Comments of the Attorneys General of
Illinois, California, Connecticut, Hawaii, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, Wisconsin

October 3, 2023

Via electronic submission to www.regulations.gov

U.S. Department of Justice
Civil Rights Division
Disability Rights Section
P.O. Box 440528
Somerville, MA 02144

Re: RIN 1190-AA79 or Docket ID No. 144; Multistate Comments in Response to the U.S. Department of Justice's Proposed Revisions to the Regulations of Title II of the Americans with Disabilities Act Concerning Accessibility of Web Information and Services of State and Local Government Entities

The undersigned State Attorneys General of Illinois, California, Connecticut, Hawaii, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, Wisconsin ("Attorneys General") respectfully submit these comments supporting the Department of Justice's ("DOJ") proposed rules to update the regulations for Title II of the Americans with Disabilities Act ("ADA") to establish specific requirements for state and local government web and mobile application ("mobile apps" or "apps") accessibility for people with disabilities. 88 Fed. Reg. 51948 (August 4, 2023) (the "Proposed Rules" or the 'Proposal").

The Attorneys General strongly support DOJ's adoption of a specific technical standard for website and mobile app accessibility for state and local governments ("public entities"). The Attorneys General are mindful of the need to both ensure full and equal access to services, programs, and activities offered by public entities through the web and mobile apps, while also setting forth obligations that public entities can reasonably achieve given the innovation and dynamism of websites and mobile apps. The Attorneys General recognize the challenges inherent in accomplishing both objectives and appreciate DOJ's balanced approach.

I. Legal and Factual Background

A. Statutory and Regulatory Framework – Title II of the ADA

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*., is a comprehensive civil rights law designed to give individuals with disabilities equal access to all aspects of society. This statute, passed by Congress with bipartisan support, was signed into law on July 26, 1990 by President George H.W. Bush. The statute was amended by Congress in 2008 and signed on September 25, 2008 by President George W. Bush. In enacting the ADA, Congress found that, historically, society has tended to isolate and segregate individuals with

disabilities, and discrimination against individuals with disabilities persists in critical areas such as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.[1] Individuals with disabilities encounter discrimination through architectural, transportation, and communication barriers, as well as failures to modify existing facilities and practices.[2] In the ADA, Congress set forth the goal of assuring individuals with disabilities equality of opportunity, full participation, independent living, and economic self-sufficiency.[3] The purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.[4]

Title II of the ADA ("Title II") applies to all activities of State and local governments regardless of whether the public entities receive financial assistance from the Federal government.[5] DOJ's proposal seeks to amend the Title II regulations which provide that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.[6] The Title II regulations also require public entities to take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.[7] Title II does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.[8] If an action would result in such an alteration or such burden, a public entity is required to take any other action that would be less burdensome, but would nonetheless ensure, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.[9]

DOJ's Proposal recognizes that public entities provide access to many of their services, programs, and activities via their website ("web") or mobile apps. Reliance on websites and mobile apps, which was once considered a convenience, became a necessity during COVID-19 pandemic era restrictions and is now a way of life. Public entities must ensure their web and mobile app-based services are accessible to individuals with disabilities to ensure that no qualified individual with a disability is denied the benefits of their services, programs, or activities. DOJ's Proposal will assist public entities in meeting their Title II obligations while ensuring people with disabilities have equal access to their services, programs, and activities.

B. State Efforts Towards Website Accessibility

[1] 42 U.S.C. §§ 12101 (a)(2) and (3).
[2] *Id.* § 12101 (a)(5).
[3] *Id.* § 12101 (a)(7).
[4] *Id.* § 12101 (a)(7).
[5] 42 U.S.C. §§ 12131-65.
[6] 28 C.F.R. § 35.130 (a).
[7] 28 C.F.R. § 35.160 (a) (1).
[8] 28 C.F.R. § 35.164
[9] *Id.*

Even in the absence of a specified standard for website accessibility, DOJ has interpreted Title II as applying to websites and mobile apps, investigating and entering settlement agreements with multiple State and local governments for inaccessible websites, including public entities located in the jurisdictions of the undersigned Attorneys General.[10]

In the absence of a concrete federal standard by which to measure website accessibility, States have established website accessibility requirements for the public entities within their jurisdiction. For example, Illinois passed the Illinois Information Technology Accessibility Act ("IITAA"), which took effect in August 2007.[11] The purpose of the IITAA is to require that information technology developed, purchased, or provided by the State of Illinois be accessible to individuals with disabilities. The IITAA defines the functional performance criteria and technical requirements that must be met to ensure that information technology is accessible. The IITAA bases its technical requirements on the standards adopted for the Federal government's web content by Section 508 of the Rehabilitation Act of 1973 ("Section 508"),[12] but provides that as standards and guidelines are updated, the State of Illinois will review and modify their technical requirements as appropriate.

Effective July 2019, California requires state agencies and entities to certify that their website is in compliance with the Web Content Accessibility Guidelines 2.0, or a subsequent version, at a minimum Level AA success criteria.[13] California also requires that state governmental entities, in developing, procuring, maintaining, or using electronic or information technology, either indirectly or through the use of state funds by other entities, shall comply with the accessibility requirements of Section 508.[14]

Like Illinois, Hawaii also bases its technical requirements on Section 508 Standards.[15] Many Hawaii State government websites also include an accessibility statement regarding Hawaii's commitment to strive for WCAG 2.0 Level AA conformance. Additionally, in June 2022, the Hawaii State Legislature passed the Hawaii Electronic Information Technology

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[10] *See, e.g.*, U.S. Attorney Announces Agreement With The City University Of New York To Remedy The Exclusion Of A Student With Visual Impairments, United States Attorney's Office, Southern District of New York (Apr. 12, 2023), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-agreement-city-university-new-york-remedy-exclusion-student; Consent Decree, *United States v. The Regents of the Univ. of Cal*. (Nov. 20, 2022), https://www.justice.gov/d9/case-documents/attachments/2022/11/21/consent_decree_-_u.s._v._uc_berkeley.pdf; Settlement Agreement with Champaign-Urbana Mass Transit Dist. (Dec. 14, 2021), https://www.justice.gov/d9/case-documents/attachments/2021/12/14/champaign-urbana_sa.pdf; United States Reaches Agreements with New York State and Local Government Agencies to Improve Accessibility to COVID-19 Vaccination Websites for People with Vision Impairments, United States Attorney's Office, Eastern District of New York (Oct. 5, 2021), https://www.justice.gov/usao-edny/pr/united-states-reaches-agreements-new-york-state-and-local-government-agencies-improve; Settlement Agreement with the National Federation of the Blind and the Sacramento Public Library Authority, (August 28, 2012), https://archive.ada.gov/sacramento_ca_settle.htm.

[11] *See* 30 ILCS 587/1 *et seq*

[12] See Information and Communication Technology ("ICT") Standards and Guidelines, 82 FR 5790, 5791 (Jan. 18, 2017) (The U.S. Access Board adopted WCAG 2.0 as the technical standard for the Federal Government's web content under Section 508 of the Rehabilitation Act of 1973).

[13] Cal. Gov't Code § 11546.7.

[14] Cal. Gov't Code § 7405.

[15] *See* Comptroller's Memorandum 2010-28 (https://ags.hawaii.gov/wp-content/uploads/2012/09/CM2010-28.pdf).

Accessibility Act ("HEITAA").[16] Similar to Illinois' statute, the HEITAA requires all information technology that the state develops, purchases, or uses be accessible. HEITAA also mandates Hawaii's Office of Enterprise Technology Services ("ETS") to develop and publish accessibility standards, called "Hawaii Electronic Information Technology Disability Access Standards," for all state entities to implement and follow.

Massachusetts has established standards for website accessibility pursuant to M.G.L. c. 7D, § 3. Massachusetts has adopted the WCAG 2.1 level A and AA Guidelines through a Policy Advisory.[17] Additionally, on July 26, 2023, Governor Healey issued a new executive order that establishes the Digital Accessibility and Equity Governance Board, creates a Chief IT Accessibility Officer, and requires the appointment of Secretariat IT Accessibility Officers to, among other things, track and report on accessibility as well as train employees.[18] Given this new executive order, Massachusetts expects significant changes in IT accessibility, oversight, and maturity in the near future.

New York state agencies and local governments must follow WCAG 2.0 A and AA guidelines for all newly created Information Communication Technology ("ICT") and public facing content[19] pursuant to a regulatory policy established by the New York State Office of Information Technology Services.[20]

The undersigned Attorneys General recognize the importance of website and public app accessibility for public entities, and support the adoption of a uniform federal standard that will apply consistently across all their jurisdictions.

C. Interests of State Attorneys General

The Attorneys General are each the chief legal officer for their respective States, and, as such, have a defined interest in submitting these comments. The Attorneys General are responsible for protecting the public interest of, and the people within, their States including individuals with disabilities. For instance, the Office of the Attorney General of Illinois' Public Interest Division houses a Disability Rights Bureau that works to advance and protect the rights of its constituents with disabilities to access all aspects of society. The Disability Rights Bureau enforces disability rights laws, provides technical assistance, and helps shape policy. Similarly, the State of California Department of Justice has a Disability Rights Bureau within its Civil Rights Enforcement Section. The establishment of a federal standard for web and mobile app

[16] S.B. 2144, 31st Leg., (Haw. 2022) (enacted)
[17] *See* Policy Advisory: Enterprise Information Technology Accessibility Policy, issued July 28, 2021, available at https://www.mass.gov/policy-advisory/enterprise-information-technology-accessibility-policy.
[18] *See* Exec. Order No. 614: Establishing the Digital Accessibility and Equity Governance Board, issued July 26, 2023, available at https://www.mass.gov/executive-orders/no-614-establishing-the-digital-accessibility-and-equity-governance-board.
[19] NYS Off. of Info. Tech. Services, Chief Tech. Off., IT Policy No. NYS-P08-005 § 4.0, Accessibility of Information Communication Technology (May 24, 2023), https://its.ny.gov/system/files/documents/2023/05/nys-p08-005-accessibility-of-information-communication-technology.pdf.
[20] Pursuant to its statutory authority under N.Y. State Tech. Law § 103(10).

accessibility will help the Attorneys General ensure their constituents with disabilities are afforded the access to digital applications they require.

As part of their enforcement authority, many Attorneys General have the power to protect people with disabilities in their States by investigating discriminatory policies, practices or procedures, systemic failures, or patterns and practices of disability discrimination in violation of one or more state laws. For example, the Office of the Attorney General of Illinois has exclusive authority to enforce the Illinois Environmental Barriers Act ("EBA"),[21] and its design standards, the Illinois Accessibility Code ("IAC").[22] This Bureau also enforces the Illinois Human Rights Act ("IHRA")[23] on behalf of its constituents with disabilities which prohibits discrimination in employment, real estate transactions, financial credit, places of public accommodation, and secondary education. The California Attorney General has broad jurisdiction to enforce all state laws protecting people with disabilities from discrimination.[24] including: California's Unruh Civil Rights Act, California's Disabled Persons Act, California's Fair Employment and Housing Act, and California's Education Code. Similarly, the New Jersey Attorney General is responsible for enforcing the New Jersey Law Against Discrimination which prohibits discrimination based on disability.[25]

The Attorneys General also hold a unique interest in submitting comments to DOJ's Proposed Rules to ADA's Title II regulations because of their *parens patriae* jurisdiction. Many Attorneys General use their *parens patriae* jurisdiction to apply the ADA,[26] the Fair Housing Act ("FHA"),[27] and other federal laws on behalf of their constituents with disabilities. The establishment of a clear, consistent standard for Title II web and mobile app accessibility will assist the Attorneys General in their enforcement efforts.

As the chief legal officer of their States, the Attorneys General also consult, advise, represent, and defend State officers for actions in their official capacities. Establishing a clear, consistent standard for web and mobile app accessibility will assist the Attorneys General in guiding compliance of the agencies they represent.

Finally, as a State government entity, the Offices of the Attorneys General are also obligated to comply with Title II of the ADA and its implementing regulations. The Attorneys General recognize the importance of providing their constituents with accessible web and mobile apps to access their own programs, services and activities, and look forward to the establishment of a clear, consistent standard of accessibility to work towards.

In summary, the Attorneys General strongly support DOJ's adoption of a specific technical standard for website and mobile app accessibility because a concrete standard will

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[21] 410 ILCS 25/1 *et seq*.
[22] 71 Ill. Adm. Code 400.
[23] 775 ILCS 5/1 *et seq*.
[24] *See e.g.,* California's Unruh Civil Rights Act, California's Disabled Persons Act, California's Fair Employment and Housing Act, and California's Education Code. *See* Cal. Civ. Code §§ 52, 55.1; Cal. Gov't Code § 12980; Cal. Educ. Code § 220.
[25] N.J. Stat. Ann. 10:5-1 *et seq.*
[26] 42 U.S.C. § 12101 *et seq*.
[27] 42 U.S.C. § 3601 *et seq*.

facilitate the Attorneys General in enforcing digital accessibility on behalf of their constituents, providing counsel to the state agencies they serve, and ensuring compliance of their own web applications as public entities subject to Title II.

II. State Responses to Solicited Comment Questions

The Proposed Rules, published on August 4, 2023, update DOJ's regulations for Title II entities, adopting WCAG 2.1 Level AA as the standard for accessibility. The Attorneys General strongly support DOJ's Proposed Rules and offer this comment with additional suggestions to strengthen the Proposal.

The DOJ's Proposal solicits responses to specific numbered questions. The Attorneys General list their responses below, along with a reference to the question number(s) in the comment.

A. Technical Standard Selected (Question 3)

The DOJ's Proposal makes clear the need for set regulations to assure the accessibility of public entities' websites, mobile apps, and other web-related content. When considering the standard that should be utilized in making those regulations, the Attorneys General agree that looking to the World Wide Web Consortium's ("W3C") Web Content Accessibility Guidelines, ("WCAG") is the most appropriate starting point. W3C has been at the forefront of web accessibility since its first drafted standards in 1999. DOJ has proposed utilizing the most recent finalized standards, namely WCAG 2.1. DOJ also notes and seeks comment on a newer standard, WCAG 2.2, that is currently in draft form.[28] In considering whether to adopt WCAG 2.1 or the newer 2.2, the Attorneys General acknowledge the need to have a set standard, while also understanding the utility of adopting the most current standards for creating accessible web content given the rapid pace of advancement of web content. As a result, if the WCAG 2.2 is finalized prior to the end of the rulemaking process, the Attorneys General advocate for its adoption as the standard incorporated by the regulations with sufficient time for public entities to reconcile differences between the standards. Like WCAG 2.1, WCAG 2.2 is not a wholly new standard, but builds on its predecessor. The bulk of its content is inclusive of the 2.1 standards,[29] with the current draft of WCAG 2.2 only presenting nine new standards beyond WCAG 2.1. If finalized prior to the end of rulemaking, its adoption would not present an overly burdensome or dramatically different standard than the adoption of 2.1. Further, since they have been in development for several years and are unlikely to have changed significantly if finalized prior the end of rulemaking, public entities are likely well aware of the Draft 2.2 standards in their current form. This approach will allow the DOJ the flexibility to institute standards which are on the cutting edge in a technologically fast paced area. In turn, it creates the greatest impact on web content accessibility, while efficiently mitigating the possibility of needing to go through a new rulemaking process to remain current with the standards adopted by the industry.

[28] *See* 88 FR 51948, 51961 (August 4, 2023).
[29] "What's new WCAG 2.2," https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/ retrieved September 19, 2023. "The 2.0 and 2.1 success criteria are exactly the same (verbatim, word-for-word) in 2.2. with one exception."

B. Consistent Standard Across Entities (Questions 5, 8, 11)

The Attorneys General believe the accessibility standard for websites and mobile apps should be consistent across all public entities regardless of size. First and foremost, Title II itself does not distinguish between different size public entities in requiring them to provide access for people with disabilities to their programs, services and activities. What little distinction there is relates to administrative obligations, not substantive obligations. Second, a single, uniform standard will allow for more uniform experiences for people with disabilities that are not dependent on the size of the public entity whose programs and services they wish to access. Requiring different standards could create a class of individuals with particular disabilities who have less access to the web content of the public entity serving them, and therefore less opportunity for equal participation, simply because of that entity's size. Finally, a uniform standard will simplify compliance and enforcement efforts. Applying different standards to different size public entities creates another layer of proof requiring additional information about a given entity when determining compliance.

Given these considerations, the Attorneys General encourage DOJ to adopt an accessibility standard for websites and mobile apps that is consistent across all size public entities.

C. Compliance Dates (Questions 9, 10)

The Attorneys General are concerned that by establishing future dates of compliance with the standards adopted in this new rule, DOJ will send an inadvertent message that public entities do not need to have accessible web content until that date. As a result, we encourage DOJ to clarify that by establishing compliance dates for the standards set in this regulation, DOJ is not pausing the general obligation for public entities to have accessible websites until the dates that those standards become effective. This will help make clear that any necessary web accessibility enforcement action required during the intervening period remains unencumbered.

D. Budget (Question 12)

The Attorneys General suggest that budget be adopted as an additional consideration in determining which public entities are classified as "small public entities." Considering budget in this determination more closely reflects the defenses available under Title II, which consider the costs associated with implementing changes to current programs and services. Further, because it is likely that most public entities, especially smaller public entities, will require the services of outside contractors to comply, budget more closely associates with the effect of that increased cost. However, the Attorneys General agree that a longer timeline for compliance with the new standards is appropriate for small public entities. While the costs of compliance may be similar across a variety of different sized public entities, the proportional burden on smaller budgets necessitates a longer timeline across which to spread those costs to maintain fiscal responsibility. The Attorneys General encourage DOJ to consider the costs for building a compliant web site and or/mobile app to determine a budgetary guideline to utilize in conjunction with the population guidelines already in place when defining "small public entity."

E. Captions for live audio content (Question 13)

The Attorneys General agree with DOJ's Proposal to apply the same compliance date to all of the WCAG 2.1 Level AA success criteria, including live-audio captioning requirements. Given the advancements in and widespread availability of captioning technology, it is not necessary to set a different compliance date for captioning of live audio content. Many remote meeting platforms, including Zoom and WebEx, already include live audio captioning.[30] With captioning already available in widely used meeting platforms, it will not be burdensome for Title II entities to meet the compliance date for live-audio captioning.

Furthermore, with the increase in remote public meetings following the COVID-19 pandemic, it is crucial for people with disabilities to have full and equal access to be able to participate in civic life. In Illinois, for example, although the COVID-19 disaster proclamation requiring remote meetings has ended, public bodies still have the option of allowing members of the public to attend open meetings via remote means.[31] This option is particularly useful to individuals with disabilities who may face more challenge in participating in-person. Given these circumstances, the Attorneys General agree that live-audio captioning should have the same compliance date as the rest of the WCAG 2.1 Level AA criteria.

F. Exceptions and Limitations (Questions 16, 19-20, 25, 33, 35-36, 44, 47)

The Attorneys General support reasonable exceptions to the proposed rule, although caution that such exceptions should be narrow so as to afford greater accessibility for people with disabilities. The ADA already provides defenses to Title II entities, including undue burden and fundamental alteration of services.[32] The undersigned also recognize public entities are generally required to make certain web content accessible, regardless of an existing exception, if so requested by an individual with a disability.[33] In general, the Attorneys General are supportive of limited exceptions to the proposed rule and provide the following comments in response to the questions posed.

1. Archived Content (Question 16)

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[30] *See* Zoom Video Communications, *Viewing Captions in a Meeting or Webinar* (June 1, 2023), https://support.zoom.us/hc/en-us/articles/4403492514829-Viewing-captions-in-a-meeting-or-webinar; Cisco, *Show or Hide Automated Closed Captions during a Webex Meeting or Webinar* (Sept. 5, 2023), https://help.webex.com/en-us/article/lzi8h2/Show-or-hide-automated-closed-captions-during-a-Webex-meeting-or-webinar.

[31] *See* Illinois Public Access Counselor, *Guidance to Public Bodies on the Open Meetings Act at the Expiration of the Gubernatorial COVID-19 Disaster Proclamation* (May 15, 2023), https://foiapac.ilag.gov/viewpdf.aspx?P=~/content/pdf/Updated%20Remote%20Meetings%20Guidance%20May%202023.pdf&H=OMA%20Remote%20Attendance%20Guidance

[32] *See, e.g.*, 28 C.F.R. § 35.164 (public entities not required to provide auxiliary aids and services to ensure effective communication if it would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens).

[33] *See, e.g.*, 28 C.F.R. § 35.130(b)(7) (public entities required to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability).

As written, the definition of "archived web content" is vague and unquantifiable. The Attorneys General are concerned that the vagueness will hinder compliance, complicate enforcement, and impede disability rights advocates from researching past policies in order to find evidence of past discrimination. The Attorneys General recommend that DOJ revise the definition of "archived web content."

In the Proposed Rule, "archived web content" is defined as content that (1) is maintained exclusively for reference, research, or recordkeeping; (2) is not altered or updated after the date of archiving; and (3) is organized and stored in a dedicated area or areas clearly identified as being archived. The second and third prongs are straightforward, but the first prong is imprecise. It is not clear what it means to maintain a document exclusively for reference, research, or recordkeeping.

For example, the Office of the Attorney General of the State of Illinois publishes the written official opinions of the Attorney General on its website.[34] Official opinions issued from 2010 to the present are available on the landing page, along with a link to the "Opinions Archive" which provides links to the official opinions issued from 1971 to 2009. Under the proposed rule, it is not clear whether the official opinions available at the "Opinions Archive" link are exempt from coverage as archived web content. At first glance, the opinions are maintained for reference, research, or recordkeeping; they are not altered or updated after the date of archiving; and they are organized and stored in a dedicated area clearly identified as being archived. Although official Attorney General opinions are not binding upon the courts, it has been held that a well-reasoned opinion is entitled to considerable weight, especially in a matter of first impression in Illinois. Indeed, in some areas of the law, such as the doctrine of incompatibility of offices, Attorney General opinions constitute the most significant body of interpretative authority available. Accordingly, it is beneficial for government officials and members of the public to have access to them. In this sense, the "archived" official opinions are not just maintained for research purposes. Rather, they constitute interpretations of the law by the chief legal officer of the State. This example illustrates how it will be difficult for Title II entities to determine what content falls within the archived web content exception.

Furthermore, research of archived material is an important tool for disability rights advocates to examine past practices of discrimination. As written, the archived web content exception is too broad and may obstruct people with disabilities from conducting research of web content to advocate for their rights based on past practices of discrimination by Title II entities.

The Attorneys General recommend DOJ reconsider its definition for "archived web content" in order to make it clear and quantifiable.

2. Pre-existing conventional electronic documents (Questions 19 and 20)

Similarly, the Attorneys General are concerned that the proposed pre-existing conventional electronic documents exception is vaguely defined and may cover content that is already excepted by the archived web content exception. The Attorneys General are unclear what additional information would be covered by this exception that is not already covered by the

[34] *See* Office of the Illinois Attorney General, *Opinions*, https://www.illinoisattorneygeneral.gov/ Opinions/index.

archived web content exception. Presumably, a public entity archives conventional electronic documents that are no longer in use for accessing its services, programs, or activities. If a public entity does not archive such material, it may still defend itself on the basis of undue financial and administrative burden if it is not feasible to make pre-existing conventional electronic documents accessible. In the interest of creating a clear rule that is easy for public entities to follow and enforce, the Attorneys General suggest DOJ either clarify or combine this exception with the archived web content exception.

3. Mobile Apps (Question 25)

The Attorneys General agree with DOJ that there should not be an exception for external mobile apps. Many public entities use external mobile apps to provide their programs, services and activities. If a public entity chooses to provide services and programs through an external mobile app, that app must be accessible to people with disabilities. However, the Attorneys General suggest DOJ consider an extension to the compliance date for external mobile apps. During this time of increasing cybersecurity attacks, public entities will need ample time to review software and applications by third party vendors to ensure they are in compliance with the entity's cybersecurity standards as well as with the proposed accessibility standards. The Attorneys General support DOJ's inclusion of external mobile apps in the Proposed Rule, and suggest the consideration of a longer compliance date.

4. Public Educational Institutions (Questions 33 and 35)

Under the Proposed Rules, all services, programs, or activities available to the public on the websites of public educational institutions must comply with the proposed accessibility standard. However, the Proposal provides exceptions for public educational institutions' password-protected class or course content where there is no student with a disability enrolled in the class or course who needs the password-protected content to be made accessible. In the elementary and secondary school environment, the exception applies where there is no student enrolled in the class or course who has a parent with a disability. The Attorneys General believe that in the post-secondary education context, this exception for public educational institutions' password-protected class or course content is too broad and will impede and delay access to essential class content by post-secondary students with disabilities.

The Attorneys General are confident that elementary and secondary public education students with disabilities will generally not be negatively impacted ty the Proposal's exception for public educational institutions' password-protected class or course content because of the robust protections provided by the Individuals with Disabilities Education Act ("IDEA")[35] and Section 504 of the Rehabilitation Act of 1973 ("Section 504").[36] Specifically, States receiving Federal financial assistance under IDEA have the duty to identify, locate, and evaluate all children with disabilities in their jurisdiction who may need special education and related services ("child find").[37] IDEA establishes detailed procedures public schools must follow for

[35] 20 U.S.C. § 1400 *et seq.*
[36] 29 U.S.C. § 701 *et seq.*
[37] 20 U.S.C. at § 1412 (a) (3).

conducting initial and subsequent evaluations of children with disabilities,[38] culminating in the development of an Individualized Education Program ("IEP"),[39] uniquely designed to meet the individual educational needs of the child. The child's parents are also provided procedural safeguards including the opportunity to file a complaint with the State educational agency if they believe their child's rights under IDEA have not been met.[40] As with IDEA, students who qualify for special education under Section 504 are protected by regulations which require public elementary and secondary education programs to 1) identify and locate every person with a disability in need of public education;[41] 2) provide a free, appropriate public education;[42] 3) implement an Individualized Education Program[43] following thorough evaluation procedures;[44] and 4) provide procedural safeguards for the child's parents or guardian.[45] Public elementary and secondary schools who are complying with their obligations to identify, evaluate, and develop an IEP or Section 504 Plan for a student with a disability will have ample notice if a student will need access to password-protected content specific to a class or course in which they will be enrolled.

By contrast, postsecondary institutions are not required to comply with IDEA or the Section 504 elementary and secondary school regulations. While postsecondary educational institutions must comply with Section 504 and Title II of the ADA which prohibit discrimination on the basis of disability, they have no obligation to identify, locate, and evaluate students with disabilities who may be entitled to accommodations under these statutes.[46] Rather, the responsibility is on postsecondary students to locate the appropriate campus office, make themselves known, and initiate the process of requesting and proving their own need for accommodations.[47] Whereas the student's elementary and secondary public school provided extensive evaluations at no cost to the student with a disability, the postsecondary public school may request the student provide proof of their disability and need for accommodations at the student's own expense.[48] In recognition of the challenges post-secondary students with disabilities encounter in establishing disability at postsecondary educational institutions, Illinois passed the Removing Barriers to Higher Education Success Act on June 9, 2023, effective January 1, 2024.[49] The Act requires each public institution of higher education in Illinois to accept a student's previous IEP or Section 504 Plan as documentation that the student is an individual with a disability. On March 30, 2023 a similar bill was introduced at the federal level, The Respond, Innovate, Succeed, and Empower (RISE) Act.[50] This proposed and enacted

[38] *See* 20 U.S.C. § 1414 (a), (b), and (c).
[39] *See Id.* at § 1414 (d).
[40] *See* 20 U.S.C. § 1415.
[41] 34 C.F.R. § 104.32
[42] 34 C.F.R. § 104.33
[43] 34 C.F.R. § 104.33(b) (2).
[44] 34 C.F.R. § 104.35.
[45] 34 C.F.R. § 104.36.
[46] *See* U.S. Department of Education, Office for Civil Rights, Transition of Students With Disabilities to Postsecondary Education: A Guide for High School Educators, Washington, D.C., 2011, available at http://www2.ed.gov/about/offices/list/ocr/transitionguide.html.
[47] *Id.*
[48] *Id.*
[49] 110 ILCS 195/.
[50] H.R. 2401.

legislation demonstrates acknowledgment by both Federal and State lawmakers that postsecondary students with disabilities face challenges in establishing their disability to get needed accommodations, such as access to password protected specific course content.

The Proposal provides two limitations to the exception for password-protected content, both triggered by the postsecondary institution being put on notice that a student with a disability requires the password-protected content be accessible.[51] However, since Title II of the ADA imposes no "child find" obligation on postsecondary public schools, both of the Proposal's limitations put the burden on the student to provide the school with notice. This process can result in delay in a student with disabilities accessing online course content, which in turn can diminish that student's equal opportunity to benefit from, and succeed in, the course. For these reasons, the Attorneys General urge DOJ to reexamine its exception for accessibility of course content on password-protected websites of postsecondary institutions, and consider requiring all newly posted password-protected course content be made accessible by the first day of class.

5. Individualized, password-protected documents (Question 47)

The Attorneys General urge DOJ not to exempt all individualized, password-protected documents as proposed. Rather than a wholesale exemption, the Attorneys General suggest that DOJ require Title II entities to make all new individualized, password-protected documents accessible beginning with the rule's compliance date. Preexisting individualized password-protected documents would still be exempted. This appropriately places the burden on the Title II entities to make all new content accessible rather than on people with disabilities to request accommodations.

In keeping with the stated purpose of the proposed rule to ensure equal access to public entities' services, programs, and facilities, individualized, password-protected documents should be accessible beginning with the proposed rule's compliance date. DOJ emphasizes public entities must provide people with disabilities with accessible versions of their own password-protected documents. But if a public entity must make some documents accessible, it should not be too burdensome to implement a system in which all newly-published (as of the compliance date) password-protected documents are accessible. And, as always, public entities may defend against allegations of discrimination by alleging an undue financial or administrative burden. The Attorneys General recommend that DOJ include new individualized, password-protected documents in the final rule.

In general, the states are supportive of limiting the exceptions to the proposed rule, given the defenses already available to Title II entities such as undue burden and fundamental alteration of services. The undersigned also accept limited exceptions recognizing that public entities are generally required to make certain web content accessible, regardless of an existing exception, if so requested by an individual with a disability.

G. Measuring and Assessing Compliance (Questions 50-54, 56, 58-64, 66)

[51] *See* 88 FR 51948, 51972-51973 (August 4, 2023).

As discussed above, the Attorneys General strongly support DOJ's adoption of a specific technical standard for website and mobile app accessibility for public entities. As each State's chief legal officer, and as a public entity subject to the revised ADA Title II regulations, the Attorneys General offer comments on ways to measure and assess compliance with DOJ's final rule.

The Attorneys General support DOJ's efforts to craft a framework for determining compliance with the specific technical standard. The Attorneys General recognize the need to balance ensuring full and equal access to services, programs, and activities for individuals with disabilities, with setting forth compliance obligations that public entities can reasonably achieve. The Proposed Rules appear to take a thoughtful approach to achieving this balance.

The Attorneys General agree with DOJ's determination that a nuanced definition of compliance is appropriate and that the impact of nonconformance should be considered. A standard that focuses on the impact of nonconformance, along with whether a public entity follows clear policies and practices, would provide a framework that prioritizes equal access for individuals with disabilities while also offering flexibility to public entities. The Attorneys General urge DOJ to support such multi-faceted approaches to measuring and assessing compliance.

1. **Measuring Compliance (Questions 51-54, 58-64)**

The Attorneys General appreciate DOJ's careful consideration of how to measure compliance when websites and mobile applications frequently change and undergo system updates. The Attorneys General therefore urge DOJ to adopt a nuanced definition of compliance and a multi-faceted approach to measuring a public entity's adherence to the specific technical standard for website and mobile application accessibility.

Specifically, the Attorneys General believe the final rule should include a two-step process, similar to what the United Kingdom is already utilizing: (1) use a well-known tool to conduct periodic automated testing of websites and mobile applications; and (2) conduct periodic manual testing of a representative sample of websites and mobile applications. Like the United Kingdom, the representative sample would include content with a larger social impact (*e.g.*, the size of the user population or the frequency of use), content that is the subject of a large number of complaints regarding inaccessibility, or both.

To assist with the analysis, one or several designated state or contracted agencies would define and categorize the levels of impact of nonconformance and also look at trends rather than a point in time. In other words, the agencies responsible for measuring compliance would look at whether the public entity's compliance is trending positively over a specific period of time.

For example, in Illinois, the Department of Innovation & Technology ("DoIT"), uses an automated tool to continuously conduct automated testing of about 136 websites of 70-100 Illinois state agencies. It takes about a week to run the testing and apply conformance ratings for all agencies. Hawaii and New Jersey also use automated tools/services to continuously measure accessibility across their sites. California's Department of Technology offers an online tool that

state agencies and entities can use for testing. California's Department of Justice performs manual testing to measure compliance across the sites it manages. In Illinois, DoIT also manually checks a representative sample of websites, when necessary, because automated testing alone is often unable to measure compliance. DoIT categorizes the impact of nonconformance as either critical, high, medium, or low and addresses issues according to their assigned level of impact. Similarly, in Hawaii, manual testing may be performed by the State's centralized IT agency as necessary. In New York, state entities are required to conduct manual testing of ICT for compliance with accessibility policy before production use and prior to any fundamental alteration. Automated testing is performed biennially, after the manual testing conducted before launch or alteration, through use of specialized software or services.

In summary, many of the states of the Attorneys General already have designated state agencies that utilize a multi-faceted approach to measure website compliance that includes both automated and manual testing, as suggested in this comment.

2. **Assessing and Enforcing Compliance (Questions 51-54, 58-64)**

As the chief legal officers of our respective states, the Attorneys General agree with DOJ's proposal to determine a public entity's level of nonconformance based on the impact the nonconformance has on an individual's ability to access the services, programs, or activities a public entity offers on its website or mobile application. If an individual with a disability challenges the accessibility of a public entity's website or mobile application, the burden would then fall on the public entity to show that noncompliance with the specific technical standard had only a minimal impact and was therefore ADA compliant.

The Attorneys General believe DOJ should adopt the minimal impact standard approach in conjunction with consideration and review of relevant feedback, testing, and remediation policies and practices a public entity is following in order to comply with its digital accessibility obligations. This multi-faceted approach would, again, prioritize accessibility while also recognizing the need for some flexibility.

Although DOJ states that it has not made determinations about what feedback, testing, and remediation policies and practices would be sufficient, the Attorneys General believe DOJ's adoption or recommendation of a few key principles or requirements for public entities to include in any existing or forthcoming policies and practices would be beneficial in providing more direction and preventing any confusion.

In addition to urging DOJ to adopt multi-faceted approaches for measuring and assessing compliance, the Attorneys General respond to additional compliance-related questions below.

3. **Sufficient Evidence of Noncompliance (Question 50)**

Due to Title II's requirement that individuals with disabilities have equal access to websites and mobile applications of public entities, the Attorneys General believe one testing methodology or configuration of assistive technology is sufficient evidence for an allegation of

noncompliance. However, a third party with knowledge of technology and, specifically, the requirements around digital accessibility should first have the opportunity to confirm the public entity's noncompliance.

4. **Different Standard Based on Creation of Website or Mobile Application (Question 56)**

The Attorneys General do not support adopting a different standard or timeframe for public entities coming into compliance depending on when the website or mobile application content was created. In other words, it should not matter whether the content existed at the time or was created after the final rule took effect. DOJ already is considering different timeframes for compliance depending on population size, and the ADA allows public entities to defend themselves against challenges by claiming the request creates an undue burden or a fundamental alteration of programs. Establishing a consistent standard will reduce confusion, and facilitate both compliance and enforcement. Public entities that are already in compliance with, for example, WCAG 2.0 Level AA, will likely not find it burdensome to ensure compliance with WCAG 2.1 Level AA.

5. **Ongoing Versus Isolated or Temporary Noncompliance (Question 66)**

The Attorneys General support forgiveness for an isolated or temporary episode of noncompliance, particularly where the public entity can demonstrate improved compliance. However, for instances of ongoing nonconformance, where the public entity is resistant to comply, the Attorneys General recommend DOJ consider appropriate remedies.

III. Conclusion

For these reasons, the Attorneys General strongly support the adoption of the Proposed Rules for public entity website and mobile app accessibility, as modified by the above-recommended changes, so that public State and local governments will have a clear, consistent standard with which to comply, and our State constituents with disabilities will have equality of opportunity, full participation, and equal access to programs, services and activities as envisioned by the drafters of the ADA.

Sincerely,

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