

# Legal Briefings

*Prepared by:*

**Barry C. Taylor, Vice President of  
Systemic Litigation and Civil Rights and  
Rachel M. Weisberg, Staff Attorney, with  
Equip for Equality**



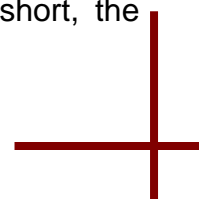
## **Websites & the ADA: Accessibility in the Digital Age<sup>1</sup>**

### **Introduction**

Congress passed the Americans with Disabilities Act (“ADA”) in 1990 to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>2</sup> The ADA prohibits discrimination in all aspects of society—from employment to government services to businesses to telecommunications. Despite these broad proclamations against discrimination, the ADA was silent about its application to the Internet. This is not surprising; in 1990, the Internet, at least as we know it today, did not exist. Throughout the last two decades, there has been a debate about whether the ADA’s non-discrimination requirements apply to websites. This Legal Brief explores the legal issues surrounding website accessibility, focusing on case law, regulatory interpretations, and settlement agreements. This Legal Brief first discusses the ADA, and then briefly outlines other relevant state and federal laws.

#### Internet Accessibility: Why it Matters to People with Disabilities

Over the past two decades, the Internet has completely altered the way most people live their lives. Instead of traveling from store to store to compare prices, consumers can quickly find the best deal by searching online. Instead of visiting a local government office, residents can easily apply for benefits, renew State-issued identification cards, file taxes, and even register to vote in some states, all by visiting their local government’s website. Instead of going to a library to learn more about the ADA, you were able to download this Legal Brief from a website. These technological advances have changed the way that college students register for classes, and how doctors’ offices share test results. The Department of Justice (“DOJ”) called the Internet “the ubiquitous infrastructure for information and commerce.”<sup>3</sup> In short, the Internet is everywhere, and affects nearly everything.



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For some people, including many people with disabilities, the Internet opens doors. However, many people with disabilities have a difficult or impossible time navigating certain websites due to the existence of electronic barriers.

## Internet Accessibility: A Primer on Website Accessibility

This Legal Brief does not provide technical guidance on how to make an accessible website. Nonetheless, it is important to have a basic understanding of what accessibility means in the virtual world to have a better understanding of the legal issues at play. Thus, this Legal Brief includes a short (albeit incomplete) introduction to a few common barriers to website access. For those interested in the technical aspects of website access, see the end of this Legal Brief for information about the various technical standards, and technical assistance materials regarding such standards.

Many barriers that exist in the virtual world impact individuals who are blind who use screen-reading software when using a computer. To aid the user, screen-reading software reads the text on the computer screen aloud. Screen-reading software only works, however, if the electronic content is configured in a readable way. For instance, if a website uses a graphic or an image to convey content, screen-reading software cannot read (or comprehend) the graphic or image, and as a result, the individual who is blind will be disadvantaged by not having access to the graphic/image's meaning. However, there is a simple solution to this problem. The web developer, or the individual adding the content to the site, can label the graphic/image with a text description. This is frequently referred to as tagging the image with an "alt text." With this additional description, the screen-reader (and consequently, the individual), will be able to obtain the same information conveyed visually through the graphic/image. For similar reasons, information conveyed through graphics or charts in an image form are only accessible with appropriate text descriptions. Further, given the manner in which screen-reading software reads content, websites containing tables need to be labeled with row and column identifiers that ensure that the information is understood in a meaningful way. Likewise, screen-reading software is unable to comprehend color, so when color is the exclusive medium to convey content, this content becomes inaccessible to a screen-reader. Color coding content also renders the content inaccessible to individuals who are colorblind. Similarly, some individuals with low-vision need to adjust a website's font, size, or color contrast to access the information. Websites can be designed in a way to allow the user to manipulate the text in this way.

Barriers to Internet access exist for individuals with other types of disabilities as well. For example, if a website includes a video, this content is inaccessible to a user who is deaf or hard of hearing, unless the video is captioned. Further, websites that require the user to manipulate a mouse, without providing keyboard alternatives, are inaccessible to some individuals with mobility disabilities. While there are certainly a number of additional examples of electronic barriers, and solutions, one final example is that web content should not include flashing visual content, which can trigger seizures.

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Although websites exist in the virtual world, an accessible website has much in common with an accessible building. Like a physical building, it is more cost-effective to create an accessible website in the first instance, instead of retro-fitting it later for accessibility.<sup>4</sup> Second, the principles of universal design apply to websites, just as they do to physical buildings. A ramp might be intended to create access for an individual who uses a wheelchair, but also benefits others, including parents with strollers or travelers with suitcases. Likewise, accessible websites might be intended to benefit people with disabilities, but can benefit others as well. Captioning on a video may be intended for a user who is deaf, but would also benefit a non-native English speaker, or a user navigating the website in a crowded venue. Further, the same technology that enables text to be readable by screen-reading software also makes text searchable, a feature that benefits all users.

## Americans with Disabilities Act

Whether websites must be accessible to people with disabilities has been a hot topic in the legal and disability community for the past fifteen years. Throughout the country, courts have expressed differing opinions about whether Title III of the ADA applies to the Internet, and if so, under what circumstances. The DOJ, on the other hand, the federal agency charged with promulgating regulations and enforcing Titles II and III of the ADA, has a well-established position that the ADA requires web entities to be accessible to people with disabilities. However, to date, the DOJ's position has come in the form of settlement agreements, amicus briefs, statements of interest, and an Advanced Notice of Proposed Rulemaking ("ANPRM"). It is expected that the DOJ will soon issue its Notice of Proposed Rulemaking ("NPRM"), which is the next step in the rule-making process. The DOJ has indicated that it will issue its NPRM for Title II entities in August 2014<sup>5</sup> (which has already passed), and in March of 2015 for Title III entities.<sup>6</sup> Further discussion about the DOJ's rule-making process can be found below.

### Title III (Places of Public Accommodation)

The vast majority of cases involving the ADA and website accessibility arise under Title III, and most of those cases turn on whether the website at issue is a place of public accommodation. Title III states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>7</sup>

Given this language, to fall within Title III's coverage, an entity must be a "place of public accommodation." The ADA and its implementing regulations define "public

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accommodation” by providing twelve categories of entities that are “considered public accommodations,” so long as they “affect commerce.”<sup>8</sup>

These twelve categories are:<sup>9</sup>

- an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- a restaurant, bar, or other establishment serving food or drink;
- a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- an auditorium, convention center, lecture hall, or other place of public gathering;
- a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- a terminal, depot, or other station used for specified public transportation;
- a museum, library, gallery, or other place of public display or collection;
- a park, zoo, amusement park, or other place of recreation;
- a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Thus, the threshold question in any case challenging the accessibility of a website under Title III of the ADA is: Is the website a place of public accommodation?

## *History: Insurance Precedents and Other Cases Preceding ADA Access Cases*

Courts in the U.S. judicial system are bound by the principle of *stare decisis*, a doctrine that requires courts to follow applicable precedential decisions. At times, however, courts are faced with questions of first impression, which is when the court is the first in its jurisdiction to rule on a particular issue. Under those circumstances, courts look to decisions with analogous facts as guidance to inform their ruling.

For this reason, to understand the current state of law as it relates to the ADA and website access, it is critical to understand the cases that shaped these decisions, many of which were against insurance companies. In the insurance cases, litigants sued insurance companies, alleging that the companies’ policies violated Title III of the ADA because disparities existed either in coverage for physical versus mental disabilities,<sup>10</sup> or because the policy placed a cap on specific disabilities, such as HIV-

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and AIDS-related illnesses.<sup>11</sup>

Because these cases were brought under Title III, the courts first had to determine whether the insurance companies, and the policies that they offered, were places of public accommodation. While these cases had differing substantive results, they made a number of important statements about the ADA's definition of public accommodation. Some courts held that Title III applied to conduct that occurred outside of a place of public accommodation,<sup>12</sup> although others found that Title III applied only to physical places of public accommodation and did not regulate conduct that occurred outside of the physical structure, unless there was a nexus to a physical place of public accommodation.<sup>13</sup>

## *Case Law: Title III Applies to Conduct Outside of a Physical Structure*

The first appellate court decision on this issue, *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Association of New England, Inc.*, was decided in 1994 by the First Circuit.<sup>14</sup> In *Carparts*, the First Circuit assessed whether Title III applied to an insurance policy. In holding that it did,<sup>15</sup> the First Circuit reviewed the ADA's definition of public accommodations, and concluded that the list of twelve categories is "illustrative," meaning that it does not include each and every entity that could be a public accommodation. Then, it noted that the definition of public accommodation does not explicitly include a requirement that the entity be limited to a physical structure. The court also emphasized that Congress must have intended Title III to include entities that do not require a person to physically enter "an actual physical structure" because it included "travel service" as an example of a place of public accommodation.<sup>16</sup> The court reasoned that many travel services conduct business by phone or correspondence, with customers who never actually enter a physical site, and concluded that: "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result."<sup>17</sup> This language and rationale is relied on in future website access cases.

To further support its decision, the court in *Carparts* also cited the ADA's legislative history, emphasizing that the ADA "invoke[s] the sweep of Congressional authority ... in order to address the major areas of discrimination faced day-to-day by people with disabilities."<sup>18</sup> Given this broad purpose, the court determined that "[t]o exclude this broad class of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."<sup>19</sup> Notably, while the insurance company in *Carparts* was a traditional brick-and-mortar establishment, the First Circuit did not state that a service offered off-site required a

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nexus to a place of public accommodation to be covered by Title III.

When faced with a similar legal question regarding the applicability of Title III to an insurance policy, the Seventh Circuit cited the First Circuit's decision in *Carparts*, and stated that the "core meaning" of Title III is that the owner or operator of a "store, hotel, restaurant, *Web site*, or other facility (whether in physical space or in electronic space) . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do."<sup>20</sup> Like in *Carparts*, the Seventh Circuit said nothing about requiring a nexus between the website and a physical place of public accommodation.

### *Case Law: Title III Requires a Nexus Between the Discrimination and a Physical Structure*

Other circuits, however, have concluded that places of public accommodation are "actual, physical places where goods or services are open to the public, and places where the public gets those goods and services."<sup>21</sup> For instance, in *Weyer v. Twentieth Century Fox Film Corp.*, the Ninth Circuit reviewed the ADA's list of examples of places of public accommodation, and concluded that each example is a physical place, and thus, for Title III to apply, there must be a connection between the alleged good or service, and the actual physical place. This language is later relied on by courts in the Ninth Circuit when assessing a number of ADA web access cases.

Similar to *Weyer*, the Sixth Circuit in *Parker v. Metropolitan Life Insurance Co.*,<sup>22</sup> and the Third Circuit in *Ford v. Schering-Plough Corp.*,<sup>23</sup> both concluded that Title III did not apply to the insurance policies in question because there was no nexus between the policy and the physical insurance office. Meanwhile, the Second Circuit reached a different conclusion about Title III's coverage, without explicitly accepting or rejecting the nexus requirement.<sup>24</sup> In *Palozzi v. Allstate Life Ins. Co.*, the court reviewed Title III's language requiring the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."<sup>25</sup> Noting that the meaning of the word "of" is distinct from the word "in," the Second Circuit concluded that Title III could apply to the sale of insurance policies, even if such policies were sold outside of the insurance office.<sup>26</sup>

In addition to the insurance policy cases, one other case is important to the development of the website access jurisprudence. In *Rendon v. Valleycrest Productions, Ltd.*, individuals with hearing and mobility disabilities sued the producers of the television quiz show "Who Wants to be a Millionaire," alleging that the show's contestant hotline tended to screen out applicants with disabilities.<sup>27</sup> The show screened potential contestants by using a game called "fast finger," which required applicants to answer a series of questions via a telephone number, without a TTY option. Because speed was critical to an applicant's success, use of the relay service for individuals who are deaf was not an option, and individuals with mobility

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impairments were disadvantaged. This case was brought under Title III, and thus, the court had to determine whether the contestant hotline was a place of public accommodation. The lower court found that it was not, dismissed the case, and the plaintiffs appealed the decision.

On appeal, the Eleventh Circuit first noted that quiz show itself was a place of public accommodation covered by Title III because it fell within the category of “theaters and other places of entertainment.”<sup>28</sup> After reviewing the statutory language, the court held that nothing in Title III suggests that discrimination must occur on site to be unlawful, stating that “the fact that the plaintiffs in this suit were screened out by an automated telephone system, rather than by admission policy administered at the studio door, is of no consequence under the statute.”<sup>29</sup> While this case does not expressly state that it required a nexus, as demonstrated below, it has been interpreted by other courts to require a nexus between the good/service and physical place of public accommodation. The insurance precedents and *Rendon* created the framework for courts to analyze whether a website is a place of public accommodation subject to Title III of the ADA.

## *Case Law/DOJ Guidance: Are Websites Places of Public Accommodation?*

Courts have analyzed Title III’s applicability to two types of websites over the years— websites used by traditional brick-and-mortar establishments, and websites of businesses housed exclusively online.

Long before courts were asked to render an opinion regarding the ADA’s application to the Internet, the DOJ had already articulated its position. In 1996, then Assistant Attorney General for Civil Rights, Deval L. Patrick, signed a letter addressed to Senator Tom Harkin, stating that “[c]overed entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.”<sup>30</sup> This letter did not address the question of whether the ADA covered businesses operating exclusively online, but it did squarely state that otherwise covered entities that use the Internet must ensure the accessibility of the website to meet the ADA’s requirement to provide effective communication.

One of the first court cases evaluating Title III’s applicability to a website was *Access Now, Inc. v. Southwest Airlines, Co.*,<sup>31</sup> a case in the district court in Florida that was bound by the Eleventh Circuit’s decision in *Rendon*. Southwest Airlines was the first airline to have a website, which, as many now do, provided consumers with means to check airline fares, schedules, book airline reservations, and stay informed of promotions. In *Southwest*, the plaintiffs brought an ADA lawsuit, alleging that the website’s inaccessible features violated the ADA. Specifically, the plaintiffs alleged that

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the website failed to provide (1) “alternative text” to communicate content displayed visually on the website; (2) online forms that can be completed with the use of a screen-reader; and (3) a “skip navigation link,” which permits consumers to bypass the navigation bar on a website and proceed to the main content. Because this claim was brought under Title III, the court analyzed whether southwest.com was a place of public accommodation, and held that “Title III of the ADA governs solely access to physical, concrete places of public accommodation” and does not apply to “virtual” spaces.<sup>32</sup> Part of the court’s reasoning was that the examples listed as places of public accommodation in the ADA are all physical, concrete structures. When rendering this opinion, the court declined to adopt the First Circuit’s decision in *Carparts*, explaining that the Eleventh Circuit’s decision in *Rendon* had not “read Title III of the ADA nearly as broadly.”<sup>33</sup>

After concluding that the website itself was not a place of public accommodation, the court considered whether there was a “nexus” between southwest.com and a “physical, concrete place of public accommodation,”<sup>34</sup> using the legal framework established in *Rendon*, but distinguishing the outcome. Whereas in *Rendon*, there was a connection between the contestant hotline and the quiz show, here, the court explained, there was no indication that the website’s barriers “impede[] . . . access to a specific physical, concrete space such as a particular airline ticket counter or travel agency.”<sup>35</sup> Thus, the court found the website was outside the scope of Title III and dismissed the plaintiffs’ claims.<sup>36</sup> Notably, aircrafts are exempt from Title III of the ADA, instead subject to the Air Carrier Access Act, and as a result, the court’s decision may have differed if it could establish a nexus between a place of public accommodation, listed in Title III, and the website.

When litigants can demonstrate a connection between a website and a physical, concrete structure, however, some courts have found the website to be subject to Title III. In *National Federation of the Blind v. Target Corporation*, for instance, the plaintiffs alleged that “unequal access to [t]arget.com denies the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation.”<sup>37</sup> The plaintiffs asserted that the website failed to comply with certain protocols, including adding “alternative text” to describe graphics, ensuring that the site was able to be navigated with a keyboard instead of a mouse, and including clear navigation links. This case, which was decided by a court bound by the Ninth Circuit’s decision in *Weyer*, stated that the Ninth Circuit has defined “place of public accommodation” as “a physical place.”<sup>38</sup> However, the court then explained that Title III applies to the “services of a place of public accommodation, not services in a place of public accommodation.”<sup>39</sup> Thus, the court denied Target’s motion to dismiss regarding any inaccessibility issues of target.com that impede “full and equal enjoyment of goods and services offered in Target stores,” while granting Target’s motion regarding the information and services “unconnected to Target stores.”<sup>40</sup> In issuing this decision, the court stated that “[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute.”<sup>41</sup>



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Shortly after the court's ruling, the parties settled the lawsuit.<sup>42</sup> As part of the settlement, Target agreed to modify its website to ensure "that blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease of use."<sup>43</sup> In addition, Target agreed to pay over \$6 million to the class and \$20,000 to the California Center for the Blind, a nonprofit organization dedicated to helping individuals who are blind. This decision suggests that if there is a nexus between a place of public accommodation and a website, the website is covered by Title III of the ADA.

The more complicated legal question being litigated is whether Title III applies to businesses that operate exclusively online. The first case brought against an Internet-only business was *National Federation of the Blind v. AOL Time Warner, Inc.*, filed in 1999.<sup>44</sup> In this case, the NFB asserted that AOL's browser interfered with the ability of individuals who are blind from using screen-reader software to access AOL. A court never decided this case, however; in 2000, the parties settled this case, as AOL agreed to establish an accessibility policy, and consult on accessibility with the disability community.<sup>45</sup>

Once again, before the courts had an opportunity to render an opinion on this legal issue, the DOJ presented its position. In 2000, the DOJ filed an amicus brief in the Fifth Circuit in *Hooks v. OKBridge, Inc.*<sup>46</sup> In *Hooks*, the plaintiff, an individual with bipolar disorder and other disabilities, brought an ADA claim against an Internet-only business. Instead of challenging the website's accessibility, however, the plaintiff claimed that the site had barred him from an online bridge tournament and associated bulletin board because of his disability. The district court granted the business's motion for summary judgment, finding both that the website was not a place of public accommodation because it provided services over the Internet rather than at a physical place, and that it was a private membership club exempt from the ADA. The Fifth Circuit affirmed the lower court's decision, but on grounds that added little to the jurisprudence regarding website access. The Fifth Circuit concluded that the defendant was unaware of the plaintiff's disability and thus, could not have discriminated against him.

Nonetheless, this case is important because it provided a forum for the DOJ to issue its interpretation that the ADA applies to Internet-only businesses. The DOJ explained that to limit Title III to entities that provide services on-site would be an "arbitrary and irrational limitation on coverage that conflicts with the clear and important purposes of the Act."<sup>47</sup> It also explained that Congress's decision to include "catchall phrases" in its definition of public accommodation, such as "other service establishment," demonstrate that the definition is "plainly broad enough to encompass establishments that provide services in their clients' homes, over the telephone, or through the internet."<sup>48</sup> The DOJ also argued that courts regularly "apply old words to new technology," noting that the Supreme Court has applied the First Amendment's

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principles of freedom of speech to new mediums not originally envisioned, including the Internet.<sup>49</sup>

Despite the DOJ's stated position, the case law on this issue is inconsistent and has resulted in differing positions. To date, there has been one judicial opinion concluding that an Internet-only business is subject to Title III of the ADA. In *National Association of the Deaf v. Netflix, Inc.*, the plaintiffs asserted that Netflix's "Watch Instantly" streamed content without providing closed captioning in violation of Title III of the ADA.<sup>50</sup> Netflix filed a motion to dismiss, arguing that as an Internet-only business, Netflix was not a place of public accommodation. The plaintiffs opposed this motion, and the DOJ filed a statement of interest in support of the plaintiffs' arguments.<sup>51</sup>

In this statement, the DOJ made a number of strong statements in support of its argument, and clearly stated that "Netflix is subject to [T]itle III of the ADA, even if it has no physical structure."<sup>52</sup> The DOJ also explained that "the fact that the regulatory process is not yet complete does not support any inference whatsoever that web-based services are not already covered by the ADA, or should not be covered by the ADA."<sup>53</sup> Indeed, the DOJ "has long interpreted [T]itle III to apply to web services, and DOJ's ongoing regulatory developments concerning the accessibility of web content and services support that Netflix is a public accommodation subject to [T]itle III of the ADA."<sup>54</sup>

Agreeing with the DOJ and the plaintiffs, the court denied Netflix's motion to dismiss, and held that Netflix could be a place of public accommodation. In so doing, the court relied heavily on the First Circuit's decision in *Carparts*, which held that "'places of public accommodation' are not limited to 'actual physical structures.'"<sup>55</sup> The court found it irrelevant that the ADA did not include web-based services as a specific example of public accommodation, based on the legislative history, which indicated Congress's intent that the examples were not intended to be exhaustive, and that the ADA was intended to adapt to changes in technology.<sup>56</sup> Instead, the court reviewed the various categories of places of public accommodation, and agreed with the plaintiffs that Netflix "falls within at least one, if not more, of the enumerated ADA categories," identifying "service establishment," "place of exhibition or entertainment," and "rental establishment" as potentially relevant categories.<sup>57</sup> Shortly after the district court denied Netflix's motion to dismiss, the parties resolved the case through a consent decree.<sup>58</sup> Netflix agreed to provide captioning for 100% of its content by 2014.<sup>59</sup>

Other than *Netflix*, most cases challenging the accessibility of an Internet-only business have been brought in the Ninth Circuit, which, according to *Weyer*, limits the definition of "places of public accommodation" to "actual physical spaces,"<sup>60</sup> and thus, have been dismissed. The DOJ did not file amicus briefs or statements of interest in any of these cases. One of these recent cases was also against Netflix, demonstrating the clear split in the case law. In *Cullen v. Netflix, Inc.*, the court recognized the

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conflicting opinion about *Netflix* in Massachusetts, but held that it “must adhere to Ninth Circuit precedent” which defined “place of public accommodation” to be a physical place.<sup>61</sup> Thus, because the Netflix website was not “an actual physical place,” and because it had no nexus to one, the court dismissed the case.<sup>62</sup>

Other district cases in the Ninth Circuit regarding Internet-only businesses have had similar results. In *Young v. Facebook, Inc.*,<sup>63</sup> the plaintiff, a *pro se* litigant, filed an ADA lawsuit against Facebook alleging that Facebook deactivated her account because she had bipolar disorder. In *Ouellette v. Viacom*, the plaintiff, another *pro se* litigant, asserted that Google, YouTube, and Myspace violated his rights as an individual with a reading disability by removing his videos from the Internet, and then failing to process the plaintiff’s notices challenging the removals because they had “minor errors.”<sup>64</sup> Again, due to the Ninth Circuit’s position, both cases were dismissed early in the litigation. In *Young*, the court held that because “Facebook operates only in cyberspace,” it is “not a place of public accommodation as construed by the Ninth Circuit.”<sup>65</sup> In *Ouellette*, the court found that the plaintiff failed to state a claim on which relief could be granted because Google, YouTube, and Myspace were not physical places of public accommodation, and lacked a connection to a physical structure.

In addition, in *Earll v. eBay, Inc.*, the plaintiff alleged that eBay violated the ADA by using a seller verification system inaccessible to the deaf community.<sup>66</sup> Specifically, she asserted that she was unable to register as a seller on ebay.com because she was required to verify her identity through an automated, telephone verification process. The court denied the plaintiff’s request to amend her complaint, and in so doing, held that the “eBay website is not a place of public accommodation within the meaning of the ADA.”<sup>67</sup> It explained that “[u]nder controlling Ninth Circuit authority, ‘places of public accommodation’ under the ADA are limited to ‘actual physical spaces.’”<sup>68</sup>

Given the number of newly emerging web-only businesses, courts outside of the First and Ninth Circuit will likely be faced with the question of the ADA’s applicability in the near future. It is also possible that litigants will appeal district court opinions to the appellate courts, possibly changing the established precedent on this issue.

The DOJ’s highly anticipated Notice of Proposed Rulemaking may have a substantial impact on the way courts analyze website accessibility cases, and the future of this legal issue. As noted above, the DOJ published its Advanced Notice of Proposed Rulemaking, or ANPRM, in 2010, which is the first step in the rule-making process. It has not yet, however, published its Notice of Proposed Rulemaking, or NPRM, which is the second step in the process. In its ANPRM, the DOJ stated that businesses with websites must make their websites accessible. Specifically, the DOJ interpreted the plain language of the ADA to apply “to discrimination in offering the goods and services ‘of’ a place of public accommodation . . . rather than being limited to those goods and services provided ‘at’ or ‘in’ a place of public accommodation . . . .”<sup>69</sup> The DOJ

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emphasized that “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 Web sites.”<sup>70</sup>

When the DOJ does publish its NPRM, it is anticipated that there will be two separate notices—one for Title II and one for Title III.<sup>71</sup> It is anticipated that the NPRMs will propose requirements for the scope of the obligation to provide website accessibility, as well as the technical standards necessary to comply with the ADA.<sup>72</sup> In light of inconsistent court decisions, differing standards for determining website accessibility, the NPRM may change the way that businesses, state and local governments, and the courts analyze questions of website accessibility.

### *Settlement Agreements: Websites Connected to a Brick-and-Mortar Establishment*

There have been a number of settlement agreements related to website accessibility, and the DOJ has been active in this area. While some recent DOJ agreements have focused exclusively on website accessibility, others have included website access in a laundry list of other accessibility issues addressed. One of the most important agreements for the future of website accessibility is the recent consent decree between the National Federation of the Blind (“NFB”), the United States, and H&R Block.<sup>73</sup> NFB and private plaintiffs brought a lawsuit against H&R Block, and in December 2013, the DOJ intervened in the case.<sup>74</sup> The DOJ asserted that www.hrblock.com was inaccessible, and consequently, prevented people with disabilities from enjoying its services, and taking advantage of its benefits. These services included the ability to independently prepare and file taxes online, download tax preparation software, find tax professionals, obtain information on the website’s blog, review an instructional video about getting a “Second Look” review, and have taxes prepared in real time via a “Block Live” function.

The consent decree addresses H&R Block’s website, its mobile applications, and its online tax products.<sup>75</sup> Specifically, H&R Block agreed to make its website and Online Tax Preparation Product accessible pursuant to the Level A and AA Success Criteria in the Web Content Accessibility Guidelines (“WCAG”), version 2.0, by January 1, 2015, and to ensure that all mobile applications conform to the same standards by January 1, 2016. Among a number of other provisions, H&R Block also agreed to designate an employee as the web accessibility coordinator, adopt and implement a web access policy, and appoint a web access committee, which is charged with monitoring the terms of this agreement.

A sample web access policy is attached to the H&R Block consent decree as Exhibit A.<sup>76</sup> In addition to its general anti-discrimination policy, this web access policy includes the following requirements: all new web pages, web applications, content published to existing websites, mobile applications, and electronic products meet the Level A and Level AA Success Criteria for WCAG 2.0; notices soliciting feedback on how

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accessibility can be provided are publicized; the web access policy is distributed on an annual basis; a web accessibility coordinator is designated; annual training is provided; accessibility is assessed and reviewed annually; automated tests to test for accessibility are regularly conducted; enlisting people with various disabilities to test for accessibility is regularly done; and a web access consultant will annually evaluate accessibility and provide a report identifying barriers and providing recommendations.

Because H&R Block is traditional brick-and-mortar establishment that offers services via a website, this settlement agreement does not add much to the discussion of whether Internet-only businesses are places of public accommodation. Nonetheless, the requirements of this consent decree have sounded a warning bell for other businesses that have not yet made their websites and related technology accessible to people with disabilities. Given the level of detail in the web access policy, businesses are encouraged to use the H&R Block web access policy to inform their own policies on website access.

The DOJ has also entered into a number of other settlement agreements with places of public accommodation, which included website accessibility as one, of many, provisions. For instance, the DOJ recently entered into an agreement with a museum in Washington D.C. called the Newseum, where the museum agreed to ensure that the visual and audio contents of its website conform to Level A and Level AA Success Criteria of WCAG 2.0.<sup>77</sup> Likewise, in its settlement agreement with the Cavaliers Operating Company (“Cavs”),<sup>78</sup> the Cavs agreed, within six months from the date of the agreement, to ensure that its website complied with WCAG 2.0, level AA success criteria. The Cavs also agreed to develop a written policy to evaluate the site routinely, and remedy any accessibility problems. They also agreed to advertise a contact email address to allow people with disabilities to inform the Cavs of any accessibility problems. This agreement does not, however, require the Cavs to ensure that the advertising provided by third parties on its website is accessible, or ensure that links to third party websites are accessible.

In addition to the DOJ, a number of other advocacy organizations have been very active in ensuring that websites are accessible for people with disabilities. Among other organizations, the American Council of the Blind (“ACB”), the American Federation for the Blind, and the California Council of the Blind (“CCB”) have achieved a number of successful settlement agreements through the use of Structured Negotiations. Structured Negotiations is a strategy where complainants, their attorneys, and a business enter into an agreement to negotiate in good faith to resolve a dispute, in lieu of more formal litigation. Attorneys Lainey Feingold and Linda Dardarian have represented ACB and others and used Structured Negotiations successfully to reach a number of comprehensive settlement agreements addressing website accessibility.

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As a result of Structured Negotiations, two large drug store chains have agreed to make their websites accessible to people with disabilities. In 2009, CVS/pharmacy agreed to use best efforts to ensure that all pages on [www.cvs.com](http://www.cvs.com) substantially comply with the WCAG guidelines.<sup>79</sup> According to the terms of the agreement, CVS retains the right to choose whether to apply the standards in WCAG 1.0 or WCAG 2.0.<sup>80</sup> To ensure compliance, CVS hired a consultant to audit its website, who would provide a final audit report to the parties. The agreement excludes third party content, although includes a requirement that if CVS issues a request for proposals or enters into contracts regarding third-party content, it will make a good faith effort to locate and select contractors and vendors able to comply with the WCAG guidelines.

In 2008, Rite Aid entered into a similar agreement with the same parties.<sup>81</sup> Like the CVS agreement, Rite Aid agreed to use best efforts to comply with either WCAG 1.0 or WCAG 2.0, and similar to the CVS agreement, there are a number of carve outs for third-party content.<sup>82</sup> In the Rite Aid agreement, if third-party content is provided in an inaccessible format, Rite Aid must notify the vendor that a complaint has been made about the accessibility of its content, make good faith efforts to promote adherence to the WCAG, and provide the vendor's contact information to the parties, so that the parties can contact the vendor directly. Rite Aid must also include compliance with WCAG 1.0 in its requests for proposals and vendor contractors, although it is not obligated to require adherence as a condition of contract.

Notably, the Rite Aid agreement specifically discusses the website's use of visual security measures, or CAPTCHAs. To ensure that CAPTCHAs are accessible to people with disabilities, Rite Aid agreed to make best efforts to incorporate alternative security measures that are equally effective and usable by blind and visually-impaired users, without impairing security. When the agreement was executed, the parties had approved the CAPTCHA in use by [riteaid.com](http://riteaid.com), and under the agreement, if Rite Aid wishes to use a different CAPTCHA, it will provide an opportunity for testing by the organizations involved that represent individuals who are blind or have low vision.

Although not the topic of this Legal Brief, CVS/pharmacy and Rite Aid also agreed to install a tactile device to enable customers with disabilities unable to read information on a flat screen point of sale device to privately enter their PIN or other confidential information.<sup>83</sup> With tactile keys, individuals with disabilities are no longer required to share their PINs with employees, and are able to securely, privately, and independently, enter their personal information.

Similar agreements have been reached with RadioShack,<sup>84</sup> Safeway,<sup>85</sup> and Staples.<sup>86</sup> As the years go by, the specific accessibility code cited in the agreements has changed. For instance, the agreement in RadioShack, one of the older agreements, specifically designates WCAG 1.0 as the appropriate standard, although explains that should WCAG be updated, then Radio Shack has the option of choosing to comply

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with either WCAG 1.0 or WCAG 2.0. The more recent agreements, such as CVS and Rite Aid, permit the entities to choose which of the two standards they wish to apply. The most recent agreements, such as the agreement in Safeway, designate WCAG 2.0 as the appropriate standard for web accessibility.

## *Settlement Agreements: Businesses Housed Exclusively Online*

In addition to the consent decree in *Netflix*, a handful of other settlement agreements have been reached recently with Internet-only businesses. Notably, as a result of structured negotiations, the NFB, represented by Disability Rights Advocates, reached a settlement with Amazon, Inc.<sup>87</sup> Amazon agreed to make amazon.com, as well as several affiliated websites, accessible to people who use assistive technology to read and navigate Internet websites. Further, Amazon agreed to create an accessibility committee, which is intended to assure that accessibility remains a priority even as new Internet technology develops. An interesting part of the settlement is that it explicitly recognizes that new technologies are bound to develop, and the parties agree to cooperate with one another to identify and potentially implement solutions to accessibility barriers posed by new technology.

State attorneys general have also entered into settlement agreements with two Internet-only businesses. Priceline.com agreed to implement a range of accessibility standards required by WCAG in an agreement with the New York Attorney General's Office.<sup>88</sup> Monster.com, similarly, agreed to provide job seekers who are blind with full and equal access to its products and services, including its mobile applications, as a result of an agreement with the Massachusetts' Attorney General's Office and the NFB.<sup>89</sup>

Moreover, through Structured Negotiations, the ACB and two of its state affiliates entered into a comprehensive agreement to make the digital arm of Major League Baseball ("MLB") accessible.<sup>90</sup> MLB operates both www.mlb.com, and each of the official MLB club sites, such as www.cubs.com. In a 2009 agreement, MLB agreed to use reasonable efforts to ensure that all content on www.mlb.com and the club sites satisfy the Level A and AA Success Criteria set forth in WCAG 2.0. MLB further agreed to ensure that content delivered through its Game Day Audio Player and related Media Center, as well as its radio and television streams, satisfy the same criteria. Interestingly, despite the comprehensive nature of this agreement, the parties executed an addendum in 2012 to address new technologies used by MLB, specifically the www.mlb.com at Bat mobile application.<sup>91</sup> Under the terms of the addendum, MLB agrees to use reasonable efforts to ensure that the content provided on its mobile application satisfies the Level A and AA Success Criteria set forth in WCAG 2.0.

## Title II (State and Local Governments)

Under Title II of the ADA, qualified individuals with disabilities shall not be excluded from "participation in or be denied the benefits of the services, programs, or activities of a public entity."<sup>92</sup> Title II's requirements are commonly referred to as program

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accessibility.

Unlike Title III, there has not been much dispute about whether the websites of state and local governments are subject to the ADA, and the DOJ's position on this question has been clear for some time. In 2003, the DOJ published a technical assistance document called "Accessibility of State and Local Government Websites to People with Disabilities," which states that under Title II, state and local governments must provide equal access to programs, services or activities, subject to the ADA's standard defenses.<sup>93</sup> The DOJ explains that one way for state and local governments to comply with the ADA is to ensure that a government website is accessible to people with disabilities. More recently, in 2010, the DOJ stated in its ANPRM, "[t]here is no doubt that the Web sites of state and local government entities are covered by [T]itle II of the ADA."<sup>94</sup>

## *Case Law: Website Accessibility for State/Local Government Websites*

There has not been a serious debate in the case law about Title II's applicability to the Internet, but at least one case has evaluated this topic. In *Martin v. Metropolitan Atlanta Rapid Transit Authority*, the plaintiffs, individuals with mobility- and vision-related disabilities, alleged that MARTA violated the ADA in a number of ways, including by failing to provide access to information via the agency's website, and moved for a preliminary injunction.<sup>95</sup> Granting the injunction, the court held that the information available on MARTA's website was not equally available to people with disabilities. The court explained that until MARTA's website was made accessible, MARTA was "violating the ADA mandate of 'making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service.'"<sup>96</sup>

In analyzing this case, the National Council on Disability explained that even though some information was available by phone (i.e., particular route and schedule information), this information was not equivalent to that provided by the Internet, and interestingly posed the question of whether there could ever be a feasible way, at any reasonable cost, to provide information as "instant, on-demand, 24-7" and with the "interactive capacity afford[ed]" by a website in another alternate format.<sup>97</sup> In other words, while public entities can theoretically choose which medium to use to communicate information to people with disabilities, providing information through an accessible website is typically the superior method of providing program access.

## *Settlement Agreements: Website Accessibility for State/Local Government Websites*

The DOJ has also entered into a number of recent settlements with Title II entities regarding their inaccessible websites. For instance, on July 17, 2014, the Orange County Clerk of Courts (the "Clerk") agreed to resolve a DOJ complaint filed by an attorney who is blind regarding its accessibility features.<sup>98</sup> The complainant alleged that the Clerk denied him full and equal access to electronic court documents because



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the electronic court documents were provided in an inaccessible format. After conducting an investigation, the DOJ concluded that the Clerk is the designated custodian of court records in Florida, with control over the format in which documents were filed. The Clerk required litigants to submit documents in PDF format, to be fully searchable, and to be optical-character-recognition (“OCR”) compliant. OCR, which allows users to “search” the document, also makes a PDF accessible for individuals who use screen readers. Despite these requirements, some documents were filed in a non-searchable, non-OCR complaint, PDF format, and consequently, were inaccessible. In this case, the attorney made repeated requests for documents in an accessible format, and even filed a motion with the court requesting that the opposing party be required to provide copies to him in an accessible format. While the opposing party ultimately provided these accessible copies, this occurred only after months of delay. The DOJ concluded that the Clerk discriminated against the complainant by “excluding him from full and equal participation in, and denying him the benefits of the services, programs, or activities of, the Clerk of the Courts.”<sup>99</sup>

As a result of this agreement, the Clerk agreed to take steps to make the official court record accessible to qualified individuals with vision disabilities. Among these requirements, within six months of the agreement, the Clerk will ensure that its web pages and web applications comply with WCAG 2.0 AA, including all other websites owned, operated, branded or funded by the Clerk, including the Clerk’s electronic filing system.<sup>100</sup> The Clerk also agreed to establish a procedure for individuals with disabilities to request court documents in an accessible format, and designate a person responsible for electronic and website access. Further, the Clerk agreed to provide training on the WCAG 2.0 AA accessibility requirements to all employees and contractors with responsibilities related to website access.

The DOJ has entered into a number of agreements with state and local governments through its Project Civic Access, generally requiring similar terms. The recent Project Civic Access agreement with the City of Fort Morgan, Colorado, included the following provisions with respect to the Internet and web-based programs and services:<sup>101</sup>

- On an annual basis, the City will distribute to its employees and contractors with responsibility related to the City’s website, the technical assistance document: “Accessibility of State and Local Government Websites to People with Disabilities.”
- Within three (3) months of the effective date of this Agreement, the City will do the following:
  - Post online a policy that its web pages will be accessible and create a process for making its web pages accessible;
  - Make all new and modified web pages and content accessible;
  - Make existing web content accessible;
  - Post a telephone number or e-mail address on its home page for visitors to request accessible information; and
  - At least annually, enlist people with disabilities to test its pages for ease of

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use.

Other Project Civic Access agreements have similar requirements.<sup>102</sup> The biggest difference is that, in certain agreements, instead of agreeing to make all existing web content accessible, the state and local governments agree to “[d]evelop and implement a plan” to make existing web content more accessible.<sup>103</sup> While the Project Civic Access agreements themselves do not specify the standards to be used by state and local government entities, the agreements refer to a DOJ technical assistance document, which discusses both the WCAG standards and the standards promulgated under Section 508 of the Rehabilitation Act (“508 Standards”).

## *Settlement Agreements: Colleges/Universities & Healthcare Services & Financial Institutions*

In addition to other traditional Title II and Title III entities, the DOJ and the U.S. Department of Education (“DOE”) have recently entered into settlement agreements with various colleges and universities to improve the accessibility of their websites. Note that there have also been many agreements specific to accessible course materials, but those are not addressed in this Legal Brief. In the Title II context, Louisiana Tech University agreed that all of its new and redesigned web pages, web applications, and web content, published by all of its colleges, departments, programs, units and professors, available to students, prospective students, and applicants, will comply with WCAG 2.0 AA.<sup>104</sup> As far as pre-existing pages, LTU agreed to develop a plan to make all pages posted since January 2010 comply with WCAG 2.0 AA by December 1, 2014, which is about one and a half years after the date of the agreement. Pages used most frequently, and pages of greater importance, are to be prioritized, and each site will include contact information to report inaccessible content.

On the healthcare front, WellPoint, a large health benefits company, recently announced an initiative to make its affiliated health plan websites, mobile applications, and print information accessible for all people.<sup>105</sup> Specifically, it adopted the WCAG 2.0 AA as its accessibility standard, in consultation with people with disabilities. Further, the American Cancer Society agreed to make its website accessible as a result of Structured Negotiations with the ACB.<sup>106</sup> Specifically, the American Cancer Society agreed to use best efforts to ensure that its website complies substantially with WCAG 2.0 AA. In addition to specifying the use of WCAG as the accessibility standards, the agreement contains separate requirements to ensure that PDF documents housed on the website, and the use of CAPTCHAs, are accessible. Like a number of other agreements, this agreement too excludes third-party content.

The financial services industry has also recognized the importance of providing access to people with disabilities. By providing access to banking technology, including online banking and talking ATMs, people with disabilities are able to do their banking independently and privately, which is of the utmost importance when dealing with private and important financial information.

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There are a significant number of cases and settlement agreements regarding accessible ATMS and online banking, and this Legal Brief reviews only a handful. In 2012, Charles Schwab entered into a settlement agreement, as a result of Structured Negotiations, and agreed to use good faith efforts to ensure that its client website satisfies the Level A and AA Success Criteria in WCAG 2.0, and phases in these accessibility requirements.<sup>107</sup> While still excluding third-party content from this requirement, the Charles Schwab agreement's requirements regarding third-party content are stronger than a number of the older agreements. If third-party content is inaccessible, Charles Schwab will request that the third-party bring their content into compliance. If the third-party does not bring the content into compliance, then Charles Schwab will use good faith efforts to find an alternate vendor that will provide content in an accessible manner. Further, all future requests for proposals for development or inclusion of third-party content will include compliance with Level A and AA Success Criteria in WCAG 2.0 as a requirement in all requests and proposals. Other settlement agreements have been reached with LaSalle Bank,<sup>108</sup> Bank of America,<sup>109</sup> First Union,<sup>110</sup> Bank One,<sup>111</sup> Fleet Bank,<sup>112</sup> and Washington Mutual.<sup>113</sup>

These recent initiatives demonstrate that many businesses and other covered entities understand the importance of providing website accessibility, and are moving toward full compliance.

## Title I (Employment)

Title I of the ADA prohibits employers from discriminating against qualified individuals with a disability with regard to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."<sup>114</sup> While these protections likely apply to issues related to website accessibility, there are no known cases on this topic. Still, as employers continue to use the Internet for recruitment and application purposes, it is likely that courts will be faced with questions about employment and website accessibility. One potential Title I website accessibility case could arise if an employer required all job applicants to apply for employment via an application through an inaccessible website. Many employers are also using online tests, which can raise accessibility issues. As more and more employers rely on electronic applications, the more likely we are to see cases arise under Title I challenging an employer's use of an inaccessible website.

## Rehabilitation Act of 1974, as Amended

In 1998, Congress amended the Rehabilitation Act to require federal agencies to make their electronic and information technology access to people with disabilities.<sup>115</sup> Specifically, Congress enacted Section 508, which required federal agencies to give employees with disabilities and members of the public access to information that is

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comparable to access provided by others. Section 508 also charged the U.S. Access Board with establishing standards for electronic and information technology, which were approved in April 2001 and enforceable as of June 25, 2001.<sup>116</sup> Given this clear mandate, there has not been significant litigation on the topic of website access under the Rehabilitation Act.

## Other Laws/Regulations Regarding Website Accessibility

In addition to the ADA and the Rehabilitation Act, businesses and government entities must comply with other applicable laws ensuring access to electronic information for people with disabilities. Many states have their own anti-discrimination laws, many of which include specific requirements for website accessibility. Thus, state and local governments, and private businesses should be sure to evaluate which laws apply to them.

### Accessibility of Airline Websites

Recently, the Department of Transportation (“DOT”), the federal agency charged with implementing regulations under and enforcing the Air Carrier Access Act of 1986, issued new rules to improve airline travel for people with disabilities.<sup>117</sup> Among other changes, the DOT is requiring airlines to make their websites accessible for passengers with disabilities. Under these new rules, airlines will have two years to make their website pages with core travel information and services available accessible, and three years to make all other web pages accessible. DOT also specifies WCAG 2.0 as the proper standard, requiring airlines to meet the Level AA Success Criteria.

The DOT’s rule applies to both U.S. and foreign airlines, so long as the foreign airline has a website that markets air transport to U.S. consumers for travel within, to, and from the U.S. The rule also requires ticket agents to disclose and offer web-based discount fares to customers unable to use their websites due to a disability. Interestingly, the DOT’s rule also includes a type of reasonable accommodation requirement; it requires that even after the airlines’ website satisfies the WCAG accessibility standards, airlines must offer equivalent services to passengers with disabilities who are unable to use their websites.

### Accessibility of College/University Educational Materials

There may soon be another federal law relevant to colleges and universities. In February 2014, legislation called the Technology, Education, and Accessibility in College and Higher Education (“TEACH”) Act was introduced into the Senate, with the goal of strengthening the accessibility of education technologies for college students with disabilities.<sup>118</sup> The TEACH Act was previously introduced in the U.S. House of Representatives. If enacted, the TEACH Act would require the U.S. Access Board to develop guidelines for the accessibility of electronic instructional materials and information technologies at institutions of higher learning.<sup>119</sup> Interested parties should

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stay informed on the progression of this legislation.

## Technical Standards and Resources

Those interested in learning more about the technical standards for website access should review the Web Content Accessibility Guidelines, or WCAG, updated in December 2008, as WCAG 2.0. These standards are developed by Web Accessibility Initiative (“WAI”) of the World Wide Web Consortium (“W3C”), and contain twelve guidelines for web access. Various resources exist to become familiar with these guidelines.

- WCAG 2.0: <http://www.w3.org/TR/2008/REC-WCAG20-20081211/>
- Technical Assistance
  - How to Meet WCAG 2.0: A Customizable Quick Reference to Web Content Accessibility Guidelines 2.0 Requirements (Success Criteria) and Techniques, W3C (July 11, 2013), available at <http://www.w3.org/WAI/WCAG20/quickref/>.
  - WebAim’s WCAG 2.0 Checklist: <http://webaim.org/standards/wcag/checklist>
  - Understanding Conformance: <http://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html>

The other relevant technical standards are the Electronic and Information Technology Accessibility Standards, commonly referred to as the Section 508 Standards. These are the standards derived from the Rehabilitation Act Amendments of 1998, and published by the U.S. Access Board.

- Section 508 Standards: <http://www.section508.gov/section-508-standards-guide>
- Technical Assistance
  - Summary of Section 508 Standards: <http://www.section508.gov/summary-section508-standards>
  - GSA 508 Tutorials, Guidance, Checklists: <http://www.gsa.gov/portal/content/103565>
  - DOJ materials on Section 508: <http://www.justice.gov/crt/508/508home.php>

There are a number of resources that exist to evaluate a website’s accessibility.

- The World Wide Web Consortium compiled a list of various sites that assess website accessibility: <http://www.w3.org/WAI/ER/tools/complete>
- Web Accessibility Evaluation Tool: <http://wave.webaim.org/>
- Section 508 Technology Tools: <http://www.section508.gov/technology-tools>

The ADA National Network also provides technical assistance on website accessibility issues. To reach your local center, contact (800) 949-4ADA or [www.adata.org](http://www.adata.org).

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## Conclusion

The Internet has changed the way that we live our lives. However, due to virtual accessibility barriers, many people with disabilities are unable to access goods and services of businesses and public entities. Whether Title III of the ADA applies to websites, especially to websites of Internet-only businesses, is a hot topic. While courts have consistently held that traditional brick-and-mortar stores must make their websites accessible, there is a split in the courts about whether businesses housed exclusively online are subject to Title III of the ADA. Regardless of this split, there have been a number of settlement agreements where Internet-only businesses agreed to make their websites accessible. Seeking additional clarity on this issue, businesses, people with disabilities, and state and local governments eagerly await the publication of the DOJ's NPRM on the topic of website access. Given the importance of websites to our society, and the real barriers that can prevent access for many people with disabilities, this is a legal issue that will continue to grow in importance in the years to come.

## Notes

1. This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights and Rachel M. Weisberg, Staff Attorney, with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank Kathleen Kinsella, Equip for Equality Legal Intern, for her valuable assistance with this Legal Brief. Equip for Equality is providing this information under a subcontract with Great Lakes ADA Center.
2. 42 U.S.C. § 12101(b)(1) (2014).
3. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 142, 43461 (proposed July 26, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf>
4. Bradley A. Areheart and Michael Ashley Stein, *Integrating the Internet*, Univ. of Tenn. College of Law, Research Paper #231, April 2014, n. 83, Geo. Wash. L. Rev. (forthcoming 2015), available at <http://ssrn.com/abstract=2420510> (last accessed Sept. 14, 2014).
5. See <http://www.reginfo.gov/public/do/eAgendaViewRule?publd=201404&RIN=1190-AA65>; see also <http://llegal.com/2014/06/doj-delay/>.
6. See <http://www.reginfo.gov/public/do/eAgendaViewRule?publd=201404&RIN=1190-AA61>; see also <http://llegal.com/2014/06/doj-delay/>.
7. 42 U.S.C. § 12182(a) (2014) (emphasis added).
8. 42 U.S.C. § 12181(7) (2014); 28 C.F.R. § 36.104 (2013).
9. *Id.*
10. *E.g.*, *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000).

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11. *E.g., Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).
12. *See Pallozzi*, 198 F.3d 28; *Doe*, 179 F.3d at 559; *Rendon v. Valleycrest Prod., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).
13. *See Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006 (6th Cir. 1997); *Ford*, 145 F.3d 601; *Weyer*, 198 F.3d 1104.
14. *Carparts*, 37 F.3d 12.
15. Title V of the ADA creates limitations for the application of insurance policies; thus, courts that find insurance policies subject to Title III of the ADA, qualify this finding as subject to the safe harbor provision in Section 501(c) of Title V. *See, e.g., Pallozzi*, 198 F.3d at 33.
16. *Carparts*, 37 F.3d at 19.
17. *Id.*
18. *Id.* (citing 42 U.S.C. § 12101(b)).
19. *Id.* at 20.
20. *Doe*, 179 F.3d at 559 (emphasis added).
21. *Weyer*, 198 F.3d 1104 (holding that insurance policy was not subject to Title III because it lacked a connection with an actual physical place).
22. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997).
23. *Ford*, 145 F.3d at 612-13 (finding insurance policy outside the scope of Title III because there was no "nexus" between the challenged policy and the services offered to the public from the insurance office).
24. *See, e.g., Pallozzi*, 198 F.3d at n.3 (stating that there "is no dispute that Plaintiffs in this case have such a nexus").
25. 42 U.S.C. § 12182(a) (2014) (emphasis added).
26. *Pallozzi*, 198 F.3d at 33.
27. *Rendon*, 294 F.3d 1279.
28. *Id.* at 1283.
29. *Id.* at 1286.
30. Ltr. from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, Sept. 9, 1996, available at [http://www.justice.gov/crt/foia/readingroom/frequent\\_requests/ada\\_tal/tal712.txt](http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt)
31. *Access Now, Inc., v. Southwest Airlines, Co.*, 227 F. Supp.2d 1312 (S.D. Fla. 2002).
32. *Id.* at 1318.
33. *Id.* at 1319.
34. *Id.* at 1321.
35. *Id.*
36. *See also Access Now v. Southwest Airlines*, 385 F.3d 1324 (11th Cir. 2004) (dismissing plaintiffs' appeal on procedural grounds without rendering a decision on the merits of the case).
37. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 952 (N.D. Cal. 2006).

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38. *Id.*
39. *Id.* at 953 (emphasis in original).
40. *Id.* at 956.
41. *Id.* at 953.
42. Press Release, Disability Rights Advocates, National Federation of the Blind and Target Agree to Class Action Settlement (Aug. 27, 2008), available at <http://www.dralegal.org/pressroom/press-releases/national-federation-of-the-blind-and-target-agree-to-class-action>
43. Settlement Agreement, *Nat'l Fed'n of the Blind v. Target Corp.*, available at [http://www.dralegal.org/sites/dralegal.org/files/casefiles/settlementagreement\\_2.pdf](http://www.dralegal.org/sites/dralegal.org/files/casefiles/settlementagreement_2.pdf)
44. *Nat'l Fed'n of the Blind v. AOL Time Warner, Inc.*, No. 99-cv-12303 (D. Mass. Compl. filed Nov. 16, 1999).
45. Settlement Agreement, *Nat'l Fed'n of the Blind v. AOL Time Warner, Inc.*, available at <http://www.nfbcal.org/nfb-rd/1633.html>
46. Brief of the United States as Amicus Curiae in Support of Appellant, *Hooks v. OKBridge, Inc.*, No. 99-50891, (5th Cir. June 30, 2000) available at [www.justice.gov/crt/briefs/hooks.htm](http://www.justice.gov/crt/briefs/hooks.htm)
47. *Id.* at 7.
48. *Id.* at 12.
49. *Id.* at 17.
50. *Nat'l Ass'n of the Deaf, et al, v. Netflix, Inc.* 869 F. Supp. 2d 196 (D. Mass. 2012).
51. Statement of Interest of the United States of America in Opposition to Defendant's Motion for Judgment on the Pleadings, *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 3:11-cv-30168 (D. Mass. May 15, 2012), available at [http://www.ada.gov/briefs/netflix\\_SOI.pdf](http://www.ada.gov/briefs/netflix_SOI.pdf)
52. *Id.* at 4.
53. *Id.* at 12.
54. *Id.* at 4.
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