

The Consumer Finance Podcast: ADA Website Accessibility: Insights and Updates

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Guests: Kim Phan and Lori Sommerfield

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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. And I'm glad you've joined us for today's episode, where we're going to be talking about some important updates in ADA website accessibility issues. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com) and [TroutmanPepperFinancialServices.com](https://www.TroutmanPepperFinancialServices.com).

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So first, on July 25th of this year, the Department of Justice issued a proposed rule under Title II of the Americans with Disabilities Act. That's the title that deals with state and local governments that seeks to improve state and local government website and mobile app access for individuals with disabilities. But it's our understanding that Title II rulemaking will likely be used by the Department of Justice as a model for new rules under Title III governing public accommodations. That means the private sector websites at some later date. So it's important to understand those Title II proposed rules. And then the second thing we're going to talk about during this episode is that the International World Wide Web Consortium, W3C, released the latest version of its Web Content Accessibility Guidelines, WCAG. This is version 2.2 as a proposed recommendation on July 20th this year. And then those were finalized and issued on October 5th of this year.

And then also on July 24th, the W3C released its first working draft of the WCAG 3.0 technical standards. So that's a preview of what's to come under those accessibility guidelines in the

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future. As those evolve, we want you to know about it. So we're going to be talking about it during this hour too. Kim and Lori, thanks very much for joining me on the podcast today to talk about this stuff. Kim, let me start with you and the proposed rule that came out from the Department of Justice under Title II of the ADA. Give the listeners some background about what rules have been proposed. What's the DOJ proposing with respect to Title II?

Kim Phan:

So the Department of Justice has issued a Notice of Proposed Rulemaking. So these aren't the final rules yet. This is just another step toward final rules that would help what the DOJ characterizes as a shift of services from state agencies, federal agencies online, especially in the wake of COVID, where a lot of services were pushed online to prevent person-to-person interactions. As that shift online has been occurring very rapidly over the last couple of years, the DOJ has stepped up their activity in this area to try to assist people with disabilities to be more capable of accessing those services. The public comment period for these proposed rules closed on October 3rd, and we're going to be monitoring very closely for when those final rules come back. And I'm sure Lori and I will be thrilled to be back on the podcast with you to talk about what those look like when they're finally published. But this has been a long time coming.

The ADA was first signed into law way back in 1990, so over 30 years ago. And while the DOJ has issued implementing regulations under Title II, at that time, back in 1991, when the rules first came out, obviously the internet was just in its infancy. And while the DOJ has over the years articulated their interpretation of the ADA as also applying to websites, it wasn't until more recently, in 2010, the DOJ issued an initial advance notice of proposal rulemaking to talk about web information, online services. While that was somewhat derailed for a short period of time during the Trump administration when President Trump issued an executive order withdrawing any further work on that particular rulemaking, since President Biden has taken office, the DOJ has picked this back up.

But over the years, despite not having rules in this area, they have brought a number of enforcement actions to enforce the ADA with regard to websites and mobile apps, including against Louisiana Tech University in 2013, the city of Denver, Colorado, in 2018, the University of California in 2022, as well as issuing specific guidance, not rules, just their guidance, their interpretive guidance of the ADA in March of 2022, about how to make websites accessible to those with disabilities. So that's just a little background on how we got to where we are today.

Chris Willis:

Okay. Well, thanks for that. What do the proposed rules establish in terms of a standard if they are finalized as proposed?

Kim Phan:

The DOJ looked at a number of different standards that are currently out in the world. They looked at standards by NIST, the National Institute of Standard Technology. They looked at ISO, the International Standards Organization, but where they landed was on the Web Content Accessibility Guidelines, which Lori's going to talk about in quite a bit more detail shortly. But the level of compliance that they're looking at with regard to those standards is level AA 2.1 success criteria, which again, I think Lori's going to give some more details about, but the DOJ has said

that is what their expectation is here in the United States with regard to websites and mobile apps.

Chris Willis:

Got it. So if the rule is finalized, what would be the effective date for covered entities to adopt what you just mentioned in terms of the standard?

Kim Phan:

And just to be clear, the covered entities we're talking about again are agencies, governmental agencies, federal state agencies, and the standard that the DOJ is going to be looking at with regard to those state and federal agencies implementing this is looking at total population for which those public entities are responsible. And we're talking about total population, we're talking about the size of the public entity's footprint according to the U.S. Census Bureau, or if the public entity isn't directed at a specific population, the jurisdiction that it sits within. So based on total population, again, which is somewhat fuzzy math, I think on the part of DOJ, if a agency services a population over 50,000 people, they will have two years to implement the standards as articulated in the proposed rules. If the agency services less than 50,000, they will have three years.

Chris Willis:

Got it. Are there any exceptions that are set forth in the proposed rule of particular categories where compliance isn't required to the standard that you mentioned before?

Kim Phan:

There is online content, certainly legacy systems, other types of content that the DOJ acknowledges may be difficult, if not impossible, to bring up to standard with the Web Content Accessibility Guidelines. So they have laid out seven different exemptions for things like archived web content, preexisting electronic documents that were not established or developed under these standards. Web content posted to an agency's website by a third-party or third-party content that the agency links from on the agency website with regard to state-funded universities and colleges course content, class materials only if that content is behind a password-protected or otherwise secured websites for enrolled students, as well as other conventional electronic documents that individuals may be accessing behind a password-protected or otherwise secured firewall on a website. The DOJ also permits companies to pursue conforming alternative versions of webpages, which is a pretty high standard.

What they have said with regard to these conforming alternative versions of websites is that it's only permissible when the actual website that the agency makes available is not possible, high standard, impossible due to technical or legal limitations to convert in compliance with the standard. But the alternative page still has to be accessible to the extent it can be, has to be up-to-date with the same content as the accessible page, has to have the same level of functionality. And there has to be a link between the accessible and the non-accessible versions that someone with an accessibility issue would be able to navigate.

Chris Willis:

Got it. Now we don't think that there's that many in-house lawyers or compliance people from government agencies that listen to this podcast, it being a financial services podcast. So why is this development under Title II of the ADA important to our private sector listeners in the audience for this podcast?

Kim Phan:

Well, as you foreshadowed a little bit in your opening comments, Chris, this is something that absolutely will be a precursor to Title III, the private sector title of the ADA that will address the private sector. And what's so important about what the DOJ is doing here is that it's the first time in history the DOJ has ever issued a proposed rule on website accessibility. As I noted, they've issued other ADA-related rulemakings with regard to physical accessibility and other areas of life. And while the DOJ has issued prior guidance that gives an insight into what they're thinking with regard to online accessibility, this is the first time that they've put it down pen to paper. Here's what our vision is for the proposed rules. And once these are finalized, I think there's a wide expectation that something similar with similar expectations, a similar standard, similar exceptions, and options that are available will be released for the private sector to adopt.

Chris Willis:

Okay. So it's a great cue for us in terms of the compliance expectations that may be here already and may be expressed in a future rulemaking under Title III, right?

Kim Phan:

Correct.

Chris Willis:

Okay. Well, I don't want to leave Lori out of this conversation. So, Lori, if you don't mind, I'd like to ask you to talk about the new WCAG guidelines, the new 2.2 that just was finalized, and then the proposed sort of initial draft of the 3.0 technical standards. First of all, maybe it's obvious to most people, but not to me. Why is it important for companies to pay attention to these technical standards issued by the World Wide Web Consortium?

Lori Sommerfield:

First, WCAG was mentioned by the DOJ as the appropriate standard for website accessibility in its attempted rulemaking for Title III back in 2010 and 2016, as Kim previously mentioned. And now it recommends the WCAG standard in its proposed rulemaking for Title II. So arguably the DOJ doesn't want to have to come up with and then maintain a separate set of accessibility standards when the WCAG standards have proven to do quite nicely, thank you. Secondly, the WCAG technical standards have really become the de facto accessibility standard, not only in the U.S. but also worldwide. That's because DOJ hasn't issued a uniform accessibility standard for Title III of the ADA yet. So companies had turned to the W3C's WCAG standards as the appropriate benchmark to use, even though they're purely voluntary standards.

Chris Willis:

Okay. So we know they're important. Let's talk about the significance of this new technical standard that just came out. Can you tell me about the new 2.2 standard and how it differs from prior versions like 2.1 that preceded it?

Lori Sommerfield:

Sure. There's a lot of technical detail here that I won't go into, but let me just say that the WCAG 2.2 standard took a while to develop. It was first issued in February of 2020, and it was just issued this past summer. So it's taken three years to go through the developmental process, working drafts, and commentary process within W3C. WCAG 2.2 is primarily geared toward making websites and mobile apps more accessible to individuals who have mobility and cognitive disabilities. The guidelines also make web content more usable by older individuals who have changing abilities due to the aging process. So WCAG 2.2 uses the same three conformance levels as 2.1, and those conformance levels are single A, AA, and AAA. I kind of think of those as a minor league baseball classification. Single A is pretty easy to comply with, AA is the intermediate standard (it's moderately difficult but makes sense to comply with), and AAA is the most difficult.

Folks consider the AA standard to be sort of the "Goldilocks" standard or the preferred standard to comply with, right in the middle. The new WCAG 2.2 technical standard adds nine new success criteria. There are two at the single A level, or at AA, and three at AAA, and those build on top of what already exists in the WCAG 2.1 standard. So let me just give an example for the audience. There's one new guideline called "Dragging Movements" that specifies that a drag-and-drop type of movement can't be the only way to do something with a pointer like a mouse or finger touch. So an alternative method should be provided to assist individuals who have mobility issues. There's another guideline called "Target Size" that states the keyboard buttons have to be large enough so users can hit the right keys, so they have to have some sort of minimum size or spacing requirement around them.

So, as you can see, some of the new success criteria deals with the interface of equipment with website accessibility. That rather brings in this sort of reality aspect to the WCAG standards. While 2.2 really isn't a significant change, I think it represents progress in the evolution of the 2.X series, as we call it.

Chris Willis:

Okay. Well, now that the 2.2 standard has been finalized, what should financial institutions in particular be doing in response to its being finalized in October?

Lori Sommerfield:

They should begin migrating toward the WCAG 2.2 standard now, and migrating from one WCAG standard to another takes time. There's developer training involved, there's implementation steps, and post-validation testing. So it's important to get started now on the scoping process and implementation efforts. And if an institution is already complying with the prior standard of WCAG 2.1, it really won't be a heavy lift. But if your institution is complying with

an earlier standard like 2.0 or maybe not complying with the WCAG standards at all, then it's going to involve more effort.

As a point of reference, I just want to mention that when WCAG 2.1 was introduced back in June of 2018, it didn't become the standard requested by plaintiffs in ADA website accessibility lawsuits until about mid-year 2020. So it usually takes about one or two years until a new WCAG standard becomes the new norm in legal proceedings. I expect that some of the more active plaintiff law firms will likely begin citing to the WCAG 2.2 standard sooner.

Chris Willis:

And, Lori, you've talked a lot about the evolution of these standards over time and how sort of each successive version has built on the one preceding it. And I think in addition to finalizing the 2.2 standard, we also have sort of a preliminary draft of the 3.0 standard that has just come out. What's going on with that? Tell the audience a little bit about what are the objectives of that set of standards, and what's the timeline that you expect in terms of them ultimately being finalized?

Lori Sommerfield:

That's right, Chris. The W3C organization is always working on different versions of the WCAG standard in tandem. So while they were working on 2.2, they were also working on version 3.0. And 3.0 is going to represent another major revision to W3C's technical standards. And it's expected to involve a more substantial restructuring of the website accessibility guidance than the 2.X series. And the goal is to address certain gaps that might exist in the framework and better reflect these types of real-world accessibility issues that I was mentioning. Also reflecting the use of modern technology. Now, in terms of timing, the final release isn't expected until at least 2027. We're still years away from WCAG 3.0 becoming a recommendation, and the WCAG 2.X series still has a pretty long shelf life.

Chris Willis:

Got it. You've talked about the necessity of beginning efforts to comply with the new 2.2 technical standard, and of course, this is an area where financial institutions have seen a lot of private litigation over the years for alleged failure to make their websites accessible to people with disabilities. In light of that history of litigation and legal exposure, do you have any other recommendations for how financial institutions should seek to comply with the ADA with respect to their websites and mobile apps for people with disabilities?

Lori Sommerfield:

DOJ enforcement actions and press releases are very informative in terms of what the DOJ considers to be best practices in establishing an ADA risk management program and making websites and mobile apps accessible to individuals with disabilities. But let me just throw out a few ideas here for the audience. First of all, it's really important to understand whether your website and mobile apps actually meet the WCAG standards. Having your website and mobile app audited by a qualified website consultant for compliance with the applicable technical standard is a really great idea. That way, you know where the gaps lay and where you can address them. You might seek to have a website consultant audit your website for conformance

with WCAG 2.1 if you're using that now and then help you migrate to 2.2, and maybe do another audit after you implement the WCAG 2.2 standards.

I also recommend posting an accessibility statement on your website and mobile app, letting people know that your organization is committed to ADA compliance. You should also offer contact information for individuals with disabilities who might encounter technical barriers and provide a feedback loop so that they can suggest ways to improve the accessibility of your website or mobile app. And then finally, I would just say treat ADA website accessibility as part of your compliance management system and build a compliance risk management program around it involving appropriate policies, procedures, and an accessibility coordinator to manage it all. Those are my thoughts.

Chris Willis:

Those are all great suggestions, Lori. So thank you for sharing that. And thanks, Kim, for being on the podcast today too to talk about what the DOJ did recently with its proposed rulemaking. And, of course, thanks to our audience for listening to today's episode. Don't forget to visit and subscribe to our blogs, [TroutmanPepperFinancialServices.com](https://www.troutmanpepper.com/financial-services) and [ConsumerFinancialServicesLawMonitor.com](https://www.troutmanpepper.com/consumer-financial-services-law-monitor). And while you're at it, why don't you go ahead and visit us at [troutman.com](https://www.troutman.com) and add yourself to our Consumer Financial Services email list? That way, you'll get copies of the alerts that we send out and invitations to our industry-only webinars. Don't forget to head to your app store, look up Troutman Pepper, and try out our really nifty mobile app. And, of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.

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