

August 11, 2011

Dear AIM Commission:

RE: August 12 Draft Recommendations of the Federal Advisory Commission on Accessible
Instructional Materials in Postsecondary Education for Students with Disabilities

On behalf of the Software & Information Industry Association (SIIA) and our 500+ member high tech companies, I write to offer our comments on the AIM Commission draft recommendations to be reviewed during the August 12 Commission meeting. SIIA's comments follow our testimony at the July 12, 2011 Commission hearing in Seattle, Washington, as well as our related written testimony. Specifically, these comments come in response to the draft report titled, "Recommendations (shortened) 8 8 11.docx."

As you know, SIIA is the principal trade association for the software and digital content industry. Some one-third of SIIA's members have products and services designed for use in education. These range from learning management systems to faculty training, from online learning institutions to technology devices, and from adaptive learning software to digitized textbooks.

Following are SIIA's comments and edits to the draft report:

- Background Sections. SIIA understands that the Commission's final report will have extensive background sections, presumably providing context around the key issues as well as justification for the recommendations. In the name of full transparency and in the interest of ensuring as accurate a report as possible, SIIA strongly encourages this full draft report to be shared publicly prior to it being finalized, in order to provide opportunity for comment by SIIA and other stakeholders.
- "Unified Perspective." SIIA supports the migration of draft Recommendation #1, "timely access" to an introductory, unified perspective. SIIA has several comments on this section:
 - Exceptions. The draft appropriately references the accessibility challenges for "high cost and/or low incidence circumstances." In addition, SIIA suggests adding "technically infeasible" to that list. As noted by SIIA members in their testimony, there are certain types of content, functionality, etc. that are simply not technically possible to make fully accessible at this time, such as the rendering of all complex graphics. In many such cases, the issue is not simply cost, but the fact that certain content and functions cannot be made accessible in some cases given existing technologies.
 - Continuum. SIIA further encourages that this section include a recognition that accessibility is not simply determined – there is no exact cut-off point at which a product goes from being inaccessible to being accessible. Accessibility is instead a continuum determined by multiple dimensions. We must ask in each case: "What particular resource, in what particular way and to what degree, and for which student with which particular disability?" Variables include the student, the resource, the evolving techniques and technologies, and the dynamic interaction of all three in infinite combinations and variations. Thus, absolute criteria and judgments are difficult, and so flexibility is needed at the same time we strive to provide ever more enhanced accessibility.
 - Authorized Entity. Footnote #2 on institution Disability Resource/Service Department (DR/S) offices notes that "Some believe that DR/S offices qualify as "authorized entities" under the Chafee Amendment whereas others believe that a typical DR/S office falls outside the scope of Chafee . . ." SIIA believes that in light of the Chafee Amendment's legislative history, the law clearly limits "authorized entities" to a very limited number of nonprofit and governmental bodies, and does not include typical college DSS offices or the colleges themselves. SIIA would encourage that this footnote and reference to disagreement be removed in this and any other case when the facts are clear and indisputable. Instead, as noted in our testimony, "SIIA would also support further efforts for the domestic sharing of accessibility-

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enhanced instructional material files among and between institutions and other organizations producing these accessible materials in compliance with Chafee and all other relevant laws, regulations, and requirements in place to protect all rights of the copyright holder.” While sharing among DS/R offices cannot be done under Chafee, there are other opportunities for similar results.

- Open Software & Resources. SIIA notes some confusion regarding the treatment of “open” software in the paragraph beginning, “In circumstances.” SIIA notes that “open educational software” does not mean there is “no identifiable publisher or distributor.” Perhaps the report intended to reference “Orphan Works,” which have no identifiable or locatable rights holder. If “open” was intended, then the reference probably should have been to “open educational resources” (i.e., content). In addition, SIIA believes there should not be a double standard – any responsibility for providing accessibility placed on the author or rights holder should apply equally to open educational resources, faculty-developed resources, or commercial resources.
- Recommendation #2, Licensing Models. SIIA supports the recommendation, but notes that the discussion references only a single license model – voluntary collective licensing – while the heading references the plural – models – and previous draft reports listed other appropriate models. SIIA suggests description of these other appropriate models be reinserted into the report.
- Recommendation #3, Market Failure and Congressional Action. SIIA disagrees with the apparent conclusion among some Commission members that there is market failure with regard to instructional materials supporting accessibility of students with disabilities. SIIA’s testimony, and that of ten SIIA members, demonstrated the efforts of the technology industry to support accessibility for students with disabilities, as well as to integrate these functions as a means to better support the needs of all students. These examples included market leaders like Apple and Blackboard, open-source service providers like Moodlerooms and Red Hat, and new providers like Flat World Knowledge and Inkling, to name a few – representing devices, LMSs, and content. SIIA member SAS testified to their leading efforts to provide accessibility of data. These are just a few examples of industry efforts, and provide a good sampling to demonstrate that, while there is more work to be done, the market is responding. Further, the market is quickly evolving from print to digital and is composed of various sub-markets of various sizes and complexities. Tablet and eReader devices are exploding onto the market, while eTextbook designs and business models are rapidly changing. As such, SIIA urges that the final report recognize that any purported determination of market failure would be either inaccurate or premature at this point in the market’s evolution.
- Recommendation #4, Accessible Instructional Materials Standards Board. The draft report calls for establishment of an Accessible Instructional Materials Standards Board. SIIA has several concerns with this approach, and suggests shifting the emphasis of this recommendation as follows:

“With respect to digital materials, IHEs should request and publishers should provide VPATs when requested by colleges or instructors to document the manner and degree to which the product addresses the Section 508 functional standards. Further, IHEs should require that faculty, and other instructional materials decisions and procurement processes, should employ a two-step process by first identifying materials that meet their educational needs, and from those, then select the product that best meets the 508 accessibility standards, including by allowing functional equivalents and alternative format workarounds where necessary. The Commission recognizes that this process creates incentives and competition for continued innovation and accessibility, thus ensuring that students with disabilities gain greater and greater access. Finally, the federal Access Board should be encouraged to solicit input from students, publishers, and other higher education stakeholders to ensure any unique e-learning factors are considered.”

SIIA’s proposed changes are based on the following concerns and views:

- Education Demand. The Commission emphasizes the market model, but does little to emphasize the importance of the demand side. Even if a new Board established minimum mandatory standards, this will have limited impact if institutions and faculty do not consider these standards in their materials selection and technology procurement.

- Section 508. As noted in SIIA's testimony, "SIIA recommends a focus on Section 508, which has become the default standard for the industry, and for many states and public educational institutions. Section 508 provides an appropriate set of functional performance standards and review criteria, as well as a balanced process that recognizes the multitude of applications and platforms, the dynamic nature of technology, and the wide variety of decision factors. Section 508 appropriately focuses on functional requirements rather than a specific file or other format. We understand the pending updated Section 508 standards will be largely aligned with WCAG 2.0 guidelines. The single 508 standard is especially appropriate, because many technologies are designed for use outside of education, but imported to education's use. It will promote competition in the industry by clarifying market requirements for accessibility."

In addition, SIIA is concerned with two subcomponents of this draft recommendation:

- Certification of Materials as Accessible. SIIA strongly opposes the component of this draft recommendation that the Board "create a certification of materials as accessible." First, as noted above, accessibility is a continuum and varies widely by circumstances such as particular student needs, making it impossible for one national body to determine accessibility. Second, with the many thousands of instructional materials and related technologies, no single body would be capable of reviewing all of these materials, and certainly would not be capable of keeping up with ongoing product changes, especially for digital and online resources often updated monthly if not more often. Third, this Board appears somewhat based on the federal Access Board, but that Board does not certify products. Instead, the Board recognizes that there are many goals of procurement, that accessibility must be weighed along with other factors, and that accessibility is not always possible or practical.
- Standards for Files. SIIA strongly opposes the component of this draft recommendation that, "This board would . . . set standards for files." It was SIIA's understanding, including as noted in the draft recommendation #8, that the Commission agreed that a standard file format was not the appropriate approach, and that instead the focus should be on functional standards that could be met in multiple ways. Just as EPUB was developed as a result of the creation of eReader devices, other standards are likely to emerge to address the enhanced functionality and accessibility of yet to be developed devices.
- Recommendation #5, Market Incentives. SIIA generally supports draft recommendation #5 for Congress to encourage all stakeholders through market incentives. However, SIIA has some concerns:
 - First, SIIA questions the logic of the notion that publishers who meet accessibility requirements set by a standards board would benefit without fear of competition. SIIA recommends modifying this component to read as follows:

~~"For example, if universities (and their faculty) would agree to limit the assignment of [included accessibility as a core criteria for selecting] instructional materials to products that comply with accessibility requirements (per a standard setting organization like that discussed in Recommendation 5); [and made that clear to providers, then this would drive the market, because] those publishers and other content providers [would seek to compete further around these product features] who act in good faith would benefit without fear of competition from less conscientious competitors."~~
 - Second, SIIA appreciates the Commission's reference to the June 29, 2010 joint letter issued by the U.S. Departments of Education and Justice. To accurately capture the full extent of their legal interpretation and guidance, SIIA asks that the report also include the following section of the letter, explaining that accommodations or modifications are acceptable in some circumstances to provide an equal educational experience: "Requiring use of an emerging technology in a classroom environment when the technology is inaccessible to an entire population of individuals with disabilities – individuals with visual disabilities – is discrimination prohibited by the [law] . . . unless those individuals are provided accommodations or modifications that permit them to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner." Further, the related FAQ #3 reflects an acknowledgement by the federal government that, at this time, it is not feasible for every piece of technology to be accessible. For example, the technology does not yet exist to render all complex graphics to be accessible.

However, it is not the intent of either agency to prohibit schools from using emerging technology. Rather, schools and colleges are reminded to consider how equal access will be provided, in the event that the technology is not accessible.

- Recommendation #8, Functional Requirements. SIIA suggests elimination of this recommendation detailing several functional requirements as duplicative with draft recommendation #4 regarding an Access Board to set such standards.
- Recommendation #10, DRM. SIIA suggests clarification of the term “accessibility” in this context of digital rights management. While the term likely references accessibility for those with disabilities, some might confuse it with accessibility for all to the technology. In a DRM context, of course, DRM is intended to prevent accessibility for those without license or other appropriate authorization or rights.
- Recommendation #15, Faculty Training. SIIA generally supports this recommendation, including that “the pedagogical quality of instructional materials should remain the primary basis for content assignments by faculty . . .” Elsewhere in the draft it is suggested that accessibility is an absolute requirement, including for publishers, presumably despite any consideration of pedagogical quality. SIIA agrees that accessibility should be a critical factor, not the primary factor in selecting instructional materials. As noted above, SIIA recommends a two-step process by which materials are first identified that meet educational needs, and from those, the product is selected that is most accessible. SIIA urges that the report be modified throughout to reflect this principle.
- Recommendation #16, HEOA Section 133(d). SIIA agrees with the potential benefits of Section 133(d) as noted in the draft report. SIIA’s testimony noted that: “By requiring identification of course materials at the time of course registration, Section 133 (d) of the Higher Education Opportunity Act of 2008 will support this process, and provide further opportunity for interaction among students, faculty, DSS offices and vendors to support accessibility.” However, SIIA opposes the draft recommendation to amend the HEOA by striking Section 133(d)(i), “No Regulatory Authority.--The Secretary shall not promulgate regulations with respect to this section.” SIIA believes the legislation is clear, and is concerned that further regulation would threaten to impose one-size-fits-all requirements, which would not appropriately recognize the complexity of schedules and processes and the diversity among institutions.

Thank you for the opportunity to provide these comments and recommendations as a follow up to our previous testimony on the important issue of instructional materials accessibility for postsecondary students with disabilities. SIIA is also pleased to respond to the Commission’s further questions and request for information and recommendations.

Sincerely,

A handwritten signature in black ink, reading "Mark Schneiderman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mark Schneiderman
Senior Director of Education Policy