

ADA Compliance For Financial Institutions In The Crosshairs

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During the second half of 2016, numerous financial institutions of all sizes began receiving demand letters from plaintiffs firms representing disabled individuals and seeking settlements for violations of website accessibility standards related to Title III of the Americans with Disabilities Act (ADA, 42 U.S.C. § 12101 et seq.). These demand letters follow on the heels of similar demand letters sent to retail establishments, restaurants, hotels and other businesses during the past two to three years.[1]

As discussed below, these demand letters continue a recent trend of stepped up enforcement of the ADA by the U.S. Department of Justice[2] and private plaintiffs against companies to increase access to digital platforms, such as websites and mobile applications, for disabled individuals. Through its enforcement actions, the DOJ has clearly taken the position that Title III covers access to websites, online tools and mobile applications of public accommodations. The demand letter tactic poses an additional ADA enforcement method that carries increased regulatory, enforcement and litigation risks for financial institutions.

Demand Letters

Plaintiffs counsel representing advocacy groups for the disabled and/or disabled individuals are scrutinizing websites with the assistance of consultants using automated tools to find alleged accessibility barriers. Companies or financial institutions with purported accessibility deficiencies are then targeted with prelawsuit letters notifying the company about the deficiency and proposing that the parties engage in negotiations to reach an enforceable agreement providing injunctive relief and granting attorneys' fees and costs. While it is certainly good public policy to make digital platforms accessible to the disabled, the plaintiffs bar appears to be acting opportunistically rather than altruistically in issuing these demand letters on such a large scale.

The demand letters rely heavily on rules that were proposed by the DOJ more than six years ago but never finalized. In 2010, the DOJ issued an advance notice of proposed rulemaking (ANPR) declaring its position that websites for "public accommodations"[3] (which, under Title III of the ADA, includes various types of companies and banks explicitly) must be accessible to persons with disabilities and that it would issue proposed regulations on the subject.[4] In its ANPR, the



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DOJ also solicited public comment on appropriate website accessibility standards to determine compliance with the ADA.[5]

One of the options for website standards suggested in the DOJ's ANPR was "Web Content Accessibility Guidelines version 2.0" (WCAG 2.0) issued by the World Wide Web Consortium. The WCAG 2.0 is a privately developed set of guidelines that is designed to make website content more accessible to individuals with disabilities. In the ANPR, the DOJ suggested the AA (intermediate) success criteria (WCAG 2.0 AA) as a potentially appropriate standard because the "enhanced criteria ... provide more comprehensive web accessibility and yet are still feasible for web content developers." [6] Moreover, as noted more fully below, the DOJ has pushed the WCAG 2.0 AA standard through its enforcement activities.

The public comment period for the DOJ's ANPR closed on Jan. 24, 2011, but to date the DOJ has not yet issued a notice of proposed rulemaking — much less a final rule — based on those comments. In its Fall 2015 statement of regulatory priorities, the DOJ announced that it planned to further delay issuing any proposed regulations for public accommodation websites until 2018 — which would be eight years after issuance of the ANPR. In the DOJ's subsequent statement of regulatory priorities (Fall 2016), the DOJ indicated no time frame for issuing a notice of proposed rulemaking, stating that it would be included "among its long-term rulemaking priorities." President Donald Trump's executive order placing significant restrictions on any new or pending rulemakings injects further uncertainty into the process.[7] As a result, the DOJ's Title III rulemaking remains on hold.

On a related note, the DOJ issued a supplemental ANPR (SANPR) related to Title II of the ADA in which, among other things, it sought additional comments on an appropriate website accessibility standard for state and local government agencies.[8] Although the SANPR does not apply to financial institutions, the DOJ stated in its Fall 2016 statement of regulatory priorities that the SANPR will serve as a "very important" foundation in developing the DOJ's notice of proposed rulemaking for website accessibility of public accommodations under Title III of the ADA. Therefore, the SANPR serves as a useful preview of the positions the DOJ may take when it eventually issues its Title III proposed rule.

DOJ Enforcement Actions

Despite the lack of a final rule and the fact that the ADA does not mention the internet in its text, the DOJ has undertaken enforcement actions based on an unclear technical standard. For example, in March 2014, the DOJ and H&R Block entered into a consent decree in which H&R Block agreed to make its website, mobile applications and tax preparation tool comply with WCAG 2.0 AA. The DOJ consent decree appears to use WCAG 2.0 AA as the standard for making websites and mobile applications accessible to persons with disabilities and ADA-compliant.

Following the H&R Block settlement, the DOJ proceeded to bring additional enforcement actions based on WCAG 2.0 AA as the technical standard for accessibility of websites and mobile applications. The DOJ has applied that standard to both brick-and-mortar businesses with websites, as well as internet-only businesses. Examples include the following:

- edX (online educational course platform)[9]
- Florida State University (FSU's police department employment website)[10]

- Peapod (online grocery delivery service website and mobile applications)[11]
- Carnival Corporation (cruise line website and mobile applications) [12]
- Miami University (college course-related websites)[13]

In these settlements, the DOJ primarily sought corrective action and injunctive relief. The DOJ typically requires some combination of the following types of corrective action in its settlements with defendants:

- Conducting annual accessibility testing
- Using an independent consultant to audit website and mobile application accessibility
- Posting a notice on defendant’s website providing an email address and toll-free telephone number to provide assistance with accessibility-related problems and soliciting feedback on how to improve the website
- Developing website accessibility policies or revising existing policies
- Providing employee training on accessibility requirements
- Obtaining commitments from vendors to conform content to comply with WCAG 2.0 AA through contractual provisions
- Designating an employee as a website accessibility coordinator
- Reporting to DOJ in detail on ADA compliance (or lack thereof)
- In limited cases, providing financial payments to aggrieved individuals

Private Litigants

Private litigation from individuals and advocacy groups (e.g., National Association of the Deaf) has also been on the rise since 2013, and most companies have settled. During calendar year 2016, 250 lawsuits were filed against companies alleging that websites were not accessible to the blind.[14] The states of California, Florida, New York and Arizona had a particularly high volume of such lawsuits during 2016.[15] Although monetary damages are fairly limited under the ADA,[16] such cases may not be easily dismissed and the cost of defense may be substantial, thus driving settlements.

Strategies for Assessing, Mitigating and Managing Risk

There are several strategies available for managing demand letters, depending on specific facts and circumstances. Because of the sensitivity of potential ADA noncompliance, it is advisable to immediately consult with legal counsel upon receipt of any demand letter to determine an appropriate response strategy.

There are also strategies to mitigate the risk of becoming a target. For example, it is prudent to post a

notice on your financial institution’s website providing a telephone number and email address to offer assistance to disabled individuals who may be having difficulty accessing certain web pages, provided that webpage is accessible to the disabled. It is also critical to proactively undertake an ADA accessibility review of your company’s digital platforms. Ensuring compliance with the WCAG 2.0 AA standard is complicated and requires a high degree of technical expertise. Therefore, institutions should consider engaging a qualified consultant and conducting the accessibility review under attorney-client privilege to protect the results and allow careful planning of next steps to achieve compliance.

It is important to note that Title III does offer an affirmative defense to ADA noncompliance. Public accommodations (which include financial institutions) are required to provide “auxiliary aids and services” to disabled individuals, which are designed to provide effective communication to individuals with a hearing, vision or speech disability. Auxiliary aids and services must be provided unless the institution can demonstrate that taking steps to do so would fundamentally alter the nature of its goods and services or would result in an undue burden. Undue burden is defined as “significant difficulty or expense.” Additional subjective factors must be taken into account in determining what constitutes an undue burden, however, including the nature and cost of the action, the number of persons employed, effect on expenses and resources, and the financial resources of any parent company.

Although there may be some uncertainty concerning the Trump administration’s go-forward strategy for enforcing the ADA through the DOJ, one thing is certain: Businesses are likely to remain in the crosshairs of private plaintiffs as they use demand letters and litigation to make digital platforms fully accessible to the disabled.

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[1] For example, since 2015, lawsuits brought by plaintiffs firms claiming business websites are not accessible to the blind rose to 148 for retail establishments, 45 for restaurants, 12 for the hospitality industry, nine for entertainment venues, eight for medical providers, seven for vehicle manufacturers, and 15 for others. Americans with Disabilities Act and Website Accessibility Standards: Practical Information You Need Now, American Bankers Association (Nov. 14, 2016), <http://www.aba.com/Training/teleweb/Pages/111416briefing.aspx>.

[2] Compliance with Title III of the ADA is enforced by the DOJ’s Disability Rights Division, which is charged with developing enforceable accessibility standards.

[3] Under Title III of the ADA, public accommodations are prohibited from discriminating against individuals with disabilities. 42 U.S.C. § 12182(a). Title III of the ADA and DOJ regulations define a “place of public accommodation” as a facility operated by a private entity whose operations affect commerce and fall within one of the enumerated statutory categories; banks are one of those categories. 42 U.S.C.

§ 12181(7); 28 C.F.R. § 36.104. In general, public accommodations must provide accessible facilities, make reasonable modifications to policies, procedures and practices to accommodate individuals with disabilities when required, and effectively communicate with disabled individuals.

[4] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (July 26, 2010), available at <https://www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf>.

[5] *Id.* at 43465.

[6] *Id.*

[7] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017); available at <https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/html/2017-02451.htm>.

[8] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 28657 (May 9, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-29/pdf/2016-18003.pdf>.

[9] Settlement Agreement Between the United States of America and edX Inc., DJ No. 202-36-255 (2015); available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf.

[10] Settlement Agreement Between the United States of America and Florida State University, DJ No. 205-17-13 (2014); available at <https://www.ada.gov/floridastate-t1-sa.htm>.

[11] Settlement Agreement Between the United States of America and Ahold U.S.A. Inc. and Peapod LLC, DJ No. 202-63-169 (2014); available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/17/peapod_settlement_agreement.pdf.

[12] Settlement Agreement Between the United States of America and Carnival Corporation, DJ No. 202-17M-206 (2015); available at https://www.ada.gov/carnival/carnival_sa.html.

[13] Consent Decree, *Dudley v. Miami University*, No. 1:14-cv-38, (S.D. Ohio, Dec. 14, 2016), ECF No. 66.

[14] Minh Vu, Kristina M. Launey & Susan Ryan, ADA Title III Lawsuits Increase by 37 Percent During 2016, *Seyfarth & Shaw: Blog Posts* (Jan. 23, 2017), <http://www.seyfarth.com/publications/ADA012317>.

[15] *Id.*

[16] Title III of the ADA provides several avenues for relief. Remedies sought by DOJ may include monetary damages, injunctive relief, attorneys' fees and costs, and civil money penalties. 42 U.S.C. § 12188(b)(2)(A), (B); 28 C.F.R. § 36.504(a)(1), (2). For violations that occur on or after April 28, 2014, civil money penalties may not exceed \$75,000 for the first violation or \$150,000 for any subsequent violation. See 28 C.F.R. § 36.504(a)(3). Title III may also be enforced by a private plaintiff's lawsuit seeking injunctive relief and attorneys' fees and costs. 42 U.S.C. § 12188(a)(2); 28 C.F.R. § 36.501 (private suits), § 36.505 (attorneys' fees). All Content © 2003-2017, Portfolio Media, Inc.