.

FOR FURTHER INFORMATION CONTACT: John Borkowski, Wireless Telecommunications Bureau, (202) 418-0626, e-mail John.Borkowski@fcc.gov. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to PRA@fcc.gov or contact Judith B. Herman at 202-418-0214 or via the Internet at Judith-B.Herman@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Policy Statement and Second Report and Order in WT Docket No.07-250; FCC 10-145, adopted August 5, 2010, and released on August 5, 2010. This summary should be read with its companion document, the further notice of proposed rulemaking summary published elsewhere in this issue of the **Federal Register**. The full text of the Policy Statement and Second Report and Order is available for public inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY-A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street SW., Room CY-B402, Washington, DC 20554; the contractor's Web site, <http://www.bcpweb.com>; or by calling (800) 378-3160, facsimile (202) 488-5563, or e-mail FCC@BCPIWEB.com. Copies of the public notice also may be obtained via the Commission's Electronic Comment Filing System (ECFS) by entering the docket number WT Docket No.07-250. Additionally, the complete item is available on the Federal Communications Commission's Web site at <http://www.fcc.gov>.

Synopsis of the Policy Statement and Second Report and Order

I. Introduction

1. In this Policy Statement and Second Report and Order (Second R&O), the Commission affirms that our hearing aid compatibility rules must provide people who use hearing aids and cochlear implants with continuing access to the most advanced and innovative technologies as science and markets develop, while maximizing the

conditions for innovation and investment.

2. The Commission also takes several actions to clarify its rules to keep pace with developments in technology and the market. The Commission clarifies that its hearing aid compatibility rules cover customer equipment that contains a built-in speaker and is designed to be typically held to the ear, adopts a streamlined procedure for amending its rules to incorporate an anticipated revision of the hearing aid compatibility technical standard that will make it generically applicable across frequency bands and interface modes, and extends its disclosure requirements to provide consumers with information about multi-band and multi-mode phones that operate in part over bands or modes for which technical standards have not been established.

3. In order to ensure that people with hearing loss will have access to new and popular models, while continuing to protect the ability of small companies to compete and to foster innovation by new entrants, the Commission modifies the *de minimis* exception in its existing rule so that companies that are not small entities will be required to offer at least one hearing aid-compatible model after a two-year initial period. In recognition of specific challenges that this rule change will impose for handsets operating over the legacy GSM air interface in the 1900 MHz band, the Commission permits companies that will no longer qualify for the *de minimis* exception to meet hearing aid compatibility requirements by installing software that enables customers to reduce the power output by a limited amount for such operations. The Commission also amends its rules requiring manufacturers to deploy hearing aid-compatible handsets so that they apply to handsets sold through all distribution channels, and not only through service providers.

4. The Commission also notes that later this year, the Commission intends to initiate a comprehensive review of the operation of our wireless hearing aid compatibility rules. In that review, the Commission will evaluate the success of our rules in making a broad selection of wireless phones accessible to individuals with hearing loss, and the Commission will consider whether further revisions to those rules are appropriate.

II. Background

5. The Commission is required by law to ensure that persons with hearing loss have access to telephone service. The Hearing Aid Compatibility Act of 1988 required all telephones manufactured or

imported for use in the United States to meet established technical standards for hearing aid compatibility, with certain exceptions, among them an exception for telephones used with mobile wireless services. The statute required the Commission to revoke or limit the exemption if it determined that:

- Such revocation or limitation is in the public interest;
- Continuation of the exemption without such revocation or limitation would have an adverse effect on people with hearing loss;
- Compliance with the requirements adopted is technologically feasible for the telephones to which the exemption applies; and
- Compliance with the requirements adopted would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed.

6. *Current Hearing Aid Compatibility Requirements.* The Commission's requirements apply generally to providers of digital commercial mobile radio services (CMRS) "to the extent that they offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls," as well as to manufacturers of wireless phones used in the delivery of such services. The applicability of the requirements is further limited to those air interfaces and frequency bands (800–950 MHz and 1.6–2.5 GHz) for which technical standards are stated in the most recent revision of the American National Standards Institute (ANSI) standard governing wireless hearing aid compatibility (ANSI C63.19–2007).

7. The Commission's hearing aid compatibility requirements address hearing aids that operate in either of two modes—acoustic coupling or inductive coupling. Hearing aids operating in acoustic coupling mode receive sound through a microphone and then amplify all sounds surrounding the user, including both desired sounds, such as a telephone's audio signal, and unwanted ambient noise. Hearing aids operating in inductive coupling mode turn off the microphone to avoid amplifying unwanted ambient noise, instead using a telecoil to receive only audio signal-based magnetic fields generated by inductive coupling-capable telephones.

8. The rules codify the ANSI C63.19 performance levels as the applicable technical standard for hearing aid compatibility. Beginning January 1,

2010, new applications for certification must use the 2007 version of the ANSI standard, although earlier grants of certification using prior versions of the standard remain valid. The Commission has delegated to the Wireless Telecommunications Bureau (WTB) and Office of Engineering and Technology (OET) authority to adopt by rulemaking future revisions of ANSI C63.19, including extensions of the technical standards to new frequency bands and air interfaces, provided the revisions do not raise major compliance issues.

9. The Commission generally requires each covered manufacturer to offer to service providers, and each service provider to offer to its customers, specific numbers of handset models per air interface in its product line that meet, at a minimum, an M3 rating for reduction of radio frequency (RF) interference between handsets and hearing aids operating in acoustic coupling mode and a T3 rating to enable inductive coupling with hearing aids operating in telecoil mode. These minimum deployment requirements vary depending on the total number of models that the manufacturer or service provider offers over the air interface, and they increase over time from February 15, 2009, to May 15, 2011.

10. The rules also contain a *de minimis* exception to the deployment benchmarks for certain digital wireless handset manufacturers and wireless service providers. Specifically, manufacturers or providers that only offer one or two handset models per air interface are exempt from all hearing aid compatibility requirements, other than the reporting requirements; those that only offer three models are required to offer one that is hearing aid-compatible.

11. In addition, the rules require service providers to make hearing aid-compatible models available for consumer testing in their owned or operated retail stores. The rules also require service providers and manufacturers to disclose in their packaging materials certain information about hearing aid-compatible handsets. Manufacturers and service providers must report annually on efforts toward compliance with the hearing aid compatibility requirements. In addition, manufacturers and service providers that operate publicly accessible Web sites are required to list on their Web sites all hearing aid-compatible models that they offer along with the ratings of those models and an explanation of the ratings.

III. Policy Statement

12. Consistent with Congressional intent to afford equal access to

communications networks to the fullest extent feasible and longstanding Federal Communications Commission precedent, it is the policy of the Commission that our hearing aid compatibility rules provide people who use hearing aids and cochlear implants with continuing access to the most advanced and innovative technologies as science and markets develop. The Commission believes that following three principles will ensure that all Americans, including Americans with hearing loss, will reap the full benefits of new technologies as they are introduced into the marketplace. To maximize the number of accessible products for this population, our policies must adhere to these principles:

- First, given that consideration of accessibility from the outset is more efficient than identifying and applying solutions retroactively, the Commission intends for developers of new technologies to consider and plan for hearing aid compatibility at the earliest stages of the product design process;
- Second, the Commission will continue to account for technological feasibility and marketability as the Commission promulgates rules pertaining to hearing aid compatibility, thereby maximizing conditions for innovation and investment; and
- Third, the Commission will provide industry with the ability to harness innovation to promote inclusion by allowing the necessary flexibility for developing a range of solutions to meet consumers' needs while keeping up with the rapid pace of technological advancement.

IV. Second Report and Order

A. Handsets and Services Covered

1. Handsets Covered by the Rule

13. As an initial matter, the Commission amends our rules to clarify that hearing aid compatibility requirements apply to otherwise covered handsets that contain a built-in speaker and are typically held to the ear. This determination is consistent with the first of the Multi-Band Principles filed on September 11, 2008, by a working group of industry and consumer representatives, which states that those principles apply to "handsets operating in a normal voice mode and typically held to the ear." In the order in which we first adopted wireless hearing aid compatibility rules (*2003 Hearing Aid Compatibility Order*), the Commission stated that devices that do not have any built-in speaker or ear piece would not be required to meet hearing aid compatibility requirements because they were unlikely to cause RF

interference to hearing aids and they could not be feasibly equipped with a functioning telecoil. Consistent with that observation, the Commission amends our rules to define a covered "handset" as a device that contains a built-in speaker and is typically held to the ear in any of its ordinary uses. Thus, if a wireless device is not designed to be typically held to the ear in any ordinary use, but only provides voice communication through a speakerphone, headphone or other instrument that carries voice communications from the handset to the ear, or other means that does not involve holding it to the ear, it is not subject to our hearing aid compatibility requirements. The Commission clarifies that in this respect, "typically" encompasses any intended or anticipated ordinary use, and does not mean "usually" or "most often." If a device is configured so as to enable a user to hold it to the ear to receive voice communications in any ordinary anticipated application, it is a "handset" covered by the rule even if the manufacturer or service provider expects that most users will operate it in a speakerphone or other mode.

14. In the *Notice in this proceeding*, the Commission asked "[w]hat constitutes a telephone in the context of devices that more closely resemble mobile computers but have voice communications capabilities" and whether the Commission should broaden or otherwise modify the scope of its hearing aid compatibility rules in order to maintain technology neutrality and ensure the continuing availability of a selection of wireless services and features that is comparable to that available to the general population. Consistent with our general determination, a device that includes both computing and covered voice communication capabilities is subject to hearing aid compatibility requirements so long as it has a built-in speaker and is designed to be typically held to the ear. This scope is necessary to ensure that people with hearing loss will have access to all means of voice communication as devices become increasingly multifunctional and the lines among device categories continue to blur.

2. Application of Technical Standard to New Bands and Air Interfaces

15. *Background.* ANSI Standard C63.19-2007 provides hearing aid compatibility tests for wireless handsets that use voice communications technologies that are in common use in the 800 MHz to 950 MHz and 1600 MHz to 2500 MHz bands. Accordingly, our

rules impose hearing aid compatibility requirements only on handsets that provide service over these frequency bands using any air interface for which technical standards exist in the ANSI C63.19 standard. The Commission has delegated to WTB and OET limited authority by rulemaking to adopt new technical standards for additional frequency bands and air interfaces as they are established by the ANSI Accredited Standards Committee C63™ and to approve new hearing aid compatibility standards adopted subsequently to ANSI C63.19-2007.

16. The Multi-Band Principles filed on September 11, 2008, to address the hearing aid compatibility of handsets that operate over multiple frequency bands or voice technology modes, some of which have no established hearing aid compatibility standards. The Multi-Band Principles propose a sequence of events to be followed when a new service is developed over a frequency band or air interface that is not yet subject to a hearing aid compatibility technical standard. Specifically, the Multi-Band Principles propose that a preliminary predictive analysis method should be employed to determine the likelihood of hearing aid compatibility issues for handsets when they operate over new frequency bands or air interfaces. If no issues are identified by this analysis and the handset is otherwise hearing aid-compatible, then the handset would be deemed hearing aid-compatible over all frequencies and bands in which it operates, including new technologies, and no further testing would be required. If a potential hearing aid compatibility issue is identified, then an ANSI-accredited body would devise a hearing aid compatibility standard within a timeframe to be set by the Commission. Beginning 12 months after standards for hearing aid compatibility have been developed and adopted by the Commission, a new handset model that operates in a new frequency band or air interface could not be labeled or counted as hearing aid-compatible if it does not meet the newly adopted hearing aid compatibility standard, although handsets certified prior to that point could continue to be counted as hearing aid-compatible.

17. More recently, ANSI Committee C63 has developed a new draft standard that would revise the current ANSI C63.19-2007 standard. The new draft standard provides for a testing method that could be used for handsets using any air interface and operating over any frequency between 698 MHz and 6 GHz. Under this testing method, a product testing threshold has been established based on certain RF power levels and

modulation characteristics. The new draft standard provides that handsets operating at or below the testing threshold will be exempt from further testing and will be considered to have an M4 rating. Handsets incorporating air interfaces and frequency bands that fail the testing threshold criteria will be required to undergo full testing in accordance with the revised ANSI C63.19 standard. ANSI states that the revised standard has completed an initial round of balloting and round-robin testing, and that it expects final balloting to be completed by the fourth quarter of 2010.

18. *Discussion.* In anticipation that ANSI will adopt the draft standard or something similar, the Commission finds it unnecessary to adopt the full regime set forth in the Multi-Band Principles for handsets operating over air interfaces or frequency bands that lack standards. Rather, the ANSI draft standard enables testing over frequency bands or air interfaces expected to be incorporated in wireless handsets in the near future. Consistent with Sections 20.19(k)(1) and (2) of our rules, the Commission delegates to WTB and OET the authority to adopt a new standard similar to the draft revision by rulemaking, and the Commission directs them to complete such a proceeding promptly following the adoption of such a standard by ANSI. In the event ANSI has not adopted a standard similar to the draft revision by March 31, 2011, the Commission will revisit its decision to withhold action on this portion of the Multi-Band Principles.

19. Under Section 20.19(k)(1), new obligations imposed on manufacturers and service providers as a result of WTB's and OET's adoption of technical standards for additional frequency bands and/or air interfaces shall become effective no less than one year after release of the adopting order for manufacturers and CMRS providers with nationwide footprints (Tier I carriers) and no less than 15 months after release for other service providers. Consistent with this delegation of authority, the Commission expects that rules implementing the ANSI draft standard, if adopted, will apply as follows: No less than 12 months after release of the order adopting the standard, but at a later date if WTB and OET determine that a longer transition period is warranted, the benchmarks then in effect for other air interfaces will apply to manufacturers and Tier I carriers offering handsets using newly covered frequency bands or air interfaces. No less than 15 months after release of the order adopting the standard, but at a later date if WTB and

OET determine that a longer transition period is warranted, the same benchmarks will apply to other service providers. These rules will apply to all handsets and services within the scope of the rule unless otherwise specified by the Commission. The authority delegated to WTB and OET does not permit any actions that depart substantially from this regime.

20. While the Commission finds it unnecessary to adopt the Multi-Band Principles in whole, the Commission focuses special attention on Principle 3, which encourages wireless carriers and manufacturers to consider hearing aid compatibility and identify issues early in the design and development of handsets. Early identification of hearing aid compatibility issues enables their resolution earlier and, in many cases, less expensively than when interference is identified in the end stages of handset development. Addressing hearing aid compatibility early on also ensures that handsets that operate over new frequency bands or voice technology modes will be made available to consumers with hearing loss as closely as possible to their availability to the general public.

3. Multi-Band and Multi-Mode Handsets

21. *Background.* Under the Commission's rules, in order to be offered as hearing aid-compatible, a handset must meet hearing aid compatibility standards for every frequency band and air interface that it uses for which standards have been adopted by the Commission. In the *Notice*, the Commission tentatively concluded that, consistent with this principle, multi-band and multi-mode phones should not be counted as compatible in any band or mode if they operate over any air interface or frequency band for which technical standards have not been established. The Commission reasoned that this limitation would conform to consumers' expectation that a phone labeled "hearing aid-compatible" is compatible in all its operations, and also that it would create incentives to develop new compatibility standards more quickly. In the *First Report and Order in February 2008*, the Commission recognized that multi-mode handsets were already on the market that included Wi-Fi capability, and it adopted an interim rule to address their status. Under the interim rule, such handsets may be counted as hearing aid-compatible if they meet hearing aid compatibility standards over all frequency bands and air interfaces for which standards exist, but the manufacturer and service provider must

clearly disclose to consumers that the handset has not been rated for hearing aid compatibility with respect to Wi-Fi operation.

22. The Multi-Band Principles propose that operations over frequency bands or air interfaces for which standards do not exist be tested using either the nearest existing approved standard or a preliminary predictive analysis method that the parties would work with ANSI to develop. If the preliminary predictive analysis determines that such operations raise no hearing aid compatibility issues, it would not be necessary to develop a measurement procedure for the operations, and handsets operating over these frequency bands or air interfaces would be considered hearing aid-compatible if they meet hearing aid compatibility standards over all frequency bands and air interfaces for which such standards exist. If hearing aid compatibility issues are identified, then during the period until a measurement procedure is developed and adopted by the Commission, such handsets that otherwise meet hearing aid compatibility standards would be considered hearing aid-compatible, but information that they have not been tested for all operations would have to be conveyed in writing to consumers at the point of sale and through company Web sites. Beginning 12 months after the new standard is adopted by the Commission, a newly produced model could not be counted as hearing aid-compatible for any of its operations unless it meets the hearing aid compatibility standard for the new operation; however, handsets previously counted as hearing aid-compatible could continue to be so counted.

23. *Discussion.* As discussed previously, if the expected draft revision of Standard C63.19 is adopted by ANSI and the Commission, the treatment of multi-band and multi-mode handsets will become moot because there will be no operations without technical standards in the foreseeable future. Nonetheless, the Commission expects it will take a minimum of two years until any such standards have been adopted and compliance becomes mandatory for all services. Meanwhile, handsets that incorporate new frequency bands and air interfaces capable of supporting voice services other than Wi-Fi are already coming on the market. Therefore, for this interim period, the Commission extends to all handsets that incorporate these new frequency bands and air interfaces the same counting and disclosure rules that currently apply to handsets with Wi-Fi. In other words, a handset that meets hearing aid

compatibility requirements over all air interfaces and frequency bands for which technical standards have been established, but that is also capable of supporting voice operations in new frequency bands and air interfaces for which standards do not exist, may be counted as hearing aid-compatible, provided consumers are clearly informed that it has not been tested for the operations for which there are no standards. This is consistent with the proposal in the Multi-Band Principles, which informs consumers that the handset has not been tested and rated in all wireless technologies incorporated in the phone, and that the consumer should thoroughly test all phone features to determine whether the consumer experiences any interfering noise.

24. As recommended in the Multi-Band Principles, the Commission requires that for newly manufactured handsets covered by this rule, the following disclosure language be clearly and effectively conveyed to consumers wherever the hearing aid compatibility rating for the handset is provided, including at the point of sale and on company Web sites: "This phone has been tested and rated for use with hearing aids for some of the wireless technologies that it uses. However, there may be some newer wireless technologies used in this phone that have not been tested yet for use with hearing aids. It is important to try the different features of this phone thoroughly and in different locations, using your hearing aid or cochlear implant, to determine if you hear any interfering noise. Consult your service provider or the manufacturer of this phone for information on hearing aid compatibility. If you have questions about return or exchange policies, consult your service provider or phone retailer." The Commission has slightly revised the language proposed in the Multi-Band Principles in recognition that not all handsets are obtained from service providers. The Commission concludes that a uniform text will ensure that consumers are provided with consistent and sufficient information. However, handsets that are already on the market with other disclosure language that complies with our current rule will not be required to replace this with the newly prescribed language.

25. This disclosure rule will apply to all handsets that operate in part over an air interface or frequency band that is not covered by the ANSI C63.19–2007 standard until the date when rules adopting any new standard become effective. The rule will also apply after

rules adopting a new standard become effective to the extent that a handset model in fact has not been tested for previously uncovered operations under the new standard. However, a handset that has actually completed testing and been found to meet hearing aid compatibility standards under the new standard should not be described as not tested, but should be labeled with its hearing aid compatibility rating. Consistent with the recommendation in the Multi-Band Principles, a handset model launched earlier than 12 months after publication in the **Federal Register** of rules adopting any new standard could continue to be counted as hearing aid-compatible for operations covered under ANSI C63.19–2007 even if it does not meet the newly adopted standard for all other operations. Rather than describing such handsets as not fully tested, the disclosure should indicate that the phone does not meet hearing aid compatibility standards for some new technologies. WTB and OET shall promulgate rules to implement this modified disclosure requirement in their proceeding to consider adopting any revision of the ANSI standard.

26. Finally, the Commission clarifies that the disclosure requirement includes handsets that are capable of supporting software that can activate additional voice capability. For example, some handsets that transmit and receive data over a Wi-Fi air interface do not contain within them the software to use Wi-Fi for voice communications, but will accommodate commercially available software to enable voice transmissions over Wi-Fi. Other air interfaces such as LTE and WiMAX, while not currently used for voice transmissions, may accommodate software that would enable them to be used for voice communication without any change to the hardware in the underlying handset. Unless they are informed to the contrary, consumers may reasonably expect that handsets which are labeled as hearing aid-compatible will function properly with their hearing aids in all modes of operation for voice communication that can be reasonably anticipated. The Commission therefore finds that this disclosure requirement will afford consumers with hearing loss the opportunity to inquire further about their ability to use the device in all voice modes and make an informed choice about whether the device meets the consumer's needs and expectations.

B. De Minimis Exception

27. *Background.* Section 20.19 of the Commission's rules provides a *de minimis* exception to hearing aid compatibility obligations for those

manufacturers and mobile service providers that only offer a small number of handset models. Specifically, Section 20.19(e)(1) provides that manufacturers and mobile service providers offering two handset models or fewer in the United States over an air interface are exempt from the requirements of Section 20.19, other than the reporting requirement. Section 20.19(e)(2) provides that manufacturers or mobile service providers that offer three handset models over an air interface must offer at least one compliant model.

28. *Discussion.* In order to ensure that consumers who use hearing aids have access to a variety of phones, while preserving competitive opportunities for small companies as well as opportunities for innovation and investment, the Commission modifies the *de minimis* rule as applied to companies that are not small entities. Specifically, the Commission decides that beginning two years after it offers its first handset model over an air interface, a manufacturer or service provider that is not a small entity, as defined herein, must offer at least one model that is rated M3 or higher and at least one model that is rated T3 or higher if it offers one, two or three total handset models. In order to maintain parity and to allow entities that have been relying on the *de minimis* rule a reasonable period for transition, this obligation will become effective for manufacturers and service providers that offer one or two handset models over an air interface two years after the latest of the following: The date the manufacturer or service provider began offering handsets over the air interface, the date this Order is published in the **Federal Register**, the date a hearing aid compatibility technical standard is adopted for the relevant operation, or the date a previously small entity no longer meets our small entity definition. In addition, the Commission permits manufacturers and service providers that would have come under the amended *de minimis* rule but for their size to satisfy hearing aid compatibility deployment requirements for the legacy GSM air interface by relying on a handset that allows consumers to reduce the maximum power output only for operations over the GSM air interface in the 1900 MHz band by no more than 2.5 decibels (dB) in order to meet the RF interference standard.

29. In conjunction with these modifications to the *de minimis* rule, the Commission also revises our "refresh" rule to clarify its application to manufacturers that will be newly subject to hearing aid compatibility requirements. The refresh rule states

that if a manufacturer offers any new models for a particular air interface, it must offer in each calendar year a number of new models rated M3 or higher that is equal to at least half of its total required number of models rated M3 or higher, except that a manufacturer that offers three models over an air interface must offer at least one new model rated M3 or higher every other calendar year. Consistent with the purposes of this rule, the Commission now requires manufacturers that are not small entities that offer two models over an air interface, after the first two years, to introduce at least one new model rated M3 or higher every other year.

30. *Retention of de minimis rule for small entities.* The *de minimis* rule serves two purposes. One purpose is to ensure that small manufacturers and service providers have an opportunity to compete in the market. When the Commission first adopted the *de minimis* exception in 2003, it stressed the disproportionate impact that hearing aid compatibility requirements could have on small manufacturers or those that sell only a small number of digital wireless handset models in the United States, as well as on service providers that offer only a small number of digital wireless handset models. In order to further this procompetitive interest, the Commission retains the *de minimis* exception in full for small entities. The Commission concludes that the benefits to competition outweigh any consumer harm from not requiring these small entities to offer hearing aid-compatible telephones.

31. For purposes of this rule, the Commission defines "small entity" by adopting size standards consistent with those of the Small Business Administration (SBA). The relevant SBA categories are: (1) Wireless communications service providers (except satellite), and (2) radio and television broadcasting and wireless communications equipment manufacturing. A wireless communications service provider is small if it is independently owned and operated, is not dominant in its field of operation, and has 1,500 or fewer employees. Independently owned and operated, non-dominant firms in the category of radio and television broadcasting and wireless communications equipment manufacturers are considered small if they have 750 or fewer employees. Accordingly, the Commission will use 1,500 or fewer employees for wireless communications service providers and 750 or fewer employees for wireless communications equipment

manufacturers as the size standards for applying the *de minimis* rule.

32. *Limitation of the de minimis rule for companies that are not small entities.* In addition to preserving competitive opportunities for small entities, the *de minimis* rule also helps ensure that new entrants to the market have the opportunity to innovate. In the *First Report and Order*, the Commission expressed its concern that the *de minimis* rule "not be limited in a manner that would compromise its effectiveness in promoting innovation and competition." Several commenters contend that the *de minimis* rule allows new entrants to the handset manufacturing marketplace to develop innovative handsets and expeditiously bring them to market.

33. The Commission recognizes that new entrants may bring innovations to the wireless handset market, and that they may be discouraged from doing so if their first products are required to meet specific technical mandates. Thus, the Commission continues to apply the existing *de minimis* rule during the first two years that a manufacturer or service provider of any size is offering handsets, and during the first two years that an established entity is offering handsets over a particular air interface. The Commission is not persuaded, however, that the interest in innovation requires preserving the *de minimis* exception for large entities indefinitely. Once an entity with substantial resources is established as a manufacturer or service provider, it should be able to offer some handsets that meet the needs of consumers with hearing aids at the same time as it is innovating and investing.

34. The Commission notes that while several commenters argue that the *de minimis* rule is necessary to allow new entrants to innovate, they generally do not specifically argue that this requires the exception to be maintained indefinitely. To the contrary, they contend that manufacturers will typically expand their product offerings and meet hearing aid compatibility requirements after an initial period. Indeed, some parties have recently proposed a limitation of the *de minimis* exception to two years as a possible alternative to the current rule. The Commission notes that Apple, Inc. (Apple) has used the *de minimis* rule over the past three years to continue offering its iPhone without full hearing aid compatibility. However, Apple's stated need for the *de minimis* exception is due to technical circumstances surrounding GSM operation over the 1900 MHz band by products with thin form configurations, which the Commission addresses below.

To the extent other unique circumstances may arise in the future, the Commission finds they would be better addressed through case-by-case consideration, rather than by retaining an overly broad *de minimis* rule that potentially denies access to handsets by people with hearing loss.

35. The Commission is not persuaded by arguments that market forces render modification of the *de minimis* rule unnecessary. Several commenters argue that after a period of time, manufacturers will naturally expand their product offerings and thereby become subject to hearing aid compatibility requirements. While such an expansion of portfolios occurs in many instances, it has not occurred, for example, with Apple. Other commenters argue that in light of the large number of hearing aid-compatible handsets that are currently on the market, it is unnecessary to apply hearing aid compatibility requirements to large entities with limited product lines. This argument overlooks that each company that offers a hearing aid-compatible handset adds to the diversity of choices on the market, and therefore there is a public interest benefit to defining the exception no more broadly than necessary to promote competition and innovation.

36. *The two-year entry period.* In order to preserve the opportunity for new entrants to develop innovative products and services, the *de minimis* rule will continue to be available during the first two years that a manufacturer or service provider is in the relevant business. Similarly, a manufacturer or service provider of any size may continue to use the *de minimis* rule during the first two years that it offers handsets that operate over a particular air interface. The Commission finds that, in light of typical industry product cycles, two years is an appropriate period for a company that is not a small entity to introduce a hearing aid-compatible handset. For example, Apple introduced its third iPhone model within approximately two years after bringing the original iPhone to market. While the interest in innovation counsels in favor of permitting any company to introduce its first handset model over an air interface without meeting hearing aid compatibility standards, the public interest requires that a sizable company, once it is on its second or third generation of handsets, place a high enough priority on hearing aid compatibility to meet these standards for at least one model.

37. The Commission also allows a similar two-year transition period in other circumstances where an entity

that offers one or two handsets over an air interface becomes newly required to offer hearing aid-compatible handsets. The Commission recognizes that companies, and particularly manufacturers, that until now have not been required to offer hearing aid-compatible handsets will need a transition period to begin doing so. Accordingly, the new requirements will not become applicable to entities that are currently in the relevant business until two years after this Order is published in the **Federal Register**. Similarly, the Commission provides a two-year transition when a previously small business first exceeds the small business size standard. In addition, when hearing aid compatibility standards are newly adopted for an air interface or frequency band, manufacturers and service providers that offer one or two handset models over that air interface or frequency band will not be required to offer a hearing aid-compatible model until two years after rules adopting the technical standard are published in the **Federal Register**. While the Commission recognizes that manufacturers are typically aware of proposed standards well before they are adopted, the Commission is persuaded that businesses with small product lines, because they have less flexibility to work with multiple form factors and other design features, may need more time to introduce hearing aid-compatible products under these circumstances than the minimum of one year afforded to other manufacturers and service providers. The two-year transition period places companies in all of these circumstances on an equal footing with companies that are newly entering the market.

38. *GSM in the 1900 MHz band.* In recognition of the special technical challenges of meeting hearing aid compatibility standards for handsets with certain desirable form factors operating over the legacy 2G GSM air interface in the 1900 MHz band, the Commission permits companies that would come under the amended *de minimis* rule but for their size to satisfy the hearing aid-compatible handset deployment requirement for GSM using a handset that allows the customer to reduce the maximum output power for GSM operations in the 1900 MHz band by up to 2.5 dB in order to meet the RF interference standard.

39. The Commission finds that a special allowance to meet hearing aid compatibility standards for handsets operating over the 2G GSM network at 1900 MHz, in the narrow context of companies that but for their size would

be eligible for the amended *de minimis* exception, is in the public interest. Achieving hearing aid compatibility for GSM handsets in the 1900 MHz band implicates special technological challenges. The Commission has noted that “technological issues make it difficult to produce a wide variety of [GSM] handsets that both meet the M3 standard for reduced RF interference for acoustic coupling and include certain popular features.” For example, based on the hearing aid compatibility status reports filed by handset manufacturers in July 2010 for the reporting period from July 1, 2009, to June 30, 2010, 121 out of 122 handsets operating over the CDMA air interface, or 99%, were rated M3 or better, whereas only 82 of 153 GSM handsets, or 54%, were rated M3 or better. Certain technological choices in handset form and function, such as thin form factors and touch screens, increase the difficulty of meeting the ANSI standard for these handsets while bringing unique benefits to consumers. If the Commission were to apply hearing aid compatibility technical standards strictly to manufacturers that narrowly specialize in phones with these features, the Commission is concerned that such handsets might become unavailable to consumers with and without hearing loss alike. Alternatively, such manufacturers may choose to produce additional models with no unique features that are not demanded by the market simply to meet the new benchmarks that will apply to them two years following the release of this Order. A targeted approach that allows some flexibility in the hearing aid compatibility technical standards, to accommodate this narrow situation, will avoid these consequences and better promote access for people with hearing loss.

40. The Commission further finds that allowing hearing aid-compatible phones to incorporate a limited user-controlled power reduction option under such circumstance is an appropriate means to address these concerns. A 2.5 dB reduction in power will have limited impact on the ability of people with hearing loss to use the affected phones. For one thing, any impact would be limited to those times when a handset is operating on GSM and at 1900 MHz. Furthermore, the diminution in power that occurs from a 2.5 dB loss should generally have an effect only when a handset is operated near the edge of reliable service coverage. Handsets usually operate at no more power than needed in order to prolong the battery charge and minimize potential interference, and they typically transmit

at full power only to overcome signal fading in areas where there are obstructions or a large distance between the handset and the nearest base station. In addition, the modified rule applies only to 2G GSM technology, which is being phased out in favor of 3G alternatives. Also, as described by ANSI ASC C63™, the new version of the ANSI C63.19 standard that is currently under consideration, because it will measure RF interference potential directly and eliminate the need for certain conservative assumptions, will make it approximately 2.2 dB easier for a GSM phone to achieve an M3 rating. The Commission expects that if the new standard is adopted, manufacturers will find it in their interest to abandon the power reduction if possible, or diminish it to the extent they can, in order to make their phones most attractive to people with hearing loss.

41. The Commission recognizes, as certain parties have argued, that the Commission has previously disfavored reduction in output power as a means of meeting hearing aid compatibility requirements. Consistent with these prior holdings, the Commission affirms that the requirement to test for hearing aid compatibility at full power generally serves the important goal of ensuring that people with hearing loss have equal access to all of the service quality and performance that a given wireless phone provides. The Commission finds, however, in this narrow context, that the interest in fully equal access is outweighed by the importance of preserving the availability of a small category of phones that have desirable and beneficial features, and that will be made substantially accessible to people with hearing loss, from companies that specialize in producing only such phones. In the Further Notice of Proposed Rulemaking, issued together with this Second Report and Order, the Commission requests comment on whether to extend this exception to the full power testing requirement beyond companies that offer only one or two handset models. In addition, as proposed by HLAA, the Commission will monitor the impact of this rule and revisit the need for it in the future. In particular, in the event a new ANSI technical standard is adopted, the Commission will initiate a review of this rule shortly thereafter.

42. Accordingly, subject to the conditions set forth below, the Commission amends its rules so that a company offering one or two handset models over the GSM air interface that would have been eligible for the amended *de minimis* exception rule but for its size may satisfy its obligation to

offer one hearing aid-compatible handset over the GSM air interface through a handset that lets the consumer reduce maximum transmit power for GSM operations in the 1900 MHz band by up to 2.5 decibels and that then meets the ANSI criteria for an M3 rating after such power reduction. The power reduction must affect only 2G GSM operations in the 1900 MHz band, and the phone's default setting must be for full power operation. Once a handset meeting these criteria has been introduced in order to satisfy this hearing aid compatibility deployment requirement, the manufacturer or service provider may continue to count it as a hearing aid-compatible handset even if it increases its number of handset models operating over the GSM air interface beyond two.

43. The Commission does find that two conditions on this rule are necessary in the public interest. First, through software or other programming, the Commission requires these handsets to operate at full transmit power when calling 911 on GSM at 1900 MHz. Although some parties have argued that powering the phone back up in this circumstance would raise consumer awareness and education issues, the Commission finds that the public interest is better served by maximizing the coverage for a 911 call even if some interference is experienced by consumers who use hearing aids. In addition, the Commission requires that consumers be adequately informed of the need to select the power reduction option to achieve hearing aid compatibility and of the consequences of doing so. Specifically, wherever a manufacturer or service provider provides the hearing aid compatibility rating for such a handset, it shall indicate that user activation of a special mode is necessary to meet the hearing aid compatibility standard. In addition, the handset manual or a product insert must explain how to activate the special mode and that doing so may result in a diminution of coverage.

44. *Other circumstances.* In recent filings, Research in Motion Limited (RIM) has urged the Commission to retain a *de minimis* rule that would apply in situations where handsets are being phased out of production or retail sales portfolios. RIM states that "if a manufacturer or service provider is phasing out a particular air interface but still offers two or three handsets for a particular air interface, absent the current *de minimis* exception or a similar provision it would be compelled (regardless of carrier or consumer demand) to either discontinue all of the models concurrently with the HAC

model, or maintain the HAC model solely for the purposes of enabling it to continue offering the non-HAC model(s)." RIM suggests a possible rule under which if a manufacturer or service provider offers four or more handsets over an air interface during a given calendar year, in the next calendar year offers three or fewer handsets, and in subsequent calendar years offers one or two of those remaining handsets, it would not need to offer any hearing aid-compatible handsets beginning in the third year.

45. The Commission declines to take action on RIM's proposal in the absence of a developed record or concrete evidence of a problem that needs to be addressed. While the scenario that RIM poses is plausible on its face, it provides no example of any instance where a manufacturer or service provider has actually used or will use the *de minimis* rule to manage its phasing out of a portfolio in which it previously offered hearing aid-compatible handsets. In the event a situation arises where retaining a hearing aid-compatible offering over an air interface that is being discontinued would cause hardship to a manufacturer or service provider, and discontinuing the handset would not unduly disadvantage people with hearing loss, the Commission would entertain a request for waiver.

46. *Review of the de minimis rule.* Hearing Loss Association of America (HLAA) proposes that whatever actions the Commission takes, it should revisit any changes to the *de minimis* rule in a timely manner to see what impact they have in the real world. While the Commission believes the actions it takes today will best balance the interests of industry and consumers, it recognizes that these rules are complex and their consequences over time cannot be predicted with certainty. The Commission therefore will undertake a comprehensive review of the *de minimis* rule no later than 2015.

C. New Distribution Channels

47. *Background.* Under current rules, manufacturers are required to produce a certain number or percentage of handset models that meet the Commission's hearing aid compatibility standards. These hearing aid compatibility deployment benchmarks for manufacturers, however, are codified in terms of the handsets that they offer to service providers. Thus, the rules apply only to handsets that manufacturers offer to service providers and that service providers then offer to consumers. If handsets are not offered to service providers, then the benchmarks in Section 20.19 do not apply.

48. *Discussion.* Based on the record in this proceeding, the Commission updates our rules and amend Section 20.19(c) and (d) to apply the deployment benchmarks to all handsets that a wireless handset manufacturer produces for distribution in the United States that are within the scope of Section 20.19(a) of the rule. This rule change will address new handset manufacturer distribution models in existing networks and ensure that wireless handsets will be covered by our hearing aid compatibility obligations regardless of distribution and sales channels.

49. The Commission finds this rule change will serve the public interest as a better and more proactive approach to ensure the availability of hearing aid-compatible handsets in the developing handset marketplace. Whatever may have been the case in 2007, it is not now premature to apply hearing aid compatibility requirements to all distribution channels. To the contrary, a variety of phones is readily available to consumers through outlets ranging from online retailers to convenience stores to electronics specialty outlets, as well as directly from manufacturers. Indeed, Google recently experimented with selling its Nexus One handset only directly to consumers. While the Commission cannot predict how the market will develop, extending the scope of the manufacturer requirement to all handsets will ensure that wireless handsets are available to people with hearing loss regardless of distribution and sales channels. Moreover, no commenter has identified, and the Commission cannot conceive, any reason why meeting deployment benchmarks for hearing aid-compatible handsets might be more difficult or burdensome as a result of the method of distribution.

50. The Commission recognizes that manufacturers may need time to meet the requirements of the changed rule. For example, a manufacturer that does not produce any handsets for sale through service providers is not currently required to offer any hearing aid-compatible handsets, and therefore may need to make technological adjustments to meet these requirements. Therefore, the Commission concludes that manufacturers will have until 12 months from publication of the rule in the **Federal Register** to come into compliance with this new provision. This is the same as the minimum compliance period that our rules currently provide when the Commission adopts hearing aid compatibility standards for a new frequency band or air interface.

51. The Commission clarifies that handsets covered by this rule include handsets that manufacturers sell to businesses for distribution to their employees. For example, a business may distribute handsets to its employees that are intended primarily for internal communications or for data tracking, but that also incorporate external voice communications capability within the scope of Section 20.19(a). If the handset incorporates a built-in speaker and is typically held to the ear, then the manufacturer must count that handset in determining whether it meets the benchmarks for deploying hearing aid-compatible handsets.

52. Finally, the Commission clarifies that the manufacturer of a phone is the party that produces it. The Commission expects to consider this issue further in the 2010 review.

D. Volume Controls

53. *Background.* In the *Notice*, the Commission urged all interested parties to specifically look into adding volume controls to wireless handsets. The Commission noted earlier statements by some in the deaf and hard of hearing community that one of hearing aid users' most important concerns regarding wireless devices is the lack of adequate volume control on handsets. The *Notice* sought comment on whether any volume control requirements should be incorporated into our rules, and if so what they should be.

54. *Discussion.* As several commenters have noted, the Alliance for Telecommunications Industry Solutions (ATIS) Incubator Solutions Program #4—Hearing Aid Compatibility (AISP.4—HAC) has formed a working group, denominated WG—11, to investigate the interaction of wireless handsets and digital hearing aids. The findings of this investigation, including recommendations for achieving adequate listening levels for consumers who wear hearing aids while using wireless phones, will be shared with the Commission upon the completion of this group's efforts. As the Commission is awaiting input from the AISP.4—HAC working group, the Commission is taking no action in this Second Report and Order. The Commission will further consider this issue as part of the 2010 review.

E. Display Screens

55. *Background.* The *Notice* noted that the Technology Access Program of Gallaudet University had pointed out that the display screens on smart phones emit electromagnetic energy that may interfere with the operation of hearing aids. It therefore invited

comment on this issue, including whether any measures are appropriate to promote the deployment of phones that enable users to turn off their screens.

56. *Discussion.* The Commission finds that the existing record does not establish a need for Commission action at this time. The Commission will seek further comment on this issue in the 2010 review.

V. Procedural Matters

A. Final Regulatory Flexibility Analysis

57. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Federal Communications Commission (Commission) included an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the policies and rules considered in the *Notice* in WT Docket No. 07–250.² The Commission sought written public comment on the *Notice* in this docket, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

1. Need for, and Objectives of, the Proposed Rules

58. In the Second Report and Order, the Commission makes several changes to its existing hearing aid compatibility requirements so that they will continue effectively to ensure in an evolving marketplace of new technologies and services that consumers with hearing loss are able to access wireless communications services through a wide selection of handsets without experiencing disabling interference or other technical obstacles. First, the Commission provides that multi-band and multi-mode handsets that meet hearing aid compatibility requirements over all air interfaces and frequency bands for which technical standards have been established, but that also accommodate voice operations for which standards do not exist, may be counted as hearing aid-compatible, provided consumers are informed that they have been tested for the operations for which there are not standards. This

¹ See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

² Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07–250, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01–309, Petition of American National Standards Institute Accredited Standards Committee C63 (EMC) ANSI ASC C63®, *Notice of Proposed Rulemaking*, 22 FCC Rcd 19760 (2007) (*Notice*).

rule change extends to all such handsets the same regulatory regime that currently applies to handsets that incorporate Wi-Fi capability, and it ensures that consumers will have the information they need to best evaluate how a handset will operate with their hearing aids. In order to further ensure that consumers are provided with consistent and sufficient information, the Commission also prescribes specific language to be used in the disclosure.

59. Second, the Commission refines the *de minimis* exception in its existing rule so that companies that are not small entities will be required to offer at least one hearing aid-compatible model after a two-year initial period. Manufacturers subject to this rule will also be required to offer at least one new model that is hearing aid-compatible for acoustic coupling every other calendar year. The Commission thereby helps ensure that people with hearing loss will have access to new and popular models, while continuing to protect the ability of small companies to compete and to foster innovation by new entrants. Further, in recognition of specific challenges that this rule change will impose for handsets operating over the legacy GSM air interface in the 1900 MHz band, the Commission permits companies that will no longer qualify for the *de minimis* exception under this rule change to meet hearing aid compatibility requirements by installing software that enables customers to reduce the power output by a limited amount for such operations.

60. Third, the Commission extends the hearing aid-compatible handset deployment requirements applicable to manufacturers to include handsets distributed by the manufacturer through channels other than service providers. This action ensures that consumers will continue to experience the benefits of hearing aid compatibility as innovative business plans give rise to a diversity of distribution channels.

2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

61. No comments specifically addressed the IRFA. Nonetheless, small entity issues raised in comments are addressed in this FRFA in Sections D and E.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Would Apply

62. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by

proposed rules, if adopted.³ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁴ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁵ A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).⁶

63. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.⁷

64. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category “Wireless Telecommunications Carriers (except satellite).”⁸ Under that SBA category, a business is small if it has 1,500 or fewer employees.⁹ The census category of “Cellular and Other Wireless Telecommunications” is no longer used and has been superseded by the larger category “Wireless Telecommunications Carriers (except satellite).” However, since currently available data was gathered when “Cellular and Other Wireless Telecommunications” was the relevant category, earlier Census Bureau data collected under the category of “Cellular and Other Wireless Telecommunications” will be used here. Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.¹⁰ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.¹¹ Thus, under this category and

size standard, the majority of firms can be considered small.

65. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹² For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹³ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁴ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.¹⁵ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.¹⁶

66. On January 26, 2001, the Commission completed the auction of 422 C and F Block PCS licenses in Auction 35.¹⁷ Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events concerning Auction 35, including judicial and agency

employment of 1,500 or fewer employees; the largest category provided is for firms with “1,000 employees or more.”

¹² See Amendment of Parts 20 and 24 of the Commission’s Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850–7852 paras. 57–60 (1996); see also 47 CFR 24.720(b).

¹³ See Amendment of Parts 20 and 24 of the Commission’s Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 para. 60.

¹⁴ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 2, 1998.

¹⁵ FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No. 71744 (rel. Jan. 14, 1997).

¹⁶ See “C, D, E, and F Block Broadband PCS Auction Closes,” *public notice*, 14 FCC Rcd 6688 (WTB 1999).

¹⁷ See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *public notice*, 16 FCC Rcd 2339 (2001).

determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.¹⁸ Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.¹⁹ Of the 14 winning bidders, six were designated entities.²⁰ In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F Block licenses in Auction 78.²¹

67. *Specialized Mobile Radio.* The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.²² The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.²³ The SBA has approved these small business size standards for the 900 MHz Service.²⁴ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR

¹⁸ See “Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,” *Public Notice*, 20 FCC Rcd 3703 (2005).

¹⁹ See “Auction of Broadband PCS Spectrum License Closes; Winning Bidders Announced for Auction No. 71,” *public notice*, 22 FCC Rcd 9247 (2007).

²⁰ *Id.*

²¹ See Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 2008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78, *public notice*, 23 FCC Rcd 7496 (2008) (*AWS-1 and Broadband PCS Procedures Public Notice*).

²² 47 CFR 90.814(b)(1).

²³ *Id.*

²⁴ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugree, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

³ 5 U.S.C. 604(a)(3).

⁴ 5 U.S.C. 601(6).

⁵ 5 U.S.C. 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*.”

⁶ 15 U.S.C. 632.

⁷ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (last visited Jan. 2009).

⁸ 13 CFR 121.201, North American Industry Classification System (NAICS) code 517210.

⁹ *Id.*

¹⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

¹¹ *Id.* The census data do not provide a more precise estimate of the number of firms that have

band.²⁵ A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 licenses. One bidder claiming small business status won five licenses.²⁶

68. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders that won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

69. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR services pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, the Commission does not know how many of these firms have 1,500 or fewer employees. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

70. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses.²⁷ This auction, which was designated as Auction 78, offered 35 licenses in the AWS 1710–1755 MHz and 2110–2155 MHz bands ("AWS-1"). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual

gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years ("small business") received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years ("very small business") received a 25 percent discount on its winning bid. A bidder that had a combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.²⁸ Four winning bidders that identified themselves as very small businesses won 17 licenses.²⁹ Three of the winning bidders that identified themselves as small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

71. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.³⁰ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System ("BETRS").³¹ In the present context, the Commission will use the SBA small business size standard applicable to Wireless Telecommunication Carriers (except satellite), *i.e.*, an entity employing no more than 1,500 persons.³² There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

72. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305–2320 MHz and 2345–2360 MHz bands. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million or less for each of the three preceding years, and a "very small business" as an entity with average gross

revenues of \$15 million or less for each of the three preceding years.³³ The SBA has approved these definitions.³⁴ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

73. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of States bordering the Gulf of Mexico.³⁵ There is presently one licensee in this service. The Commission does not have information whether that licensee would qualify as small under the SBA's small business size standard for Wireless Telecommunications Carriers (except Satellite) services.³⁶ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.³⁷

74. *Broadband Radio Service and Educational Broadband Service.* The Broadband Radio Service ("BRS"), formerly known as the Multipoint Distribution Service ("MDS"),³⁸ and the Educational Broadband Service ("EBS"), formerly known as the Instructional Television Fixed Service ("ITFS"),³⁹ use 2 GHz band frequencies to transmit video programming and provide broadband services to residential

³³ Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 para. 194 (1997).

³⁴ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 2, 1998.

³⁵ This service is governed by subpart I of part 22 of the Commission's rules. See 47 CFR 22.1001–22.1037.

³⁶ 13 CFR 121.201, NAICS code 517210.

³⁷ *Id.*

³⁸ See 47 CFR part 21, subpart K; Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands; Part 1 of the Commission's Rules—Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, 19 FCC Rcd 14165 (2004).

³⁹ See 47 CFR Part 74, subpart I; *MDS/ITFS Order*, 19 FCC Rcd 14165 (2004).

²⁸ *Id.* at 7521–22.

²⁹ See "Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period", *public notice*, 23 FCC Rcd 12749 (2008).

³⁰ The service is defined in Section 22.99 of the Commission's rules, 47 CFR 22.99.

³¹ BETRS is defined in Sections 22.757 and 22.759 of the Commission's rules, 47 CFR 22.757 and 22.759.

³² 13 CFR 121.201, NAICS code 517210.

²⁵ See "Correction to public notice DA 96–586 'FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

²⁶ See "Multi-Radio Service Auction Closes," *public notice*, 17 FCC Rcd 1446 (WTB 2002).

²⁷ See AWS-1 and Broadband PCS Procedures Public Notice, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

subscribers.⁴⁰ These services, collectively referred to as “wireless cable,” were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.⁴¹ The Commission estimates that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5 million or less in annual receipts, appears applicable to MDS and ITFS.⁴² Note that the census category of “Cable and Other Program Distribution” is no longer used and has been superseded by the larger category “Wireless Telecommunications Carriers” (except satellite). This category provides that a small business is a wireless company employing no more than 1,500 persons.⁴³ However, since currently available data was gathered when “Cable and Other Program Distribution” was the relevant category, earlier Census Bureau data collected under the category of “Cable and Other Program Distribution” will be used here. Other standards also apply, as described.

75. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction,⁴⁴ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.⁴⁵ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁴⁶ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In

addition to the 48 small businesses that hold BTA authorizations, there are hundreds of MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction and that fall under the former SBA small business size standard for Cable and Other Program Distribution.⁴⁷ Information available to the Commission indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, the Commission estimates that there are approximately 850 of these small entity MDS (or BRS) providers, as defined by the SBA and the Commission’s auction rules.

76. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).⁴⁸ The Commission estimates that there are currently 2,452 EBS licenses, held by 1,524 EBS licensees, and all but 100 of the licenses are held by educational institutions. Thus, the Commission estimates that at least 1,424 EBS licensees are small entities.

77. *Government Transfer Bands.* The Commission adopted small business size standards for the unpaired 1390–1392 MHz, 1670–1675 MHz, and the paired 1392–1395 MHz and 1432–1435 MHz bands.⁴⁹ Specifically, with respect to these bands, the Commission defined an entity with average annual gross revenues for the three preceding years not exceeding \$40 million as a “small business,” and an entity with average annual gross revenues for the three preceding years not exceeding \$15 million as a “very small business.”⁵⁰

⁴⁷ Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard for “Cable and Other Program Distribution” (annual receipts of \$13.5 million or less). See 13 CFR 121.201, NAICS code 515210.

⁴⁸ In addition, the term “small entity” under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). The Commission does not collect annual revenue data on EBS licensees.

⁴⁹ See Amendments to Parts 1, 2, 27 and 90 of the Commission’s Rules to License Services in the 216–220 MHz, 1390–1395 MHz, 1427–1429 MHz, 1429–1432 MHz, 1432–1435 MHz, 1670–1675 MHz, and 2385–2390 MHz Government Transfer Bands, 17 FCC Rcd 9980 (2002) (*Government Transfer Bands Service Rules Report and Order*).

⁵⁰ See Reallocation of the 216–220 MHz, 1390–1395 MHz, 1427–1429 MHz, 1429–1432 MHz, 1432–1435 MHz, 1670–1675 MHz, and 2385–2390 MHz Government Transfer Bands, WT Docket No. 02–8, *Notice of Proposed Rulemaking*, 17 FCC Rcd

SBA has approved these small business size standards for the aforementioned bands.⁵¹ Correspondingly, the Commission adopted a bidding credit of 15 percent for “small businesses” and a bidding credit of 25 percent for “very small businesses.”⁵² This bidding credit structure was found to have been consistent with the Commission’s schedule of bidding credits, which may be found at Section 1.2110(f)(2) of the Commission’s rules.⁵³ The Commission found that these two definitions will provide a variety of businesses seeking to provide a variety of services with opportunities to participate in the auction of licenses for this spectrum and will afford such licensees, who may have varying capital costs, substantial flexibility for the provision of services.⁵⁴ The Commission noted that it had long recognized that bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities.⁵⁵ The Commission also noted that it had found that the use of tiered or graduated small business definitions is useful in furthering its mandate under Section 309(j) to promote opportunities for and disseminate licenses to a wide variety of

2500, 2550–51 paras. 144–146 (2002). To be consistent with the size standard of “very small business” proposed for the 1427–1432 MHz band for those entities with average gross revenues for the three preceding years not exceeding \$3 million, the *Service Rules Notice* proposed to use the terms “entrepreneur” and “small business” to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively. Because the Commission is not adopting small business size standards for the 1427–1432 MHz band, it instead uses the terms “small business” and “very small business” to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively.

⁵¹ See Letter from Hector V. Barreto, Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 18, 2002.

⁵² Such bidding credits are codified for the unpaired 1390–1392 MHz, paired 1392–1395 MHz, and the paired 1432–1435 MHz bands in 47 CFR 27.807. Such bidding credits are codified for the unpaired 1670–1675 MHz band in 47 CFR 27.906.

⁵³ In the *Part 1 Third Report and Order*, the Commission adopted a standard schedule of bidding credits, the levels of which were developed based on its auction experience. *Part 1 Third Report and Order*, 13 FCC Rcd at 403–04 para. 47; see also 47 CFR 1.2110(f)(2).

⁵⁴ See *Service Rules Notice*, 17 FCC Rcd at 2550–51 para. 145.

⁵⁵ See, e.g., Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act—Competitive Bidding, WT Docket No. 96–18, PR Docket No. 93–253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10091 para. 112 (1999).

⁴⁰ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565 para. 131 (2006).

⁴¹ *Id.*

⁴² 13 CFR 121.201, NAICS code 515210.

⁴³ 13 CFR 121.201, NAICS code 517210.

⁴⁴ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

⁴⁵ 47 CFR 21.961(b)(1).

⁴⁶ See Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Docket No. 94–131, *Report and Order*, 10 FCC Rcd 9589 (1995).

applicants.⁵⁶ An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

78. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing*. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.” The SBA has developed a small business size standard for firms in this category, which is: All such firms having 750 or fewer employees.⁵⁷ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of less than 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

79. The Commission adopts several reporting, recordkeeping, and other compliance requirements which could affect small entities. First, as an interim measure, the Commission extends to all handsets that incorporate new frequency bands and air interfaces usable for voice services other than Wi-Fi the same counting and disclosure rules that currently apply to handsets with Wi-Fi. In other words, a handset that meets hearing aid compatibility requirements over all air interfaces and frequency bands for which technical standards have been established, but that also accommodates voice operations for which standards do not

exist, may be counted as hearing aid-compatible provided consumers are clearly informed that it has not been tested for the operations for which there are not standards.

80. The Commission further requires that for newly manufactured handsets covered by this rule, the following disclosure language be used: “This phone has been tested and rated for use with hearing aids for some of the wireless technologies that it uses. However, there may be some newer wireless technologies used in this phone that have not been tested yet for use with hearing aids. It is important to try the different features of this phone thoroughly and in different locations, using your hearing aid or cochlear implant, to determine if you hear any interfering noise. Consult your service provider or phone retailer about its return and exchange policies. Consult your service provider or the manufacturer of this phone for information on hearing aid compatibility. If you have questions about return or exchange policies, consult your service provider or phone retailer.” The Commission concludes that a uniform text will ensure that consumers are provided with consistent and sufficient information. However, handsets that are already on the market with other disclosure language that complies with the current rule will not be required to replace this with the newly prescribed language. This disclosure rule will apply to all handsets that operate in part over an air interface or frequency band that is not covered by the current hearing aid compatibility technical standard until the date that rules adopting any new standard become effective.

81. In order to ensure that consumers who use hearing aids and cochlear implants have access to a variety of phones, while preserving competitive opportunities for small companies as well as opportunities for innovation and investment, the Commission modifies the *de minimis* rule as applied to companies that are not small entities. Specifically, the Commission decides that beginning two years after it offers its first handset model over an air interface, a manufacturer or service provider that is not a small entity must offer at least one model that is rated M3 or higher and at least one model that is rated T3 or higher if it offers between one and three total handset models. Consistent with the SBA size standards, a “small entity” is defined as a service provider that, together with its parent, subsidiary, or affiliate companies under common ownership or control, has 1500 or fewer employees or a manufacturer

that, together with its parent, subsidiary, or affiliate companies under common ownership or control, has 750 or fewer employees. In order to maintain parity and to allow entities that have been relying on the *de minimis* rule a reasonable period for transition, this obligation will become effective for manufacturers and service providers that offer one or two handset models over an air interface two years after the latest of the following: The date the manufacturer or service provider began offering handsets over the air interface, the date the amended rule is published in the **Federal Register**, the date a hearing aid compatibility technical standard is adopted for the relevant operation, or the date a previously small entity no longer meets our small entity definition. The Commission also revises the “refresh” rule to require manufacturers that are not small entities that offer two models over an air interface, after the first two years, to introduce at least one new model rated M3 or higher every other year.

82. In recognition of the special technical challenges of meeting hearing aid compatibility technical standards for handsets with certain desirable form factors operating over the legacy 2G GSM air interface in the 1900 MHz band, the Commission permits companies that would come under the amended *de minimis* rule but for their size to satisfy the hearing aid-compatible handset deployment requirement for GSM using a handset that allows the customer to reduce the maximum output power for GSM operations in the 1900 MHz band by up to 2.5 decibels, except for emergency calls to 911, in order to meet the standard for radio frequency interference reduction. Wherever a manufacturer or service provider provides the hearing aid compatibility rating for such a handset, it shall indicate that user activation of a special mode is necessary to meet the hearing aid compatibility standard. In addition, the handset manual or product insert must explain how to activate the special mode and that doing so may result in a diminution of coverage. These actions are taken to ensure that consumers who use hearing aids and cochlear implants have access to a variety of phones and are adequately informed about the functionality and the limitations of the handsets, while preserving competitive opportunities for small companies as well as opportunities for innovation and investment.

83. Currently, wireless handsets are increasingly distributed through channels other than service providers. The Commission therefore amends

⁵⁶ 47 U.S.C. 309(j)(3)(B), (4)(C)–(D). The Commission will also not adopt special preferences for entities owned by minorities or women, and rural telephone companies. The Commission did not receive any comments on this issue, and it does not have an adequate record to support such special provisions under the current standards of judicial review. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for government mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a State program based on gender classification).

⁵⁷ 13 CFR 121.201, NAICS code 334220.

Section 20.19(c) and (d) to apply the hearing aid-compatible handset deployment benchmarks to all handsets that a wireless handset manufacturer produces for distribution in the United States that are within the scope of Section 20.19(a) of the rule.

Manufacturers will have until 12 months from publication of the rule in the **Federal Register** to come into compliance with it. The Commission clarifies that handsets covered by this rule include handsets that manufacturers sell to businesses for distribution to their employees. This rule change will address new handset manufacturer distribution models in existing networks and ensure that wireless handsets will be covered by the Commission's hearing aid compatibility obligations regardless of distribution and sales channels. The Commission finds that this rule change will serve the public interest as a better and more proactive approach to ensure the availability of hearing aid-compatible handsets in the developing handset marketplace.

5. Steps Proposed To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

84. The RFA requires an agency to describe in the IRFA any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁵⁸ The Commission considered these alternatives with respect to all of the requirements that it is imposing on small entities in the Second Report and Order, and this FRFA incorporates by reference all discussion in the Second Report and Order that considers the impact on small entities of the rules adopted by the Commission. In addition, the Commission's consideration of those issues as to which the impact on small entities was specifically discussed in the record is summarized below:

85. Until such time as any revision of the hearing aid compatibility technical standard may be adopted by the

Commission, the Commission extends to all handsets that incorporate frequency bands and air interfaces other than Wi-Fi usable for voice services for which no hearing aid compatibility standards exist the same counting and disclosure rules that currently apply to handsets with Wi-Fi capability. The disclosure requirement is necessary in order to count these handsets as hearing aid-compatible without misleading consumers, and therefore no exception is appropriate for small entities. The Commission further prescribes uniform disclosure language to ensure that consumers are provided with consistent and sufficient information. This uniform language will also streamline and simplify the disclosure process, thereby easing the burden on regulated entities. However, handsets that are already on the market bearing another label that complies with the current rule will not be required to replace this label with the newly prescribed language. This transitional exception will ease the regulatory burden on small service providers that may have a slower turnover of their inventory.

86. The Commission modifies the *de minimis* rule as applied to companies that are not small entities. Specifically, the Commission decides that beginning two years after it offers its first handset model over an air interface, a manufacturer or service provider that is not a small entity, as defined herein, must offer at least one model that is rated M3 or higher and at least one model that is rated T3 or higher if it offers between one and three total handset models. The Commission also revises the "refresh" rule to require manufacturers that are not small entities that offer two models over an air interface, after the first two years, to introduce at least one new model rated M3 or higher every other year. Consistent with the SBA size standards, a "small entity" is defined as a service provider that, together with its parent, subsidiary, or affiliate companies under common ownership or control, has 1500 or fewer employees or a manufacturer that, together with its parent, subsidiary, or affiliate companies under common ownership or control, has 750 or fewer employees. In order to minimize the economic impact on small manufacturers and service providers and preserve their opportunity to compete in the market and innovate, the existing *de minimis* rule will continue to apply to small entities. In addition, in order to ease the burden of transition, the new rule will become applicable to a manufacturer or service provider two years after the latest of: The date the

manufacturer or service provider began offering handsets over the air interface, the date the amended rule is published in the **Federal Register**, the date a hearing aid compatibility technical standard is adopted for the relevant operation, or the date a previously small entity no longer meets our small entity definition.

87. In recognition of the special technical challenges of meeting hearing aid compatibility technical standards for handsets with certain desirable form factors operating over the legacy 2G GSM air interface in the 1900 MHz band, the Commission permits companies that would come under the amended *de minimis* rule but for their size to satisfy the hearing aid-compatible handset deployment requirement for GSM using a handset that allows the customer, except for emergency calls to 911, to reduce the maximum output power for GSM operations in the 1900 MHz band in order to meet the RF interference standard. However, where a manufacturer or service provider provides the hearing aid compatibility rating for such a handset, it shall indicate that user activation of a special mode is necessary to meet the hearing aid compatibility standard. In addition, the handset manual or product insert must explain how to activate the special mode and that doing so may result in a diminution of coverage. These actions will reduce the regulatory burden on small businesses that do not come under the *de minimis* rule by making it easier to satisfy hearing aid compatibility requirements for this class of handsets, while ensuring that consumers who use hearing aids and cochlear implants have access to a variety of phones and are adequately informed about the functionality and the limitations of their handsets.

88. The Commission amends Section 20.19 to expand its scope for manufacturers such that the rule will apply to all covered handsets that they manufacture for sale and use in the United States, regardless of whether those handsets are offered to service providers, intermediaries, businesses for use by their employees, or directly to the public. Manufacturers will have until 12 months from publication of the rule in the **Federal Register** to come into compliance with it. The Commission finds that this rule change will serve the public interest as a better and more proactive approach to ensure the availability of hearing aid-compatible handsets in the developing handset marketplace, and that no exception to or modification of the rule for small entities is appropriate consistent with

⁵⁸ 5 U.S.C. 603(c).

the rule's purpose. The 12-month transition period will ease the burden of coming into compliance for small entities.

6. Report to Congress

89. The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.⁵⁹ In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.⁶⁰

B. Final Paperwork Reduction Act Analysis

90. The Second Report and Order contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), the Commission sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

91. In this present document, the Commission has assessed the effects of extending to all handsets that incorporate new frequency bands and air interfaces for which hearing aid compatibility technical standards do not yet exist the same counting and disclosure rules that currently apply to handsets with Wi-Fi capability, as well as the disclosure requirements associated with modifying the hearing aid compatibility technical standards for manufacturers and service providers that offer one or two handsets operating over the legacy 2G GSM air interface in the 1900 MHz band. The Commission finds that these disclosure requirements are necessary to ensure that consumers are adequately informed of the underlying measures that, taken as a whole, will increase the availability of innovative handsets and reduce the

burden of complying with the hearing aid compatibility requirements for entities including small businesses.

C. Congressional Review Act

92. The Commission will include a copy of this Second Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

D. Accessible Formats

93. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY).

VI. Ordering Clauses

94. *It is ordered* that, pursuant to the authority of Sections 4(i), 303(r), and 710 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 610, this Second Report and Order *is hereby adopted*.

95. *It is further ordered* that Part 20 of the Commission's Rules, 47 CFR part 20, is *amended* as specified in Appendix B, effective October 8, 2010, except for the amendments to Section 20.19(f), which contain an information collection that is subject to OMB approval.

96. *It is further ordered* that the information collection contained in this Second Report and Order *will become effective* following approval by the Office of Management and Budget. The Commission will publish a document at a later date establishing the effective date.

97. *It is further ordered* that the Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of the Second Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 20

Communications common carriers, Communications equipment, Incorporation by reference, and Radio.

Bulah P. Wheeler,

Deputy Manager, Federal Communications Commission.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 20 as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

■ 1. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 154, 160, 201, 251-254, 303, 332, and 710 unless otherwise noted.

§ 20.19 [Amended]

- 2. Amend § 20.19 as follows:
- a. Redesignate paragraphs (a)(3)(i) through (a)(3)(iv) as (a)(3)(ii) through (a)(3)(v);
 - b. Add new paragraph (a)(3)(i);
 - c. Revise paragraph (b) introductory text;
 - d. Revise paragraph (c)(1)(i);
 - e. Add paragraph (c)(1)(ii)(C);
 - f. Revise paragraph (d)(1) introductory text;
 - g. Redesignate paragraph (e)(1) as (e)(1)(i);
 - h. Add paragraphs (e)(1)(ii) and (iii);
 - i. Revise paragraph (f)(2)
 - j. Add paragraph (f)(3); and;
 - k. Revise paragraph (k)(1).

§ 20.19 Hearing aid-compatible mobile handsets.

(a) * * *
(3) * * *

(i) *Handset* refers to a device used in delivery of the services specified in paragraph (a)(1) of this section that contains a built-in speaker and is typically held to the ear in any of its ordinary uses.

* * * * *

(b) *Hearing aid compatibility; technical standards.* A wireless handset used for digital CMRS only over the frequency bands and air interfaces referenced in paragraph (a)(1) of this section is hearing aid-compatible with regard to radio frequency interference or inductive coupling if it meets the applicable technical standard(s) set forth in paragraphs (b)(1) and (b)(2) of this section for all frequency bands and air interfaces over which it operates, and the handset has been certified as compliant with the test requirements for the applicable standard pursuant to § 2.1033(d) of this chapter. A wireless handset that incorporates an air interface or operates over a frequency band for which no technical standards are stated in ANSI C63.19-2007 (June 8, 2007) is hearing aid-compatible if the handset otherwise satisfies the requirements of this paragraph.

* * * * *
(c) * * *
(1) * * *

(i) *Number of hearing aid-compatible handset models offered.* For each digital air interface for which it offers wireless handsets in the United States or

⁵⁹ *See* 5 U.S.C. 801(a)(1)(A).

⁶⁰ *See* 5 U.S.C. 604(b).

imported for use in the United States, each manufacturer of wireless handsets must offer handset models that comply with paragraph (b)(1) of this section. Prior to September 8, 2011, handset models for purposes of this paragraph include only models offered to service providers in the United States.

(A) If it offers four to six models, at least two of those handset models must comply with the requirements set forth in paragraph (b)(1) of this section.

(B) If it offers more than six models, at least one-third of those handset models (rounded down to the nearest whole number) must comply with the requirements set forth in paragraph (b)(1) of this section.

(ii) * * *

(C) Beginning September 10, 2012, for manufacturers that together with their parent, subsidiary, or affiliate companies under common ownership or control, have had more than 750 employees for at least two years and that offer two models over an air interface for which they have been offering handsets for at least two years, at least one new model rated M3 or higher shall be introduced every other calendar year.

* * * * *

(d) * * *

(1) *Manufacturers.* Each manufacturer offering to service providers four or more handset models, and beginning September 8, 2011, each manufacturer offering four or more handset models, in a digital air interface for use in the United States or imported for use in the United States must ensure that it offers to service providers, and beginning September 8, 2011, must ensure that it offers, at a minimum, the following number of handset models that comply with the requirements set forth in paragraph (b)(2) of this section, whichever number is greater in any given year.

* * * * *

(e) * * *

(1)(i) * * *

(ii) Notwithstanding paragraph (e)(1)(i) of this section, beginning September 10, 2012, manufacturers that have had more than 750 employees for at least two years and service providers that have had more than 1500 employees for at least two years, and that have been offering handsets over an air interface for at least two years, that offer one or two digital wireless handsets in that air interface in the United States must offer at least one handset model compliant with paragraphs (b)(1) and (b)(2) of this section in that air interface, except as provided in paragraph (e)(1)(iii) of this section. Service providers that obtain

handsets only from manufacturers that offer one or two digital wireless handset models in an air interface in the United States, and that have had more than 750 employees for at least two years and have offered handsets over that air interface for at least two years, are required to offer at least one handset model in that air interface compliant with paragraphs (b)(1) and (b)(2) of this section, except as provided in paragraph (e)(1)(iii) of this section. For purposes of this paragraph, employees of a parent, subsidiary, or affiliate company under common ownership or control with a manufacturer or service provider are considered employees of the manufacturer or service provider. Manufacturers and service providers covered by this paragraph must also comply with all other requirements of this section.

(iii) Manufacturers and service providers that offer one or two digital handset models that operate over the GSM air interface in the 1900 MHz band may satisfy the requirements of paragraph (e)(1)(ii) of this section by offering at least one handset model that complies with paragraph (b)(2) of this section and that either complies with paragraph (b)(1) of this section or meets the following conditions:

(A) The handset enables the user optionally to reduce the maximum power at which the handset will operate by no more than 2.5 decibels, except for emergency calls to 911, only for GSM operations in the 1900 MHz band;

(B) The handset would comply with paragraph (b)(1) of this section if the power as so reduced were the maximum power at which the handset could operate; and

(C) Customers are informed of the power reduction mode as provided in paragraph (f)(3) of this section. Manufacturers and service providers covered by this paragraph must also comply with all other requirements of this section.

* * * * *

(f) * * *

(2)(i) *Disclosure requirement relating to handsets that operate over an air interface or frequency band without hearing aid compatibility technical standards.* Each manufacturer and service provider shall ensure that, wherever it provides hearing aid compatibility ratings for a handset that incorporates an air interface or operates over a frequency band for which no technical standards are stated in ANSI C63.19-2007 (June 8, 2007), it discloses to consumers, by clear and effective means (e.g., inclusion of call-out cards or other media, revisions to packaging

materials, supplying of information on Web sites) that the handset has not been rated for hearing aid compatibility with respect to that operation. This disclosure shall include the following language:

This phone has been tested and rated for use with hearing aids for some of the wireless technologies that it uses. However, there may be some newer wireless technologies used in this phone that have not been tested yet for use with hearing aids. It is important to try the different features of this phone thoroughly and in different locations, using your hearing aid or cochlear implant, to determine if you hear any interfering noise. Consult your service provider or the manufacturer of this phone for information on hearing aid compatibility. If you have questions about return or exchange policies, consult your service provider or phone retailer.

(ii) However, service providers are not required to include this language in the packaging material for handsets that incorporate a Wi-Fi air interface and that were obtained by the service provider before March 8, 2011, provided that the service provider otherwise discloses by clear and effective means that the handset has not been rated for hearing aid compatibility with respect to Wi-Fi operation.

(3) *Disclosure requirement relating to handsets that allow the user to reduce the maximum power for GSM operation in the 1900 MHz band.* Handsets offered to satisfy paragraph (e)(1)(iii) of this section shall be labeled as meeting an M3 rating. Each manufacturer and service provider shall ensure that, wherever this rating is displayed, it discloses to consumers, by clear and effective means (e.g., inclusion of call-out cards or other media, revisions to packaging materials, supplying of information on Web sites), that user activation of a special mode is necessary to meet the hearing aid compatibility standard. In addition, each manufacturer or service provider shall ensure that the device manual or a product insert explains how to activate the special mode and that doing so may result in a reduction of coverage.

* * * * *

(k) *Delegation of rulemaking authority.* (1) The Chief of the Wireless Telecommunications Bureau and the Chief of the Office of Engineering and Technology are delegated authority, by notice-and-comment rulemaking, to issue an order amending this section to the extent necessary to adopt technical standards for additional frequency bands and/or air interfaces upon the establishment of such standards by ANSI Accredited Standards Committee C63™, provided that the standards do

not impose with respect to such frequency bands or air interfaces materially greater obligations than those imposed on other services subject to this section. Any new obligations on manufacturers and Tier I carriers pursuant to paragraphs (c) through (i) of this section as a result of such standards shall become effective no less than one year after release of the order adopting such standards and any new obligations on other service providers shall become effective no less than 15 months after the release of such order, except that any new obligations on manufacturers and service providers subject to paragraph (e)(1)(ii) of this section shall become effective no less than two years after the release of such order.

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[FR Doc. 2010-22253 Filed 9-7-10; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 207

RIN 0750-AG61

Defense Federal Acquisition Regulation Supplement; Acquisition Strategies To Ensure Competition Throughout the Life Cycle of Major Defense Acquisition Programs (DFARS Case 2009-D014)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the Weapon Systems Acquisition Reform Act of 2009, to improve the organization and procedures of DoD for the acquisition of major weapon systems.

DATES: *Effective Date:* September 8, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, 703-602-1302.

SUPPLEMENTARY INFORMATION:

A. Background

On May 22, 2009, the Weapon Systems Acquisition Reform Act (Pub. L. 111-23) was enacted to improve the organization and procedures of DoD for the acquisition of major weapon systems. This law establishes new oversight entities within DoD, as well as new and varied weapon system

acquisition and management reporting requirements.

Section 202 directs the Secretary of Defense (SECDEF) to ensure that the acquisition strategy for each major defense acquisition program (MDAP) includes: (1) Measures to ensure competition at both the prime contract and subcontract level of the MDAP throughout its life cycle as a means to improve contractor performance; and (2) adequate documentation of the rationale for selection of the subcontractor tier or tiers. It also outlines measures to ensure such competition. Furthermore, it requires the SECDEF: (1) To take specified actions to ensure fair and objective "make-buy" decisions by prime contractors on MDAPs; and (2) whenever a decision regarding the source of repair results in a plan to award a contract for performance of maintenance and sustainment of a major weapon system, to ensure that such contract is awarded on a competitive basis with full consideration of all sources.

An interim rule was published at 75 FR 8272 on February 24, 2010. No comments were received in response to the interim rule.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the changes are to internal Government organization and operating procedures only. The rule imposes new oversight and reporting requirements internal only to DoD. As such, the rule imposes no changes on contractors doing business with DoD.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 207

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR part 207 which was

published at 75 FR 8272 on February 24, 2010, is adopted as a final rule without change.

[FR Doc. 2010-22230 Filed 9-7-10; 8:45 am]

BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211 and 237

RIN 0750-AG72

Defense Federal Acquisition Regulation Supplement; Guidance on Personal Services (DFARS Case 2009-D028)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to enable further implementation of section 831 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 to require DoD to develop guidance related to personal services contracts. **DATES:** *Effective Date:* September 8, 2010.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before November 8, 2010, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2009-D028, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

○ *E-mail:* dfars@osd.mil. Include DFARS Case 2009-D028 in the subject line of the message.

○ *Fax:* 703-602-0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

To confirm receipt of your comment(s), please check <http://www.regulations.gov> approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).