
**ABA Staff Analysis:
Americans with Disabilities Act: Accessibility of Web Information and Services
September 2016**

I. Background

On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law, creating a comprehensive nondiscrimination mandate which serves to ensure equal access to goods and services for persons with disabilities in employment, state and local government services, public accommodations, commercial facilities, and transportation. Financial institutions are considered “public accommodations” subject to Title III of the ADA and its implementing regulations. In summary, Title III requires banks and other public accommodations to provide accessible facilities and to take steps to communicate effectively with customers with disabilities. With regard to the latter obligation, Title III requires public accommodations to provide, free of charge, “appropriate auxiliary aids and services” to ensure “effective communication” with individuals who have a speech, hearing, or vision disability.

The Department of Justice’s Disability Rights Division (DOJ) is charged with adopting legally binding and enforceable accessibility standards for Title III (and other ADA titles). Compliance with Title III is enforced by DOJ and remedies sought may include monetary damages, injunctive relief, attorneys’ fees and costs, and civil penalties. Civil penalties may not exceed \$50,000 for a first time violation or \$100,000 for any subsequent violation. Title III’s accessibility mandates may also be enforced by a private plaintiff’s lawsuit seeking injunctive relief and attorneys’ fees and costs.

It is important to realize that ADA compliance obligations are not static, particularly with respect to a bank’s obligation to communicate effectively with disabled customers. Ensuring that businesses, including banks, are meeting their effective communication obligations to their customers has been a top priority of DOJ in recent years.

Moreover, since the enactment of the ADA, the internet has become an integral part of consumers’ daily lives and an increasingly important vehicle for bank customers to access their accounts. An Ipsos Public Affairs survey conducted for the American Bankers Association confirms that online and mobile banking are the first and second most-preferred banking methods of bank customers, respectively. Accordingly, requiring “electronic information technology” (EIT) – which includes bank websites and mobile applications – to be accessible to individuals with sight and hearing disabilities has been a goal of DOJ.

Because vision impaired individuals may use assistive technology (e.g., screen readers) to access information contained on websites, a bank’s failure to provide accessible features (e.g., corresponding text describing an image) that enable disabled users to use assistive technology, creates barriers. Accordingly, just as the installation of ramps is a necessity for wheel-chair users to access bank branches, so is providing accessible websites and mobile apps, without which disabled individuals will be denied access to an increasingly important means of managing their finances.

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II. A Primer on the Requirements of Title III

“Auxiliary aids and services” are those designed to provide effective communication with customers that have a hearing, vision, or speech disability. Public accommodations must provide “auxiliary aids and services” to disabled customers with two exceptions: 1) if the steps would fundamentally alter the nature of the goods and services; or 2) the measures would impose an “undue burden.” The requirement to provide auxiliary aids and services as defined in the regulation is a continuing one that should be periodically reviewed, especially as new technologies become available.

As noted, auxiliary aids and services are only required if doing so does not impose an “undue burden.” This is defined as a “significant difficulty or expense.” What constitutes an undue burden is subjective and will be determined on a case-by-case basis. Factors to consider in making this determination include:

- The nature and cost of the action; the overall financial resources of the site;
- The number of persons employed;
- The effect on expenses and resources; and
- The financial resources of any parent entity.

However, due to the resources of most financial institutions (particularly in contrast to other small businesses that must comply with the ADA), it is unlikely that DOJ or a court would conclude that website accessibility modifications would cause undue an burden to a bank.

III. ADA Web Accessibility Rulemaking Timeline

a. 2010 Advanced Notice of Proposed Rulemaking

On July 26, 2010, the twentieth anniversary of ADA, DOJ issued an advanced notice of proposed rulemaking (ANPR)¹ titled *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, indicating its intention to amend the regulations implementing Titles II and III of the ADA to establish requirements to make websites accessible.

At the time, DOJ sought public comments on 19 questions about web access including—

- Accessibility standards to adopt for Web accessibility;
- Coverage limitations for certain entities, like small businesses;
- Effective and reasonable alternatives to web accessibility; and
- Compliance dates.

In the ANPR, DOJ stated that although neither “the ADA nor the regulations the Department promulgated under the ADA specifically address access to websites,” the statute’s expansive nondiscrimination mandate nonetheless includes websites where goods and services are

¹ 75 Fed. Reg. 43,460 (July 26, 2010).

provided by covered entities.² At that time, DOJ took the position that if a covered entity's website was inaccessible, the business could provide an accessible alternative provided that alternative rendered an equal degree of access to goods and services on the website (e.g., 24 hours, 7 days a week phone service for information and services available online). **In the years since the ANPR was published, however, DOJ has taken a different position, asserting that the requirement for an accessible website is an existing duty under Title III of the ADA.**³

b. 2015 DOJ Statement of Interest in Harvard and MIT Lawsuits

On February 5, 2015, the National Association of the Deaf (Association) filed a federal class action suit against Harvard University and the Massachusetts Institute of Technology, alleging that the universities violated the ADA by failing to provide closed captioning in their online programming. In essence, the Association argued that the universities' failure to provide a text version of the words spoken in their online lectures, podcasts, and other resources accessible to their students denied disabled individuals access to the videos.

The universities filed motions to dismiss, arguing that the ADA does not require closed captions be provided and that DOJ's failure to provide a legal standard released them of liability. In response, DOJ filed a Statement of Interest opposing the universities' motions to dismiss, and noting that the universities misunderstood the statute which provides an existing requirement that websites be accessible. The agency added, "The ADA and the title III regulation...have always required that public accommodations provide effective communication to persons with disabilities through the provision of auxiliary aids and services."⁴

Consistent with this position, DOJ has required that websites and/or mobile applications be accessible in many of its recent settlement agreements with banks and other places of public accommodation.⁵

c. Fall 2015 Statement of Regulatory Priorities

In April 2016, almost six years after DOJ issued its ANPR on *Accessibility of Web Information*, it released a statement expressing the agency's intention to pursue separate rulemakings to establish Titles II and III website accessibility standards and explaining that it would proceed first with the Title II rulemaking applicable to state and local government agencies.⁶ Significantly, DOJ also announced: "The Department believes that the title II web site accessibility rule will facilitate the creation of an important infrastructure for web accessibility that will be very important in the Department's preparation of the title III web site accessibility

² *Id.* at 43,463.

³ U.S. Department of Justice, Statement of Interest of the United States of America (June 2015), available at https://www.ada.gov/briefs/mit_soi.pdf.

⁴ *Id.* See 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303

⁵ See, *E.g.*, Settlement Agreement between the U.S. & Wells Fargo & Co., available at https://www.ada.gov/wells_fargo/wells_fargo_settle.htm

⁶ U.S. Department of Justice, Statement Regarding Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities (April 2016), available at https://www.ada.gov/regs2016/sanprm_statement.html

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NPRM.”⁷ Although DOJ does not anticipate publishing proposed Title III regulations until 2018, the agency has signaled clearly that the Title II rulemaking will have a significant impact on the website accessibility standards ultimately promulgated under Title III.

d. 2016 Supplemental Advance Notice of Proposed Rulemaking for State & Local government websites

On April 28, 2016, DOJ withdrew its notice of proposed rulemaking (NPRM) on *Accessibility of Web Information and Services of State and Local Government Entities* (RIN 1190-AA65) and on May 9, 2016 the agency released a Supplemental ANPR (SANPR) under Title II.⁸ In doing so, DOJ cited the evolution of the Internet (more available, less expensive, and more widely used) and the evolution of accessibility tools since the issuance of its 2010 ANPR and sought to solicit “more detailed and focused” public comments to help “shape and further its rulemaking efforts.”⁹

The submission date for public comments on the SANPR were extended from August 8, 2016 to October 7, 2016, giving commenters ample time to review and respond to the 123 questions posed.

The questions focused on key issues including, but not limited to—

- The scope of the proposed rule and whether all web content should be subject to the regulation;
- The appropriate accessibility standard; in particular, the agency sought comment on Web Content Accessibility Guidelines 2.0, level AA (WCAG 2.0 AA);
- The feasibility of a compliance date of two years after publication of the final rule;
- If there is a shortage of experts who can assist covered entities in bringing their websites into compliance with WCAG 2.0 AA;
- Whether small entities should have a lower compliance standard (e.g., WCAG 2.0, level A);
- Whether certain web content should be exempt from compliance with the proposed standard;
- Whether the rule should cover mobile applications; and
- Information on the costs and benefits of web accessibility.

The SANPR also indicates DOJ is considering a proposal that would relieve a public entity from conforming its web content to WCAG 2.0 level AA if meeting the requirement “would result in a fundamental alteration or undue financial and administrative burden.”

To the extent that conformance poses “undue financial and administrative burdens or fundamental alteration,” however, **a bank would still be required** to provide the disabled user with an **alternative method** that provides equal access to the goods and services available online. **Moreover, as noted previously, considering the resources of most financial**

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

institutions, it is unlikely that DOJ or a court would conclude that website accessibility modifications would cause undue burden to a bank.

IV. WCAG 2.0, Level AA – The Proposed Standard

Web Content Accessibility Guidelines 2.0, level AA is an internationally recognized technical standard developed by the Worldwide Web Consortium, an international organization that develops protocols and guidelines to assist web developers in creating accessible website content for disabled users. The intermediate standard, WCAG 2.0, level AA, has twelve guidelines that are organized under four principles – perceivable, operable, understandable, and robust¹⁰ – which, if adopted in the Title III rulemaking, will require banks to:

- Provide text alternatives for non-text content;
- Provide captions, audio descriptions, and other alternatives for multimedia;
- Create content that can be presented in different ways without losing meaning;
- Make it easier for users to see and hear content;
- Make all functionality available from a keyboard;
- Avoid content that causes seizures (e.g., mandate a threshold of less than three flashes);
- Provide users enough time to read and use content;
- Help users navigate and find content (e.g., use headings and labels);
- Make text readable and understandable;
- Make content appear and operate in predictable ways (e.g., require consistent navigation of the web pages);
- Help users avoid and correct mistakes (e.g., provide clear error messages identifying the location of the error and suggestions for correcting it); and
- Maximize compatibility with current and future user tools.

In addition, if WCAG 2.0 level AA is adopted as the legal standard, covered entities would be required to “comply with both Level A and Level AA Success Criteria and Conformance Requirements specified in WCAG 2.0.”¹¹

Although DOJ is considering adopting WCAG 2.0 level AA as the legal standard, understand that full compliance with WCAG 2.0 level AA will not necessarily render the covered entity in full compliance with the ADA. For instance, according to DOJ’s SANPR, if a covered entity complies with WCAG 2.0 level AA, but a disabled individual remains unable to access information or services on the entity’s website, the covered entity would not be in full compliance with the ADA. In such a scenario, the bank would be required to make additional modifications to its website to ensure that the disabled user has access to its products and services.

¹⁰ World Wide Web Consortium, Web Content Accessibility Guidelines (WCAG) 2.0 (Dec. 11 2008) available at <https://www.w3.org/TR/2008/REC-WCAG20-20081211/#contents>

¹¹ U.S. Department of Justice, Statement Regarding Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities (April 2016), available at https://www.ada.gov/regs2016/sanprm_statement.html

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V. Alert and Roadmap to Accessibility

Plaintiff's firms are aggressively pursuing covered entities, including banks, by mailing demand letters, requesting settlements, and filing lawsuits seeking injunctive relief, attorneys' fees, and costs. The allegations vary but cite the bank's failure to provide an accessible website to disabled users in violation of the ADA.

Under the circumstances and in preparation for the anticipated website accessibility standards, ABA offers the following suggestions—

1. Adopt an accessibility policy and standard for your bank (WCAG 2.0, level AA would be the safest choice).
2. Audit your website for accessibility. Consider having an expert audit your website to determine what content, if any, would not be considered accessible and in conformance with WCAG 2.0, level AA.
3. Appoint person(s) to oversee all electronic information technology (EIT) accessibility issues and review new technology for accessibility.
4. Train your website team. Make sure your in-house website team is aware of the proposed and anticipated standard (WCAG 2.0, level AA) and that bank management understands the threat presented by private litigants.
5. Direct departments to create an implementation plan.
 - Identify EIT in use and assess accessibility.
 - Develop plan for providing access to inaccessible EIT.
 - Develop interim accessibility plan.
6. Create an accessibility webpage with information on accessibility and a process for reporting website access problems and getting help.
7. Require accessibility in vendor contracts.
8. Conduct annual audits for conformance with WCAG 2.0, level AA.

Questions? Contact [Toni Cannady](#) for more information.

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