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DOJ's Recent Rulemaking Action for State and Local Government Websites Reveals Its Current Thinking on Web Accessibility.

Seyfarth Synopsis: *If you would rather not read the 30-page small print Federal Register notice, this summary will provide you with what you need to know about the Justice Department's most recent official pronouncement on web accessibility.*

As we [reported](#), last week DOJ issued a lengthy [Supplemental ANPRM \(SANPRM\)](#) for state and local government websites, which some commentators have decried as a “do-over.” This unusual move was a surprise, to be sure, but we do not view it as a complete setback. The SANPRM appears to be DOJ's attempt to preview its position on key issues and obtain public comment. As such, the SANPRM has very serious implications that go far beyond the realm of state and local governments. The rules that DOJ ultimately issues in the state and local government website rulemaking will likely provide the framework for the proposed rule for public accommodations websites — currently slated for 2018. Accordingly, public accommodations and the organizations that represent them need to submit comments in response to the SANPRM before the comment period closes on August 8, 2016.

We normally don't write long blog posts but the lengthy SANPRM — containing no fewer than 123 questions for public comment — warrants an exception. Below is a high level summary of the key issues, with some of our preliminary commentary:

- **Scope of Regulation.** DOJ is considering broadening the scope of the future rule from websites to “Web content.” This expansion could potentially cover web content that a covered entity places on websites that it does not own or control (g. advertising), and could have far reaching implications.
- **Accessibility Standard.** DOJ believes that WCAG 2.0 AA should be the standard for Web content, as we've predicted.
- **Compliance Period.** DOJ is considering giving public entities “two years after the publication of a final rule to make their Web sites and Web content accessible in conformance with WCAG 2.0 Level AA, unless compliance with the requirements would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.” This begs the question of why DOJ's enforcement attorneys have been demanding that businesses and state local governments make their websites comply with WCAG 2.0 AA right now. The two-year proposal is a shift away from DOJ's initial, 2010, ANPRM position where it contemplated different compliance dates for existing web pages versus new webpages or websites. The SANPRM also notes DOJ is considering a longer three-year compliance period for captioning of live audio content.
- **Consultants.** DOJ wants to know if there is a shortage of consultants who can bring Web content into conformance with the proposed WCAG 2.0 AA standard. Rather than rely on anecdotal comments, we suggest that DOJ canvas the field of such consultants and interview them to see if they are actually qualified. DOJ will likely learn that there are very few truly experienced digital accessibility consulting firms - certainly not enough to assist the thousands of state and local governments, let alone the millions of public accommodations that will most certainly need

guidance.

- **Less Demanding Standard for Small Entities.** DOJ is considering whether “small public entities” or “special district governments” should have a different compliance timetable or be subject to a less demanding standard such as WCAG 2.0 A, as opposed to AA. This approach could set the precedent for small businesses in a future proposed rule applicable to public accommodations.

- **Possible Exemptions.** DOJ is considering exempting the following Web content from compliance with the proposed WCAG 2.0 AA standard:

Archived Web Content. To be considered “archived Web content,” the content would have to be (1) maintained exclusively for reference, research, or recordkeeping; (2) not altered or updated after the date of archiving; and (3) organized and stored in a dedicated area or areas clearly identified as being archived. Covered entities would still have to provide accessible versions of this content if someone asks for it.

Conventional Electronic Files (g. PDFs, Word documents, Excel spreadsheets, and PPT presentations) that existed on a Web site before the compliance date of any proposed rule.

Third-party Web Content Linked from the Public Entity’s Website. Note, however, there would be no exception for linked Web content if the public entity “uses the third-party Web site or Web content to allow members of the public to participate in or benefit from the public entity’s services, programs, or activities.” For example, if the state parking enforcement authority contracts with a third party to process parking ticket payments on a third party site, that site would also need to conform to WCAG 2.0 AA.

Third Party Content. A public entity would not have to make content that is posted on its website by third parties conform with the proposed standard, unless the information is essential for engaging in civic participation or if the Web site owner has chosen to include the third party content on the Web site. This proposal strikes us as highly ambiguous. Would YouTube have to provide captioning for every video posted by third parties because it has chosen to invite such third parties to post the videos? Would allowing people to post be considered an affirmative choice by the website owner triggering the compliance obligation? What if a website owner needs to include key third party content on its site but the vendor but the vendor won’t agree to make it accessible? Would the website owner be barred from including this third party content on its website, even if no vendor will provides it?

- **Social Media Platforms.** DOJ considers social media platforms such as Facebook, YouTube, Twitter, and LinkedIn to be covered by Title III of the ADA and proposes to not address the use of these platforms by state and local governments (subject to Title II) in this rule. However, DOJ says that any information provided by public entities on those social media platforms must also be available in some alternative way if the platforms are not accessible.
- **Web content of Educational Institutions.** DOJ is considering requiring educational institutions to make all content available to the public (as opposed to exclusively for students) on their Web sites conform to WCAG 2.0 AA. Universities should be gearing up to fight this proposition vigorously because their websites tend to be vast repositories of information (some of which may never be accessed or viewed), including thousands of videos, that would have to be made to conform to WCAG 2.0 AA. DOJ said that content relevant to a particular student or parent must be made accessible on demand “in a timely manner.”
- **Conforming Alternate Versions of Web Pages and Web Content.** DOJ may permit the use of conforming alternate versions of a Web page and/or Web content (1) when it is not possible to make Web content directly accessible due to technical or legal limitations; or (2) when used to provide access to conventional electronic documents.
- **Undue Burden and Fundamental Alteration Defenses.** DOJ is considering the use of these defenses as grounds to not make Web content conform to WCAG 2.0 AA, but (1) the burden of proving defense would remain on the public entity; (2) the decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after

considering all resources available for use in the funding and operation of the service, program, or activity; and (3) the decision must be documented with a written statement of the reasons for reaching that conclusion. Moreover, the public entity still has to take any other action that would not result in such an alteration or such burdens. Moreover, the public entity still has to provide access in some alternative fashion unless doing so would also result in a fundamental alteration in the nature of a service, program, or activity or undue financial and administrative burdens.

- **Does Compliance with WCAG 2.0 AA Satisfy a Public Entity's ADA Obligations?** Not entirely. DOJ says that a public entity would not be required to go beyond this standard even if a person with a disability is unable to access the Web content. However, the public entity would still have to utilize an alternative method of providing the individual with a disability equal access to the information, service, program, or activity on its Web site unless the public entity can demonstrate that alternative methods of access would result in a fundamental alteration in the nature of the service, program, or activity or undue financial and administrative burdens.
- **Measuring Compliance with WCAG 2.0 AA: DOJ is seeking public comment on how compliance with WCAG.** Level AA should be assessed or measured, particularly for minor or temporary noncompliance. Should the measurement be based on the percentage of Web content that is accessible, or some minimum threshold of compliance? The DOJ also wants to know if there are circumstances where Web accessibility errors may not be significant barriers to accessing the information or functions of a Web site. We strongly believe that the regulations must contain a clear statement that temporary noncompliance is not a violation of the ADA. Websites change all the time and there are bound to be bugs and issues that come up. And, guidance on how compliance with the standard will be measured given the dynamic nature of websites is essential.
- **Coverage of Mobile Apps.** DOJ asks whether its rule should cover mobile apps and which standard should be used. DOJ specifically called out WCAG 2.0, the User Agent Accessibility Guidelines 2.0, the Authoring Tools Accessibility Guidelines 2.0, or ANSI/Human Factors Engineering of Software Interfaces 200 as possible accessibility requirements for mobile apps.

As you can see, there are a many issues requiring public comment in the SANPRM. State and local governments, persons with disabilities, digital accessibility experts, vendors of third-party content and public accommodations all need

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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