



BURTON BLATT INSTITUTE  
CENTERS OF INNOVATION ON DISABILITY

**Comments on the 2010 Advance Notice of Proposed Rulemaking on web accessibility  
("Nondiscrimination on the Basis of Disability; Accessibility of Web Information and  
Services of State and Local Government Entities and Public Accommodations"). 28  
C.F.R. Parts 35 and 36; CRT Docket No. 110; AG Order No. RIN 1190-AA61**

Thank you for the opportunity to comment on your Advanced Notice of Proposed Rulemaking regarding Americans with Disabilities Act (ADA) requirements for Accessibility of Web Information.

The Burton Blatt Institute (BBI) is a research, education, and advocacy organization dedicated to advancing the civic, economic and social participation of people with disabilities worldwide. Our focus areas are employment, entrepreneurship, economic empowerment, civil rights and community participation. BBI has been actively engaged in research, education and advocacy surrounding accessible technology in a variety of settings, including technology in employment, education, voting, and access to goods and services.

BBI commends the Department for proposing additional regulation of website accessibility. However, it is important that the Department not create the false impression that websites are not already subject to accessibility requirements. As the Department has consistently maintained, the ADA "applies to discrimination in offering the goods and services 'of' a place of public accommodation or the services, programs and activities 'of' a public entity, rather than being limited to those goods and services provided 'at' or 'in' a place of public accommodation or facility of a public entity.... Instead, the ADA mandate for 'full and equal enjoyment' requires nondiscrimination by a place of public accommodation in the offering of all its goods and services, including those offered via websites."

Moreover, as the Department correctly notes in the ANPRM, “Congress contemplated that the Department would apply the statute in a manner that evolved over time.” The internet has evolved over time, and accessibility standards must evolve to meet it.<sup>1</sup>

Web accessibility is essential to the full integration of people with disabilities in the 21<sup>st</sup> century. Every day, millions of Americans go on line to learn, work, be entertained, purchase goods, research health information, interact with community, and receive other public and private services and information. Americans with disabilities would like to do the same. The Department of Justice’s web accessibility ANPRM is an historic and important step in guaranteeing that people with disabilities can fully enjoy and benefit from all that the Internet has to offer.

Internet use has become essential to daily life in the United States. As time spent on-line has increased exponentially over the past decade, it has become more and more essential for individuals to be able to access and use websites effectively. In the past, a website was merely one option for obtaining information, goods and services. Now, it is often the only option. The growing prevalence of Internet access to employment, education, government services, and the marketplace has led to a corresponding reduction in other means of accessing those arenas.<sup>2</sup> Today, the ability to use the Internet is essential to get, and to keep, a job.<sup>3</sup> Most colleges and universities require their students to have computers and are beginning to provide other technology devices.<sup>4</sup> Many state and local government agencies provide websites as their primary mechanism for accessing their services. Libraries have gone online. Online-only stores (e.g., Amazon.com, Zappos.com, Overstock.com) are more and more prevalent.

Even when a website is not the only way to access a good or service, it is often the most effective way. Goods, services and information are available online 24 hours a day, without the need to leave home. In addition, as in the case of airline tickets, as well as other products and services, discounts are often offered if purchases are made online.<sup>5</sup> In some instances, particularly in rural areas for people who cannot easily travel,

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<sup>1</sup> See generally, Blanck, P., “Flattening the (Inaccessible) Cyberworld for People with Disabilities,” *Assistive Technology Journal - RESNA*, 2008 Fall;20(3):175-80.

<sup>2</sup> As of 2006, over half of new hires at leading employers came from the Internet, and most companies expected that percentage to grow in the following years. Booz Allen Hamilton, 2006 DirectEmployers Association Recruiting Trends Survey, <http://www.jobcentral.com/pdfs/DESurvey.pdf>. Nearly 85% of employers in a 2006 Manpower survey believed IT would have a greater impact on employment, workers would have to have more skills, and working from home would be more prevalent by 2016. [http://files.shareholder.com/downloads/MAN/740053096x0x63547/9f99cc2b-6ae7-44ce-b8fb-dea2e36ba5e8/UK\\_Manpower\\_world\\_of\\_work\\_FINAL.pdf](http://files.shareholder.com/downloads/MAN/740053096x0x63547/9f99cc2b-6ae7-44ce-b8fb-dea2e36ba5e8/UK_Manpower_world_of_work_FINAL.pdf).

<sup>3</sup> Younger, J. (2008). *Online job recruitment: Trends, benefits, outcomes, and implications*. Larkspur, CA: Accolor; Pew Research Center, “Americans living with disability and their technology profile,” <http://pewinternet.org/Reports/2011/Disability.aspx>.

<sup>4</sup> A. Altman, “Why Colleges Are Making Laptops a Must-Have” (Time) visited October 5, 2009. [http://www.time.com/time/specials/packages/article/0,28804,1838709\\_1838713\\_1838817,00.html#](http://www.time.com/time/specials/packages/article/0,28804,1838709_1838713_1838817,00.html#).

<sup>5</sup> Lazar, J., et al., “Up in the air: Are airlines following the new DOT rules on equal pricing for people with disabilities when websites are inaccessible?” *Government Information Quarterly* 27 (2010) 329–336.

information, goods, and services are only readily available online. For many, goods and services available through the Internet can make the difference between getting what they need in their communities and leaving their communities.

For people with and without disabilities, the Internet also offers the opportunity to create new communities. Millions of Americans now rely on virtual communities for a variety of relationships- social, professional, and family. People with disabilities want to participate in those communities. Particularly in rural areas, people with disabilities will often be unable to participate in physical communities – because transportation is unavailable, or physical facilities are too far away, are inaccessible, or are otherwise unwelcoming. The Internet offers interactive online activities and communities for a wide variety of interests: social networks, virtual worlds, book clubs, classes, support groups, political groups, health information, blogs, multi-player games, and informational and interactive websites for virtually every interest. The Internet, thus, provides types of communities that should be a tremendous opportunity for people with disabilities.

People with disabilities are often denied access to the Internet and the opportunities for information, employment, goods and services, and community that it provides. Currently, only 54% of adults with disabilities use the Internet, compared with 81% of adults without disabilities.<sup>6</sup> Without consistent accessibility of websites, people with disabilities will not be able to overcome this digital divide. We appreciate the Department's historic decision to issue regulations on the subject of web accessibility and hope that the following answers to the Department's questions will be of assistance as the Department addresses this critical issue.

**Question 1:** *Should the Department adopt the WCAG 2.0's "Level AA Success Criteria" as its standard for website accessibility for entities covered by Titles II and III of the ADA? Is there any reason why the Department should consider adopting another success criteria level of the WCAG 2.0? Please explain your answer.*

Yes. Technical standards are necessary for Title II and III entities to know what they are expected to do to make their websites accessible to persons with disabilities. Level AA Success Criteria of the Web Content Accessibility Guidelines (WCAG) 2.0 is the appropriate web accessibility standard to meet this need. WCAG 2.0, developed as a result of a rigorous multi-year process, is robust and stable, is technology-neutral, and has been designed to keep up with changing technology.

The WCAG 2.0 Level AA success criteria focus on how people with disabilities actually use and interact with websites, and allow for flexibility by web designers and developers. The WCAG 2.0 guidelines emphasize outcomes and design strategies that will ensure accessibility, without being tied to any particular technology. They are as

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<sup>6</sup> Pew Research Center, "Americans living with disability and their technology profile," <http://pewinternet.org/Reports/2011/Disability.aspx>.

valid and usable in the cloud computing environment as in the dedicated server world, as appropriate on social networking sites as on e-commerce sites, and they are useful for people using any of the many types of assistive technologies that people with disabilities use.

WCAG explains what is needed to allow people with disabilities to use the web, but does not mandate particular solutions tied to particular technologies. Techniques for meeting criteria are offered, but the criteria themselves were specifically drafted to be forward-looking – to explain *what* must be done, but not *how* to do it. Adherence to the WCAG 2.0 Level AA success criteria would not require a Title II or III entity to alter the look or feel of its websites.

A wide array of stakeholders was involved in developing WCAG 2.0. Industry, government, people with disabilities, and technology experts all participated in the very open and public process that led to final adoption of WCAG 2.0. The multi-year process ended with a detailed Implementation Report demonstrating that the Guidelines were effective and able to be implemented in a wide range of web settings. The report, which points to specific sites using the WCAG 2.0 Success Criteria, is online at <http://www.w3.org/WAI/GL/WCAG20/implementation-report/>.

Importantly, WCAG is an international – and internationally accepted – standard. Companies in the United States that do business abroad will benefit from a consistent standard that meets legal requirements wherever the Internet is accessed.

WCAG 2.0 has extensive instructional and support materials including detailed and continually updated “How to Meet” and “Techniques” documents that provide specific information on how to satisfy the guidelines using different technologies.

Finally, commercial and government websites, large and small, are *already* using WCAG 2.0 or the earlier version 1.0, and have been doing so for many years. More information about some of the companies who work to ensure that their websites satisfy the Web Content Accessibility Guidelines, is available on line at <http://llegal.com/2010/09/doj-anprm-web/>. State and local governments (Title II entities) also rely on WCAG. See for example <http://www.dor.ca.gov/webaccessibility/default.htm> (“The State of California has committed to achieving Web Content Accessibility Guidelines (WCAG) 1.0 Double A conformance on all public-facing websites.); <http://www.osc.state.ny.us/retire/accessibility.htm> (all pages of New York State Retirement system comply in full with WCAG 2.0 A, and in part with Success Criteria AA and AAA.); <http://www.prb.state.tx.us/accessibility-policy.html> (Texas Pension Review Board “striving to meet the recommendations of the World Wide Web Consortium (W3C) as shown in the Web Content Accessibility Guidelines (WCAG) 2.0”); <http://coe.berkeley.edu/accessibility-info> (U.C. Berkeley School of engineering “developed this web site to adhere to the international standards for accessibility in accordance with Web Content Accessibility Guidelines (WCAG v1.0)”.)

Sites that already meet WCAG standards (either WCAG 2.0 or its predecessor, WCAG 1.0 (in place since 1999)) remind us that while web accessibility regulations may be new under the ADA, web accessibility itself is already being provided by certain Title II and III entities. Moreover, the Department of Justice has long recognized web accessibility as an ADA obligation. The Department must ensure that these important new regulations recognize the landscape that currently exists and move accessibility forward. The fact that the Department has long recognized web accessibility as part of the ADA, and that commercial entities, large and small, as well as state and local governments, are already using WCAG, helps demonstrate why that standard is appropriate, and should be adopted by the Department.

**Question 2:** *Should the Department adopt the section 508 standards instead of the WCAG guidelines as its standard for website accessibility under Titles II and III of the ADA? Is there a difference in compliance burdens and costs between the two standards? Please explain your answer.*

No. Section 508 is a critically important standard for the federal government, but it was drafted to be just that: a tool for federal agencies and not directly for Title II or III entities or the web developers they employ. As the Department knows, Section 508 is currently under active revision, in large part to assure conformance with WCAG 2.0. When TEITAC, the industry–consumer advisory committee assisting the Access Board with the Section 508 refresh, turned in its report on revision of the 508 standards it made its recommendation as identical to WCAG 2.0 as possible given that WCAG 2.0 was not completed as of the report date. (See April 2008 TEITAC Report to Access Board at <http://www.access-board.gov/sec508/refresh/report/>, stating “The Committee worked to harmonize its recommendations with the W3C Web Content Accessibility Guidelines 2.0 (WCAG 2.0) Working Group.”) Moreover, all of the commenters, both industry and consumer, that added supplemental comments to the final report addressing the web portions urged the Access Board to either adopt WCAG 2.0 for the Web portion of the new 508 standards or make the new standards as identical as possible to WCAG 2.0.

Given the importance of international harmonization, and the extensive support materials available for WCAG 2.0, the Title II and III web regulations should refer directly to WCAG, and not adopt Section 508, a U.S.-specific regulation that is not yet stable.

**Question 3:** *How should the Department address the ongoing changes to WCAG and section 508 standards? Should covered entities be given the option to comply with the latest requirements?*

As discussed in the response to Question 1 above, WCAG 2.0 is a stable international standard adopted after a rigorous, open and transparent process. It is designed to be flexible and allow for new technologies. We urge the Department to adopt the most current version of WCAG as the web accessibility standard for Title II and III entities. Future updates to WCAG can be adopted upon their release, after notice and comment,

much as the Department currently handles the ANSI standards that are incorporated in the ADA Standards for Accessible Design. As with the ANSI standards, entities can comply with newer versions to the extent they provide equivalent facilitation.

The Department should avoid a scenario under which entities can jump back and forth between two standards (Section 508 and WCAG). While it is possible that the current 508 refresh will result in perfect harmony between the standards, this may not happen. If Section 508 does become identical to WCAG, there is nothing gained by adopting “a copy” of WCAG – WCAG itself should be adopted to insure international harmonization. WCAG was designed as a robust and complete standard and should be the only technical standard referenced in the new web accessibility regulations.

**Question 4:** *Given the ever-changing nature of many websites, should the Department adopt performance standards instead of any set of specific technical standards for website accessibility? Please explain your support for or opposition to this option. If you support performance standards, please provide specific information on how such performance standards should be framed.*

No, but a performance standard should be adopted in addition to, not in place of, adherence to the WCAG 2.0 Level AA success criteria. We recommend the following language:

*“A website owned, operated or controlled by a covered entity shall be accessible to and usable by persons with disabilities. The site shall ensure that persons with disabilities may access or acquire the same information, engage in the same interactions, and enjoy the same products and services the covered entity offers visitors to its website without disabilities with a substantially equivalent ease of use.”*

The performance standard, as the language above suggests, should emphasize usability and equal access for people with disabilities to the full range of activities and services available through a covered entity’s website. Such a generalized performance standard, however, cannot replace technical standards, which are critical to ensuring accessibility. Those technical standards are already set forth in WCAG 2.0.

The ever-changing nature of many websites does not mean that technical standards are not needed. A generalized performance standard, while important and necessary, is not specific or clear enough to ensure accessibility for the complex websites provided by Title II and III entities and would not provide sufficient guidance to those entities that seek to make their websites accessible to people with disabilities. On the other hand, a generalized performance standard in addition to the technical requirements of WCAG 2.0 Level AA is needed to ensure that any new developments in the Internet or implementation approaches that are not captured by WCAG 2.0 are undertaken in a manner that ensures equal accessibility and usability to people with disabilities.

The WCAG 2.0 Level AA Success Criteria are founded on principles that go to the core of accessibility in the context of the World Wide Web. The Success Criteria – which tell site developers *what* to do but not *how* to do it - are organized around four key principles: to be accessible, content on the web must be “perceivable, operable, understandable, and robust.” (See WCAG 2.0 introduction at <http://www.w3.org/TR/WCAG20/#intro-layers-guidance>. The “how” part of the Standards is in the Techniques document, which allows developers to embrace new methods as new technologies become available.) WCAG does not specify “how,” but only “what,” should be accomplished. Importantly, it does so in a testable fashion, providing reliability for both providers and users of websites.

We urge the Department to adopt a generalized performance standard in addition to WCAG in part to clarify the principles underlying the technical standards. A generalized performance standard will guide developers in designing sites that work for people with disabilities. But a generalized performance standard “instead of” a specific technical standard does not serve site owners, web developers, or people with disabilities. Mandating WCAG 2.0 Level AA as the technical standard in conjunction with a generalized performance standard will provide precise direction to web content providers about what is needed to enable people with disabilities to use a website. WCAG 2.0 is flexible enough to embrace new technologies as they develop, is testable and stable, and is accompanied by considerable documentation and technical assistance resources. It provides a clear roadmap to all stakeholders that will be enhanced by the generalized performance standard proposed here.

This two-pronged regulatory construct (general performance and technical specifications) is currently used in the Department’s new construction regulations. Section 36.401(a) of the Department’s Title III regulations defines discrimination as including a failure to design and construct facilities that are “readily accessible to and usable by individuals with disabilities” and Section 36.406 requires that new construction “shall comply” with the technical standards set forth in the Standards for Accessible Design.

For the reasons stated in response to Question 11 below, there should not be a distinction between “new” and “existing” or “remodeled” web sites (except insofar as the undue burden defense will apply to content posted prior to the effective date of the regulations and not refreshed after that date): both should be required to meet this two pronged approach to compliance.

**Question 5:** *The Department seeks specific feedback on the limitations for coverage that it is considering. Should the Department adopt any specific parameters regarding its proposed coverage limitations? How should the Department distinguish, in the context of an online marketplace, between informal or occasional trading, selling or bartering of goods or services by private individuals and activities that are formal and more than occasional? Are there other areas or matters regarding which the Department should*

*consider adopting additional coverage limitations? Please provide as much detail as possible in your response.*

If the Department decides to limit coverage on any of the issues mentioned in the ANPRM, it is critical that any exemption be very narrowly tailored. An accessible website allows people with disabilities to obtain information and participate in core programs and services provided by covered entities. Any exemption creates the possibility that people with disabilities will be locked out of an aspect of those programs, services and information. Each exemption must, therefore, be both fully justified and extremely limited.

(i) **Links to external pages:** The ANPRM recognizes that a covered entity must be responsible for a linked website it does not operate or control “to the extent an entity requires users of its website to utilize another website in order to take part in its goods and services (e.g., payment for items on one website must be processed through another website).” If the Department creates an exemption for linked sites that a covered entity does not operate or control, it is crucial that the exemption not extend to external linked sites that are needed to participate in the goods and services offered by the covered entity. (In other words, any ‘exemption’ for linked sites must have an ‘exception’ for certain types of linked sites.)

The interrelationship between sites is often hard to discern, and a member of the public with (or without) a disability may not even know they are leaving one site and going to another. For example, a bank may contract with a third party to provide online banking services: the bank may not own, operate or control the online banking site but online banking is obviously an important service the bank offers to the public. In such a situation, existing ADA regulations governing “contractual, licensing, or other arrangements” would mandate that the bank (the covered entity) would be responsible for ensuring that the online banking platform conforms to the Department’s new web accessibility regulations. In other words, the planned web accessibility regulations must not in any way undermine Section 36.202 of the current Title III regulations which prevent a Title III entity from discriminating “directly or through contractual, licensing or other arrangements.”

(ii) **Informal and occasional trading by private individuals:** We appreciate the Department’s concern about distinguishing between business entities (ranging from sole proprietorships to large corporations) and private individuals. An exemption from the web accessibility regulations that would address “informal or occasional trading, selling, or bartering of goods or services by private individuals” may be appropriate but only if certain (interrelated) key principles are incorporated into the exemption:

(a) Each page owned or controlled by a covered entity and used by private individuals for occasional trading, selling or bartering must meet WCAG 2.0 Level AA and the generalized performance standard when considering the page without the content posted by the private individual. In other words, if the format for the content supplied



by the private individual is dictated, managed or created by a covered entity, then that formatting must be, and must support, accessibility;

(b) The tools and content that the Title II or III entity provides to the public to enable private individuals (non-covered entities) to post and review content must meet the web accessibility requirements (this ensures that a person with a disability can use the tools and access the content);

(c) It must be possible for a private individual to create and share accessible content (i.e., content that conforms to the web accessibility regulations) on the page owned or operated by the covered entity if they choose to. The Web Accessibility Initiative provides authoring tool guidelines (ATAG) to assist content developers. <http://www.w3.org/WAI/intro/atag.php>. In this regard, the Department should urge covered entities to encourage private party occasional sellers or traders to make their content accessible by offering technical assistance in an economical fashion as part of the guidelines and requirements and rules they already impose.

(d) The regulations must be cognizant that private individuals may be posting content with the very same tools on the very same covered website that other Title II or III entities are using. For example, a private individual may use eBay to sell one item, while a Title II or III entity may also use eBay. A regulatory exemption on this issue must be very narrowly tailored so as not to exclude content posted by a Title II or III entity on a site that is also used by private individuals. Just as occasionally selling one item may not transform an individual into a Title III entity, so too will using a general site to post content not shield a Title III entity from its obligations.

An exemption that includes these principles will ensure that people with disabilities will be able, themselves, to be the “informal and occasional seller, trader or barterer.” A narrowly tailored exemption will also ensure that people with disabilities will have access to all content that otherwise covered entities post in a marketplace setting, and that individual occasional sellers, etc. choose to make accessible.

**(iii) Web content created or posted by website users for personal, noncommercial use:** As with an exemption for casual, private sellers, an exemption for web content created or posted for personal noncommercial use must be very narrowly tailored. The same core principles listed above must be included in any exemption for this type of content. Without them, people with disabilities will be locked out of social, professional and educational networks and other community sites.

Private communications between and among individuals who are not covered entities and who are communicating in a private context may be appropriately exempted from the regulation. When communications between two individuals occur in other contexts, however, such as an academic environment, the regulatory result must be different. For example, two private individuals may use a photo-sharing site just for sharing family

photos. Those individuals may choose not to share accessible content, but that site must offer tools to support accessible photo sharing for others who want it.

On the other hand, photos of a school event shared by students on a site offered by the school to encourage student interaction must be accessible so that all students, including those with disabilities, can participate in this virtual school activity. The photos in these two examples may be shared on the same site, but the accessibility obligations would be quite different.

The Department must be very wary of creating an exemption that would exclude large swaths of the Internet made available by covered entities from accessibility requirements. An exemption for personal, noncommercial use must recognize who is creating content, the context in which it is delivered, and the purpose for which the content is intended. For example, colleges and universities using Facebook to communicate with students, or holding classes through Facebook, cannot be exempt from accessibility requirements. They remain Title II or III entities regardless of where they are conducting their educational programs and providing educational services. Content shared by fellow students in an online class in response to a class assignment or teacher request must be subject to the web accessibility regulations. This is crucial as more educational institutions use the Internet to stream online lectures, post readings, host student chat forums, and host online collaborations. Web accessibility guidelines must apply to Internet use for educational purposes so that students with disabilities are fully included in all aspects of the learning process.

In today's web environment, the Department must carefully delineate what is meant by "noncommercial." There is significant content available without charge on major commercial sites that is posted by covered Title II and III entities. A covered entity (large or small) that posts content for free on a site such as YouTube or iTunes must not be exempt from providing that content in conformance with the Department's web accessibility standards. A Title II or III entity retains that character regardless of where its activities take place.

The core principles for any exemption in the context of content posted for personal noncommercial use require that language in any exemption include the following:

(a) Each page owned or controlled by a covered entity used by private individuals for the exempted purposes (e.g. personal noncommercial use) must meet the Department's web accessibility regulations when considering the page without regard to the content posted by the private individual for the exempted use. (In other words, if the format for the content supplied by the private individual is dictated, managed or created by a covered entity, then that formatting must be, and must support, accessibility);

(b) The tools and content provided by the Title II or III entity to private individuals to enable them to post and review the exempted content must, themselves, meet the web accessibility requirements;

(c) It must be possible for a private individual to create and share accessible content on the page owned or operated by the covered entity if they choose to; and

(d) Any exemption must be narrowly tailored to private individuals communicating with private individuals for private purposes. For example, a school that is otherwise a Title II or III entity that uses a website to facilitate the exchange of information with or between its students must ensure that all content on that website – even content posted by an individual student -- is accessible.

**Question 6:** *What resources and services are available to public accommodations and public entities to make their websites accessible? What is the ability of covered entities to make their websites accessible with in-house staff? What technical assistance should the Department make available to public entities and public accommodations to assist them with complying with this rule?*

There are significant resources available to the public to assist in making websites comply with WCAG 2.0 Level AA and with a generalized performance standard. The Web Accessibility Initiative of the World Wide Web Consortium has abundant resources available at [www.w3.org/wai](http://www.w3.org/wai). Many private and non-profit organizations also provide covered entities with resources, including training materials, direct training, site evaluation, site remediation, and site creation. With appropriate training, or already qualified staff, even the smallest covered entities should be able to make their websites accessible with in-house staff or reasonable outside assistance.

Department of Justice Technical assistance is always a welcomed addition to available resources, and guidance on the new web accessibility regulations should be incorporated into the Department's ADA Technical Assistance services. Given extensive resources available in the private and non-profit marketplace, the Department may want to contract with an established accessibility provider in developing TA materials and programs on this subject and/or utilize the expertise of existing federally-funded centers, such as the ADA National Network (DBTAC) offices, that provide technical assistance on disability and technology.

**Question 7:** *Are there distinct or specialized features used on websites that render compliance with accessibility requirements difficult or impossible?*

No. All pages and all functions of a website can be made accessible in conformance with WCAG 2.0 Level AA Success Criteria and with a generalized performance standard. The Department should not embark on the slippery slope of carving out site features to be exempt from coverage. This is particularly so given the rapidly evolving nature of the

web. A feature that may require extra effort to make accessible today may be either readily accessible – or obsolete – tomorrow.

Moreover, the existing “undue burden” defense should be available in connection with content posted before the effective date of the new regulations and not substantially refreshed thereafter. There is no reason, and no empirical or statutory justification, for the Department to create new exceptions to a well-developed and effective legal framework. Additional defenses and exceptions in the web context are not needed.

**Question 8:** *Given that most websites today provide significant amounts of services and information in a dynamic, evolving setting that would be difficult, if not impossible, to replicate through alternative, accessible means, to what extent can accessible alternatives still be provided? Might viable accessible alternatives still exist for simple, non-dynamic websites?*

There are no “viable accessible alternatives” to the particular manner in which information, programs and services are offered on a covered entity’s web site. Even the most simple, non-dynamic websites have unique online characteristics that cannot be replicated in a different format.

The Internet is not just a format that is instantly available 24 hours a day, 7 days a week. It is a method of service and information delivery that allows a user to find content that the user may not know s/he was looking for. Well-designed, accessible sites allow all users to privately interact with information in a way that is unique to the online world.

A staffed 24/7 phone service might be able to answer some questions, or even provide some services, but a phone staff could never, for example, read aloud all information on a site to a person with a visual impairment in the order the person wants to read the information. A phone service can never provide an equivalent alternative for the ability to independently engage one’s curiosity in the pursuit of information, programs and services that a website offers.

Similarly, other alternatives such as Large Print, Braille, electronic or audio formats of web content can never be equal to a website. Even the simplest web information can be updated and changed on a moment’s notice. The same cannot be said of information mailed (or emailed) to a person.

Even assuming a simple, one-page static website operated by a Title II or III entity with a staffed 24-7 phone service, regulations would be unable to meaningfully define “simple” or account for the fact that a site can become dynamic overnight. The ground-breaking regulations under consideration give the Department an opportunity to provide site owners and operators with clear direction on web accessibility. The Department’s regulations should not allow Title II and III entities to avoid accessibility with the claim that accessible alternatives are provided.

**Question 9:** *The Department seeks comment on the proposed time frames for compliance. Are the proposed effective dates for the regulations reasonable or should the Department adopt shorter or longer periods for compliance? Please provide as much detail as possible in support of your view.*

Single Implementation Date: The Department should adopt a single compliance deadline of six months after the Department’s new rule is published in the Federal Register. A staggered implementation date – with one date for “new or completely redesigned” websites, another for existing sites, and yet another for “new pages” on “existing sites,” is confusing to both the general public and web designers. Unnecessary conflict and potential litigation will arise over whether a site has been “completely redesigned” or whether new pages were added to an existing site. The only exceptions for full accessibility by the single implementation deadline discussed here should be for (i) legacy pages, addressed in Question 10 below; and (ii) situations where the entity can satisfy the undue burden defense in connection with content posted before the effective date of the regulation and not substantially refreshed thereafter.

When a member of the public goes to a web site, they don’t know if it is new, wholly redesigned, or partially redesigned. The public needs to have a consistent and realistic expectation of accessibility and covered entities need a clear standard for implementation.

Effective Date: As the Department is intimately aware, the regulatory process does not happen overnight. Given the length of the process, the web accessibility requirements should be effective within six months of the publication of the new regulation. The Department of Justice has repeatedly made clear that the ADA as currently written already applies to the websites of Title II and III entities, and that those entities are required to make their websites accessible. The current rulemaking should be seen as clarifying existing law and setting more specific standards for assessing compliance with the ADA. Any implementation delay is inconsistent with the Department’s previously stated position.

A two-year implementation delay as suggested by the Department would encourage companies that have ignored the law to continue to do so. As long as the standards adopted by the Department do not differ widely from currently accepted accessibility standards (and they would not with a rule embracing WCAG 2.0 Level AA and a generalized performance standard) there is no reason for a significant delay.

In addition, a two-year implementation period will be harmful to people with disabilities because covered entities will be encouraged to delay implementing accessibility and will be empowered to implement inconsistent levels of accessibility. Such a delay will stall overall progress towards making the Internet accessible. As a result, people with disabilities will continue to be unnecessarily excluded from online goods, services, information, and communities.

Although a phase-in period may be appropriate for other types of regulations, such as ADA construction standards, it does not make sense in the context of web design. Website accessibility enhancements can often be made without any significant delay, pages are constantly refreshed and new content is both constant and essential to the modern Internet. Few, if any, websites even take two years to design from scratch, or two years to redesign. With today's demands for fresh, current, online presence, few Title II or III entities would leave their websites unchanged for two years. This means that if a two year waiting period were granted, websites would be built, redesigned, refreshed and updated without reference to accessibility.

For these reasons, with the exception of legacy pages discussed below, we urge the Department to adopt a single implementation date no later than six months after the final rule is published in the federal register.

**Question 10:** *The Department seeks comment regarding whether such a requirement would cause some businesses to remove older material rather than change the content into an accessible format. Should the Department adopt a safe harbor for such online content so long as it is not updated or modified?*

As with the exemptions discussed in response to Question 5 above, an exemption (or "safe harbor") for older online content that has not been updated or modified must be very narrowly tailored. This exemption should be limited to pre-existing website pages that are no longer actively viewed or used. The Department must be careful not to treat all existing content as exempted "legacy" content. (Existing content (posted prior to the effective date of the new regulations and not substantially refreshed thereafter) should be subject to the undue burden defense.)

The reason to exempt a narrowly defined category of inactive legacy pages from coverage of the new regulations is to allow covered entities to focus on making active pages conform to the new regulations. The Department should clarify that any exemption for narrowly defined "inactive legacy pages" is not intended to deny access to these pages for people with disabilities. General non-discrimination and effective communication provisions of the regulations, tempered by the undue burden defense, may require a covered entity to provide access to exempted legacy pages on reasonable request by a person with a disability.

We propose the following definitions of "inactive legacy pages" that the Department could consider exempting from the new web accessibility regulations:

(i) Inactive Legacy pages are web pages that "predate the effective date of these regulations, have not been upgraded, modified or substantially refreshed since the effective date of these regulations, and are not necessary for the full use and enjoyment of the website for its intended purposes."

or

(ii) Inactive Legacy pages are web pages that predate the effective date of these regulations, have not been updated for more than two years, and are no longer being regularly viewed. A page is considered no longer regularly viewed if has not been visited more than 25 times within the previous twelve (12) month period.

**Question 11:** *Should the Department take an incremental approach in adopting accessibility regulations applicable to websites and adopt a different effective date for covered entities based on certain criteria? For instance, should the Department’s regulation initially apply to entities of a certain size (e.g., entities with 15 or more employees or earning a certain amount of revenue) or certain categories of entities (e.g., retail websites)? Please provide as much detail and information as possible in support of your view.*

No. There should be a consistent requirement for all websites provided by covered entities. Individuals with disabilities need access to the websites of both large and small covered entities. Moreover, such a limitation on coverage would create confusion and inconsistency in enforcement. In most cases, a customer visiting a website has no reason to know if the entity is large or small and, therefore, no way to know if the website should be compliant.

Nor is an exception for revenue or number of employees necessary. The well-established “undue burden” defense will be available to Title II and III entities that cannot meet the new regulations for content posted prior to the effective date and not substantially refreshed since the effective date. The definition of “undue burden,” takes into account the size of an entity, its financial and other resources, the number of its employees and other factors will adequately protect the legitimate interests of covered entities without erecting additional barriers to implementation of new web accessibility regulations.

Entity size is also not a predictor of ability to satisfy either a generalized performance standard or WCAG 2.0 Level AA criteria. The WCAG 2.0 Implementation Report includes sites of various sizes that have met levels A, AA and AAA Success Criteria.

<http://www.w3.org/WAI/GL/WCAG20/implementation-report/>.

The Department should also clarify, as it has done elsewhere, that if full compliance with the new web accessibility regulations would create an “undue burden” for content posted prior to the effective date and not substantially refreshed after that date for a Title II or III entity, the covered entity must comply with those regulations, to the “maximum extent feasible” and/or provide an alternative even if full compliance would result in an undue burden.

**Question 12:** *What data source do you recommend to assist the Department in estimating the number of public accommodations (i.e., entities whose operations affect commerce and that fall within at least one of the 12 categories of public accommodations listed above) and State and local governments to be covered by any*

*website accessibility regulations adopted by the Department under the ADA? Please include any data or information regarding entities the Department might consider limiting coverage of, as discussed in the "coverage limitations" section above.*

The Department has long held that the ADA applies to covered entities' conduct online. Therefore, the number of covered entities that will both be affected by any new rules and that have not heretofore had any ADA-related Internet access obligations is zero. To the (very limited) extent that "alternative methods" of access are currently allowed that would not be allowed under proposed regulations, in calculating the economic impact of such rules, the Department should be careful to account for the savings covered entities will accrue when they no longer have to maintain duplicative and specialized alternative methods for serving people with disabilities.

**Question 13:** *What are the annual costs generally associated with creating, maintaining, operating, and updating a website? What additional costs are associated with creating and maintaining an accessible website? Please include estimates of specific compliance and maintenance costs (software, hardware, contracting, employee time, etc.). What, if any, unquantifiable costs can be anticipated from amendments to the ADA regulations regarding website access?*

Many entities keep answers to these types of questions confidential for proprietary reasons. Some of the factors involved in building accessibility into a website are discussed in a document entitled "Financial Factors in Developing a Web Accessibility Business Case for Your Organization," available on the Web Accessibility Initiative Website at <http://www.w3.org/WAI/bcase/fin.html>. The Law Office of Lainey Feingold wrote about its costs in developing a WCAG 2.0 Level AAA compliant website at <http://llegal.com/2010/10/llegal-doj-anprm/>. It is widely recognized that costs of accessibility enhancements comprise a very small percentage of the overall cost of maintaining a web presence.

If accessibility features are built in and maintained, the costs are negligible. Even for existing websites with accessibility barriers, many of the obstacles that people with disabilities encounter can be fixed through simple adjustments. While there may be initial accessibility-related start-up costs for entities that have not yet undertaken any accessibility work, these costs must be seen as an investment in full equality in the 21<sup>st</sup> century to millions of people with disabilities. The undue burden defense will be available to covered entities who have not yet complied with the law and need to enhance content posted prior to the effective date and not refreshed since that date, and will protect such entities from unwarranted costs in meeting the new web guidelines. Cost factors should be irrelevant to providing access to new and re-designed websites, just as they are when considering access to new construction and alteration in the built environment.

**Question 14:** *What are the benefits that can be anticipated from action by the Department to amend the ADA regulations to address website accessibility? Please*



*include anticipated benefits for individuals with disabilities, businesses, and other affected parties, including benefits that cannot be fully monetized or otherwise quantified.*

The benefits from long-overdue Title II and III web accessibility regulations are incalculable. Benefits will flow to people with disabilities and the non-disabled public. Web accessibility regulations will be good for private sector businesses, for consumer health and healthcare generally, for the market economy as a whole, for the education system in the United States, for public sector services, and more. For people with disabilities, perhaps more than any other group, the internet offers the possibility of greater engagement, participation, and contribution than ever before possible. But if the internet is not accessible, those possibilities will not be realized, and people with disabilities will be left even further behind their peers and even further out of the mainstream. Both society and individuals with disabilities will benefit from increased online access and participation by people with disabilities. According to a 2010 survey by the Pew Research Center,<sup>7</sup> <http://pewinternet.org/Reports/2011/Disability.aspx>, only approximately 54% of adults with disabilities use the Internet, compared with 81% of adults without disabilities. According to an FCC study, 39% of all people who do not have broadband Internet access have disabilities, even though only approximately 20% of the population have disabilities. Fewer than half of all people over age 65 use the Internet. See [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296442A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf). Lack of consistent accessibility is likely a contributing factor to such non-adoption rates and increasing accessibility will likely increase Internet adoption and use.

The Department's introduction to the web ANPRM recognizes the significant and diverse ways in which Americans in the 21<sup>st</sup> century spend time online. The Pew Research Center found, in particular, that lack of Internet use is a major disadvantage to finding a job and getting health information.<sup>8</sup> Bringing accessibility to all these arenas benefits people with disabilities and society as a whole.

State and local government web accessibility ensures civic engagement by the widest possible range of citizenry. As more and more government entities, large and small, migrate information and services to the web, inaccessibility means citizens with disabilities are either denied access to those services or have to obtain them in a more expensive manner (from public employees). In addition, accessible online services, information and goods allow people to stay in their communities (including rural communities) when otherwise they would be required to move to urban and institutional settings because of lack of transportation, physical access, and other factors. Regulations must be strong and robust to make sure citizens with disabilities are not locked out of the new public sector reality.

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<sup>7</sup> "Americans living with disability and their technology profile," <http://pewinternet.org/Reports/2011/Disability.aspx>.

<sup>8</sup> <http://pewinternet.org/Reports/2011/Disability.aspx>.

Similarly, significant education programs and resources offered by both Title II and III entities are already online. Some institutions provide those resources through accessible web pages, but many more do not. The ones that have not must not be rewarded by delayed implementation or regulations guaranteeing anything less than full accessibility. Students with disabilities at all levels – from grade school through higher education, trade school, and supplemental programs - will benefit from the proposed web accessibility regulations. Making all online education tools and information available to all citizens has tremendous positive consequences for the country.

Benefits to the private retail sector are readily apparent. The more individuals who can use a website that sells products or services, the more products and services those individuals can purchase. The sooner and more completely Title III entities open their virtual doors to people with disabilities, the sooner they can become customers. And in the future, the elderly, who also benefit from web accessibility, will comprise an increasing percentage of consumers with resources.

Purchases made online have already come to predominate over purchases made in brick-and-mortar stores for many types of products, and there are several reasons that people with disabilities would be particularly likely to shop online if accessible websites enabled them to do so. Physical barriers in the built environment, as well as a lack of accessible transportation, make it difficult for many people with disabilities to travel to retail establishments. People with visual impairments have difficulty independently navigating the array of products available at a store and the information conveyed on the labels of those products. People with hearing or speech impairments may similarly find it difficult to obtain information from store personnel about merchandise. Providing product information online can avoid these barriers imposed by physical stores. And of course, people with disabilities want to shop online for the same reasons that their non-disabled peers do, including convenience, privacy, and cost savings. The Internet actually holds enormous potential to level the playing field of commerce for people with disabilities in a way never experienced before, and robust regulations from the Department of Justice on web accessibility will ensure that this potential is realized.

Benefits resulting from accessible online healthcare and medical information will also be significant. In August 2010, a Harris poll found that “The Internet is now a very important source of health information, education and perhaps reassurance for a majority of Americans.” The poll found that “more than half of the searchers have discussed information they found online with their doctors or have searched online because of a discussion with their doctors.” See report on Harris Poll at <http://bit.ly/aOdXF4>.

Potentially increased employment of people with disabilities is also a likely benefit of web accessibility regulations. Many jobs are now done online, and certainly many jobs are advertised online. Many Title II and III entities have a section on their websites for career seekers to gather information and fill out job applications. Online employment

aggregators are also a major means for employers to find workers and for job seekers to find and apply for jobs. Access to these employment sources by people with disabilities is a benefit to those individuals, and to society at large.

Accessibility of online travel information will benefit both travelers with disabilities and the sellers of travel-related goods and services. The web is now widely used for researching hotels and airfares, making reservations, booking services at travel destinations, and more. The travel industry will benefit from more individuals being able to use their online services. The ability to participate in online entertainment and communities will be a significant benefit of the proposed regulations.

Significant statistical resources are available demonstrating both the numbers of people with disabilities in the United States today and the number of Americans online. The intersection of these resources bolsters the Department's efforts to regulate in this area and underscore the importance of web accessibility regulations to a wide swath of the American public. (Various 2010 Disability statistics are available on line at <http://www.disabilitycompendium.org/>. See also <http://dsc.ucsf.edu/main.php>) General statistics related to Internet use in the United States is available from the Advisory Committee to the Congressional Internet Caucus at <http://www.netcaucus.org/statistics/>.

**Question 15:** *What, if any, are the likely or potential unintended consequences (positive or negative) of website accessibility requirements? For example, would the costs of a requirement to provide captioning to videos cause covered entities to provide fewer videos on their websites?*

The likely or potential unintended positive consequences of website accessibility requirements are discussed in response to Question 14 above. In addition to those benefits, it is widely recognized and understood that accessible web pages are easier to use on mobile devices (where significant amounts of online time is spent), assist in the sought-after "search engine optimization," and are friendlier for other automated access techniques. Accessibility also makes a site easier to use with next-generation intelligent agent browsers. We are not aware of any negative consequences.

The specific answer to the Department's question about captioning is a resounding "no." First, the technologies for captioning web-based videos and other audio content are expanding by the day and many mainstream tools are now available, including the free auto-timing and auto-captioning tools available via Google's YouTube site. The free MAGpie caption authoring tool provided by the National Center for Accessible Media is also useful and widely used for captioning the audio content of all kinds of videos. See [http://ncam.wgbh.org/invent\\_build/web\\_multimedia/tools-guidelines/magpie](http://ncam.wgbh.org/invent_build/web_multimedia/tools-guidelines/magpie). Second, the cost to caption a video is a very small fraction of the cost to create any commercial video even today and those costs are expected to continually decrease to approaching zero in the future. Third, if it is an undue burden for a covered entity to caption some or all of its video content posted prior to the effective date of the new regulations, the

Department's undue burden regulations will be applicable. No public entity will be required by new regulations to provide fewer videos.

**Question 16:** *Are there any other effective and reasonably feasible alternatives to making the websites of public accommodations accessible that the Department should consider? If so, please provide as much detail about these alternatives, including information regarding their costs and effectiveness in your answer.*

No. See response to Question 8.

**Question 17:** *The Department seeks input regarding the impact the measures being contemplated by the Department with regard to Web accessibility will have on small entities if adopted by the Department. The Department encourages you to include any cost data on the potential economic impact on small entities with your response. Please provide information on capital costs for equipment, such as hardware and software needed to meet the regulatory requirements; costs of modifying existing processes and procedures; any affects to sales and profits, including increases in business due to tapping markets not previously reached; changes in market competition as a result of the rule; and cost for hiring web professionals for to assistance in making existing websites accessible.*

As noted elsewhere, the Department's undue burden analysis will allow small businesses to consider various costs when considering web accessibility obligations for content posted prior to the effective date of the regulations and not refreshed after that date.

Entities that are not familiar with or experienced in providing website accessibility may be fearful of accessibility requirements and may foresee potential costs and burdens that arise out of their fear rather than out of reality. Therefore, the Department should be careful to look beyond the fears and expect that any responders who allege such risks provide data to support their claims and to distinguish actual experience from unfounded, albeit sincere, fear. Baseless concerns about costs and complexities are not a reason to avoid regulation, but, rather, are a reason to provide clear requirements and readily available technical assistance.

Small businesses likely will not need to employ their own accessibility experts if their sites are not large enough to justify it. Currently, a variety of accessibility resources, including accessibility consultants, web development consulting firms with high levels of accessibility expertise are available. As accessibility is required, web design templates and web development consultants will automatically incorporate accessibility, thus further reducing the costs.

**Question 18:** *Are there alternatives that the Department can adopt, which were not previously discussed in response to Questions 11 or 16, that will alleviate the burden on small entities? Should there be different compliance requirements or timetables for small*

*entities that take into account the resources available to small entities or should the Department adopt an exemption for certain or all small entities from coverage of the rule, in whole or in part. Please provide as much detail as possible in your response.*

No, there should not be different compliance requirements or timetables for small entities because those entities will be able to avail themselves of the undue burden defense for content posted prior to the effective date of the new regulations. For the same reason, and for the reasons stated in response to Questions 9 and 11, under no circumstances should small entities, regardless of the definition, be exempted from coverage in whole or in part.

**Question 19:** *The Department is interested in gathering other information or data relating to the Department's objective to provide requirements for Web accessibility under Titles II and III of the ADA. Are there additional issues or information not addressed by the Department's questions that are important for the Department to consider? Please provide as much detail as possible in your response.*

We applaud the U.S. Department of Justice for beginning the process of implementing web accessibility regulations for Title II and III entities. We urge the Department to act swiftly in adopting rigorous regulations. The ADA regulations have opened up the American built environment and traditional communications methods to people with disabilities. Web regulations are desperately needed to ensure that today's virtual world is also available to millions of individuals with disabilities in the United States.

We salute the Title II and III entities that have already made their web content, programs and services accessible to people with disabilities. These entities, large and small, show us that online accessibility is possible, attainable, and real. Any delay in implementing robust web accessibility regulations will reward entities who have ignored the law, and is inconsistent with the Department's long-standing recognition that online accessibility is required.

More importantly, in a world that each day becomes more and more virtual, any delay in implementing meaningful web accessibility regulations will further exclude people with disabilities from full and equal access to this critical part of today's economic, public, educational and social mainstream.

Thank you for your consideration of improvements to the ADA Standards and for the opportunity to comment on this important ANPRM.

Sincerely,

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