

Aldrich & Bonnefin, PLC

BANKING OPERATIONS & FINTECH UPDATE

AUGUST 2017

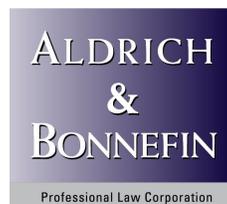
DOJ SCRAPS PLAN TO ADDRESS ADA WEBSITE ACCESSIBILITY

As reported in the November 2016 BCG newsletter, financial institutions and other businesses are increasingly becoming the target of lawsuits alleging their websites are not in compliance with Title III of the American with Disabilities Act (ADA). Title III requires individuals who own, operate or lease a “place of public accommodation” to provide full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations. 42 USC 12182(a). The lawsuits often come from attorneys representing blind or visually impaired individuals, alleging that the company’s website is inaccessible to these individuals in violation of Title III.

The Department of Justice (DOJ) is responsible for enforcing ADA compliance but has yet to implement standards or regulations addressing website accessibility. Therefore the courts have been inconsistently determining whether a website is a “place of accommodation” under the ADA. For example, in 2012 the courts reached different conclusions on two seemingly identical Title III ADA cases against Netflix. In both cases, hearing-impaired individuals alleged that Netflix’s streaming video

library violated the ADA. Following Ninth Circuit precedent, a California district court dismissed the claim, holding that since Netflix’s website is not an actual physical place, it is not a place of public accommodation under the ADA. Because the website is not a place of public accommodation, the ADA does not apply to access to Netflix’s streaming library. *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012). However, a Massachusetts court reached the opposite conclusion, holding that Netflix’s website is a place of public accommodation under the ADA. *National Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012). Following First Circuit precedent, the Massachusetts court applied a more expansive interpretation of place of public accommodation that is not limited to actual physical stores.

Another difficulty plaguing courts is how to determine whether the website is sufficiently accessible under the ADA. The DOJ has indicated that it considers a website to be accessible if it complies with the Web Content Accessibility Guidelines 2.0 (WCAG 2.0) published by the World Wide Web Consortium (W3C), available at www.w3.org/TR/WCAG20/. To satisfy this standard, a website must satisfy the WCAG 2.0 success criteria for 12 different guidelines. The



The Banking and Business Law Firm

www.ablawyers.com ■ 949.474.1944

18500 Von Karman Ave., Suite 300, Irvine, California 92612

Authors: Keith R. Forrester, Esq. and Anne M. McEvilly, Esq.

success criteria under the WCAG 2.0 is assessed under varying degrees as level: A, AA or AAA. This means a website satisfies the WCAG 2.0 standard by meeting the Level A, AA or AAA success criteria for all 12 guidelines. However, the lack of formal guidance leaves it open to interpretation as to whether a website must meet a specific level (A, AA or AAA) of the success criteria to satisfy the ADA.

Further complicating matters is the fact that the DOJ appears to apply the WCAG 2.0 success criteria levels inconsistently. In 2014, the DOJ reached a settlement agreement with Peapod, LLC for ADA violations related to the company's website accessibility. In the consent decree, the DOJ required Peapod, LLC to ensure that its website and mobile applications conform to, at a minimum, the Level AA success criteria (www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website). In that same year, the DOJ reached a settlement agreement with H&R Block. In the consent decree, H&R Block agreed that its websites would meet, at a minimum, Level A or Level AA success criteria. See www.ada.gov/hrb-cd.htm. These inconsistencies make assessing a website's ADA compliance problematic because it is impossible to know whether the website must meet Level A, AA or AAA. So while the WCAG 2.0 is a useful reference tool it does not guarantee the website will be ADA compliant.

As discussed in the November 2016 BCG newsletter, it was previously anticipated that the DOJ would adopt or conform standards to address these various discrepancies by 2018. However, on July 20, 2017, the DOJ's posted its unified agenda of regulatory and deregulatory actions and listed, "Accessibility of Web Information and Services of Public Accommodations" on the inactive list. Therefore, it appears institutions will be stuck relying on judicial opinions to determine ADA website compliance as the DOJ seems unlikely to publish uniform guidelines in the near future.

Contact Keith Forrester at KForrester@ABLAWYERS.COM for more information regarding the ADA and website accessibility.