

DOJ SAYS ONLINE BUSINESSES HAVE “FLEXIBILITY” IN HOW TO MAKE WEBSITES ACCESSIBLE

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As we reported in June, a bi-partisan assembly of 103 members of the House of Representatives wrote a letter to Attorney General Jeff Sessions and asked the Department of Justice (“DOJ”) to “state publicly that private legal action under the ADA with respect to websites is unfair and violates basic due process principles in the absence of clear statutory authority and issuance by the department of a final rule establishing website accessibility standards.” That letter urged the DOJ to “provide guidance and clarity with regard to website accessibility under the ... ADA.”

On September 25, the DOJ responded to that letter. While the response does not directly address the members’ questions, it does state that the DOJ “is evaluating whether promulgating specific web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA.”

The letter also provides some guidance that could prove useful to retailers and other businesses with an online presence. First, the letter repeats statements previously made by the DOJ:

"The Department first articulated its interpretation that the ADA applies to public accommodations' websites over 20 year ago. This interpretation is consistent with the ADA's title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities."

Additionally, the Department has consistently taken the position that the absence of a specific regulation does not serve as a basis for noncompliance with a statute's requirements.

But, then, the letter continues:

"Absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

The statements that public accommodations have “flexibility” in how to comply with the ADA and that noncompliance with a “voluntary technical standard” does not indicate noncompliance with the ADA are both important and significant. As we have previously [reported](#), demand letters and lawsuits typically demand compliance with the Web Content Accessibility Guidelines (“WCAG”) 2.0 level AA guidelines. And, as we have also [reported](#), courts have granted injunctions that specifically reference these WCAG guidelines. These new statements by the DOJ indicate that a website might be considered accessible without being fully compliant with the WCAG standards. Notably, however, the letter does not provide any guidance on how a business should go about interpreting this “flexibility” standard.

Indeed, in closing the letter, the DOJ stated: “Given Congress’ ability to provide greater clarity through the legislative process, we look forward to working with you to continue these efforts.” With this statement, the DOJ has given the baton back to Congress and it will remain to be seen what, if anything, happens next.

For questions or more information, please contact the authors, [Heather Goldman](#), [Merrit Jones](#), or any member of our [Retail Law](#) team.

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