

Web and App Accessibility: Understanding the U.S. Justice Department's Proposed Rulemaking



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Introduction

Institutions of higher education have always had to comply with accessibility laws, however; as reliance on digital technologies and assets has expanded, so have colleges and universities' obligation to students and the public.

Traditionally, the focus was on accessibility around providing physical accommodations, such as installing ramps and elevators so those with physical disabilities could navigate campuses, but now, the spotlight has shifted to digital accessibility on websites and apps.

This shift has become even more pronounced with the integration of online learning platforms, virtual classrooms, and web-based resources. And the digitalization of educational content – from course materials to administrative resources – has made web accessibility an imperative that the Department of Justice sees as critical.

To help guide entities that serve the public and provide clarity on meeting legal obligations outlined in the Americans with Disabilities (ADA) Act, the Justice Department has proposed technical standards for web and mobile accessibility.¹ “Just as steps can exclude people who use wheelchairs, inaccessible web content can exclude people with a range of disabilities from accessing government services.”²

This whitepaper outlines the Justice Department’s Notice of Proposed Rulemaking (NPRM), along with key provisions, benefits of the proposed rule and next steps in rulemaking.

“Just as steps can exclude people who use wheelchairs, inaccessible web content can exclude people with a range of disabilities from accessing government services.”

¹ <https://www.federalregister.gov/d/2023-15823/p-736>

² <https://www.federalregister.gov/d/2023-15823/p-737>

Background: NPRM for Website and App Accessibility is a Major Milestone

In August 2023, the Justice Department proposed a revision of the regulation that implements title II of the ADA to include requirements and technical standards for making services, programs, and activities offered by state and local government entities accessible on both the web and mobile applications³.

Title II of the ADA prohibits discrimination on the basis of disability in programs, services, and activities provided by public entities, including public schools, community colleges, and public universities.⁴

“Across the United States, people routinely rely on web and mobile apps to access a variety of vital public programs and services like employment and educational resources, voting information, health and emergency services, parking, and transit schedules,” a press release announcing the NPRM noted, adding that the proposed rule is even more significant as essential services and programs are offered through web and mobile apps. “It is critical for these technologies to be accessible for people with disabilities.”⁵

“This proposed rule seeks to ensure that Americans with disabilities have equal access to the websites and apps that connect them to essential services provided by state and local governments.”

“This marks the first time in the history of the Americans with Disabilities Act that the Justice Department has issued a proposed rule on website accessibility,” Attorney General Merrick B. Garland said in the press release. “This proposed rule seeks to ensure that Americans with disabilities have equal access to the websites and apps that connect them to essential services provided by state and local governments.”⁶



³ <https://www.federalregister.gov/documents/2023/08/04/2023-15823/nondiscrimination-on-the-basis-of-disability-accessibility-of-web-information-and-services-of-state#h-9>

⁴ <https://www.ada.gov/resources/2023-07-20-web-nprm/#:~:text=WCAG%2C%20the%20Web%20Content%20Accessibility,would%20be%20required%20to%20follow>

⁵ <https://www.justice.gov/opa/pr/justice-department-advances-proposed-rule-strengthen-web-and-mobile-app-access-people>

⁶ [ibid](#)

Key Provisions of the Proposal

The Justice Department proposes:

- 1. The adoption of Web Content Accessibility Guidelines (WCAG) 2.1 Level AA as an internationally recognized technical standard for web content under Title II of the ADA.**

Developed by the World Wide Web Consortium, WCAG defines how to make web content more accessible to those with disabilities, “including visual, auditory, physical, speech, cognitive, language, learning, and neurological disabilities.”⁷

Level AA is the middle tier of WCAG compliance sandwiched by A and AAA. If a website or application meets Level AA compliance, it also meets Level A compliance, and is considered “reasonably accessible for most users,” according to the Bureau of Internet Accessibility⁸. Each level has its own compliance criteria. The NPRM notes that the highest level of conformance is not proposed because, according to the World Wide Web Consortium (W3C), it is not always possible to achieve in all instances.⁹

- 2. Staggered compliance dates for implementation based on the entity’s population according to the U.S. Census Bureau.**

Because smaller entities may need time and resources to become compliant, the Department outlined a staggered compliance approach. Entities with 50,000 or more would be required to become compliant with WCAG 2.1 Level AA within two years from when the final rule is implemented. Entities with a population of less than 50,000 would have three years from the final rule’s issuance to comply.

Compliance Dates for WCGA 2.1 Level AA

Public Entity Size

Fewer than 50,000 persons/ special district governments

50,000 or more persons

Compliance Date

Three years after publications of the final rule

Two years after publications of the final rule

- 3. There are seven exemptions proposed, with limitations.**¹⁰

The thought behind outlining exemptions is to enable entities to prioritize accessibility issues. “So, we have proposed narrow exceptions for some specific types of

⁷ <https://www.w3.org/TR/WCAG21/>

⁸ <https://www.boia.org/blog/whats-the-difference-between-wcag-level-a-level-aa-and-level-aaa>

⁹ <https://www.federalregister.gov/d/2023-15823/p-727>

¹⁰ <https://www.federalregister.gov/d/2023-15823/p-34>

content that we do not think are as frequently used or that may be particularly hard for state and local governments to address right now.”¹¹

Exemptions include:

- Archived web content
- Pre-existing conventional electronic documents
- Web content posted by third parties on a public entity’s website
- Third-party web content linked from a public entity’s website
- Course content on a public entity’s password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution
- Class or course content on a public entity’s password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course at a public elementary or secondary school
- Conventional electronic documents that are about a specific individual, their property, or their account and that are password-protected or otherwise secured, including those available through mobile apps



Limitations further outline each of the above exemptions. In addition, the notice states that compliance is not required to the extent that it causes “undue financial and administrative burdens or results in a fundamental alteration of the services, programs, or activities of the public entity.”¹² The entity must provide proof of the burden and a written statement for how that conclusion was reached.

In the context of education, the NPRM notes that higher education institutions must still comply with other laws, such as the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act.¹³

¹¹ <https://www.ada.gov/resources/2023-07-20-web-nprm/#:~:text=WCAG%2C%20the%20Web%20Content%20Accessibility,would%20be%20required%20to%20follow.>

¹² <https://www.federalregister.gov/d/2023-15823/p-35>

¹³ <https://www.federalregister.gov/d/2023-15823/p-50>



Benefits of Proposed Rules

The Department evaluated the financial benefits of making public entity websites and mobile apps accessible, which include time savings for users, especially those with disabilities, and additional earnings resulting from improved educational attainment.

The estimated benefits total \$8.9 billion per year, with considerations for the population size and the implementation period. The analysis involved various assumptions, and the Department conducted sensitivity analyses to show potential variations in the estimated benefits. Overall, the goal is to emphasize the considerable positive impact of web and app accessibility on both individuals and government entities.

In addition to outlining quantifiable benefits in the Preliminary Regulatory Impact Analysis (PRIA) of the the Justice Department highlights “unquantified benefits” of implementing its proposals, which “can be difficult or impossible to quantify yet provide tremendous benefit to society.”¹⁴ Unqualified benefits to individuals, including those with disabilities, include:

Increased independence, flexibility, and dignity: Because individuals would be able to access websites and mobile applications without the aid of another individual and on their own time, the proposed rules would promote independence, flexibility and dignity.

Increased privacy: When individuals can access websites and mobile apps independently, they do not need to share personal information with a third party, such as a caregiver or aide, reducing the risk of theft or misuse.

¹⁴ <https://www.federalregister.gov/d/2023-15823/p-683>

Reduced frustration: The inability to access websites and mobile apps is a source of frustration for those with disabilities. “In addition to the inconvenience of not being able to complete a task, this frustration can lead to a lower-quality user experience,” the NPRM states.¹⁵

Decreased assistance by companions: The proposed rules note that when an individual can complete tasks without the help of friends or family members, the quality of those relationships may benefit as the person with disabilities is no longer dependent on their companions.

Increased program participation: Inaccessibility can discourage disabled individuals from participating in government services, programs, and activities. By reducing barriers to access, more people with disabilities may choose to participate in various programs.

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Increased civic engagement and inclusion:

According to the proposed rule, “Increased program participation in many civic activities will result in an unquantified benefit of greater community involvement, which will allow people with relevant disabilities to advocate for themselves and others and participate more actively in the direction of their communities.”¹⁶

Next Steps in Rulemaking

The proposed rule and NPRM are the first steps in changing existing requirements or adding new requirements to the ADA. The Department also accepted public comments through Oct. 3, 2023. After the comments are reviewed, the Department will propose a Final Rule, which is typically issued three to six months after the comment period ends.¹⁷

According to the federal register, “When an agency publishes a final rule, generally the rule is effective no less than 30 days after the date of publication in the Federal Register.”¹⁸

¹⁵ <https://www.federalregister.gov/d/2023-15823/p-706>

¹⁶ <https://www.federalregister.gov/d/2023-15823/p-717>

¹⁷ https://archive.ada.gov/doj_responsibilities.htm#:~:text=Under%20title%20III%2C%20the%20Department%20of%20Justice,were%20first%20published%20on%20July%2026%2C%201991

¹⁸ https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf

Frequently Asked Questions

What's the definition of web content?

Web content is information or a sensory experience accessed via a web browser or other software, including text, images, sounds, videos, controls, animations, navigation menus, and documents. The rule would apply to any content made available to the public, unless it were “excepted.”

What is the Americans With Disabilities Act?

The Americans with Disabilities Act (ADA) is a landmark civil rights law that prohibits discrimination against individuals with disabilities. Enacted in 1990, the ADA aims to ensure equal opportunities and access to goods, services, employment, and public facilities for people with disabilities. The law prohibits discrimination on the basis of disability in various areas, including employment, public accommodations, transportation, and telecommunications.

What is a Notice of Proposed Rulemaking (NPRM)?

It's a stage in the rulemaking process in which a proposed regulation is shared with the public for feedback before a final regulation is adopted.

What entities would have to comply with the proposed rule?

According to the U.S. Department of Justice Civil Rights Division, “Like the rest of Title II, the proposed rule would apply to all state and local government entities.”¹⁹ Examples include:

- State and local government offices that provide benefits and/or social services, like food assistance, health insurance, or employment services
- Public schools, community colleges, and public universities
- State and local police departments
- State and local courts
- State and local elections offices
- Public hospitals and public healthcare clinics

“Increased program participation in many civic activities will result in an unquantified benefit of greater community involvement, which will allow people with relevant disabilities to advocate for themselves and others and participate more actively in the direction of their communities.”

¹⁹ <https://www.ada.gov/resources/2023-07-20-web-nprm/#:~:text=WCAAG%2C%20the%20Web%20Content%20Accessibility,would%20be%20required%20to%20follow>

- Public parks and recreation programs
- Public libraries
- Public transit agencies
- What is the penalty for noncompliance with any Final Rule?

According to an article in JD Supra, “The DOJ enforces Title II of the ADA through lawsuits and settlement agreements, which often require the public entity to revise its policies and procedures and, in some cases, pay substantial damages to impacted individuals. The DOJ may also participate in private suits including class actions that it determines may impact the interpretation and application of the ADA.” Though, it’s important to note that the NPRM did not outline penalties for noncompliance.

When will the Final Rule be issued?

The Final Rule is expected to be issued within six months from when the public comment period ends, and then it typically becomes effective 30 days later.