



October 17, 2023

VIA ELECTRONIC SUBMISSION

Rebecca Bond
Chief, Disability Rights Section
Civil Rights Division
U.S. Department of Justice
150 M St. NE, 9th Floor
Washington, DC 20002

Re: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities; 88 Fed. Reg. 51948 (Aug. 4, 2023).

Dear Ms. Bond:

On August 4, 2023, the United States Department of Justice Civil Rights Division (DOJ) published a proposed rule that would require state and local government entities make their websites and mobile devices accessible under the Americans with Disabilities Act (ADA).¹ The proposed rule adopts the Web Content Accessibility Guidelines (WCAG) 2.1 Level AA as the new technical standard for compliance with Title II of the ADA.² This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

Advocacy is concerned that small governments with a population of fewer than 50,000 will face significant financial and operational challenges in complying with the proposed rule. Small governments will have difficulty updating their websites and mobile applications to comply with the WCAG 2.1 AA technical standard within the proposed three-year compliance deadline. DOJ has proposed a one-size fits all technical standard that is higher than what is currently required for the federal government. Advocacy believes that DOJ has underestimated the compliance costs and burden hours of this rule for small entities, particularly the smallest government jurisdictions. Small governments already seek to provide accessibility for their constituents but have limited revenues and a lack of internal technical staff to meet this high technical standard.

¹ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Web Information and Services of State and Local Government Entities, 88 Fed. Reg. 51948 (proposed Aug. 4, 2023) [hereinafter Proposed Rule].

² W3C Web Accessibility Initiative, *WCAG 2 Overview*, <https://www.w3.org/WAI/standards-guidelines/wcag/> (last updated Oct. 5, 2023) [hereinafter *WCAG*].

Advocacy provides the comments and recommendations below to assist DOJ in developing a final regulation that offers flexibility to small governments while improving accessibility to the public. Advocacy recommends that DOJ adopt the WCAG Level 2.0 standard for Title II of the ADA to harmonize with the current federal requirements. Advocacy also recommends that DOJ create a safe harbor from abusive litigation challenges. The agency should adopt flexibilities for compliance for the smallest governments if compliance is an undue financial and administrative burden. Advocacy also recommends that DOJ provide more flexibility for captioning requirements and provide more compliance and assistance to help small entities.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁵ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁶ The agency must provide a statement of factual basis that adequately supports its certification.⁷

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁸ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.⁹

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation,

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

⁴ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁵ 5 U.S.C. § 603.

⁶ *Id.* § 605(b).

⁷ *Id.*

⁸ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

⁹ *Id.*

federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”¹⁰

B. The Proposed Rule

Title II of the ADA prohibits discrimination on the basis of disability in services provided by state and local governments.¹¹ DOJ has stated that the ADA’s requirements apply to all the services, programs, or activities of state and local governments, including those offered on the web and via mobile applications.¹²

Section 601(5) of the RFA covers small governmental jurisdictions with a population of fewer than 50,000. This includes cities, counties, towns, villages, school districts, and special districts.¹³

In 2010, DOJ released an Advanced Notice of Proposed Rulemaking (ANPRM) seeking early public feedback on potential regulations requiring website accessibility for state and local governments and public accommodations under Title II and Title III of the ADA.¹⁴ Advocacy submitted a public comment letter to DOJ stating that any future rulemaking on this issue would have a significant economic impact on a substantial number of small entities.¹⁵ Advocacy expressed its commitment to helping DOJ reach out to small entities to analyze the economic impacts of this rulemaking and identify significant regulatory alternatives that may minimize the cost of this regulation for small entities.¹⁶

WCAG 2.0 was published in December 2008, and requires 38 success criteria to make a website more accessible, including provisions to make the website more perceivable, operable, understandable, and robust.¹⁷ This standard has multiple levels of complexity: A(basic), AA (intermediate), and AAA (advanced). WCAG 2.1 was published in 2018 and adds 12 Level A and AA success criteria to the 38 criteria contained in WCAG 2.0.¹⁸ The additional criteria provide accessibility benefits to people with low vision, manual dexterity disabilities, and

¹⁰ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

¹¹ See Americans with Disabilities Act of 1990, § 202, 42 U.S.C. § 12132.

¹² U.S. Dep’t of Just. Civ. Rts. Div., *Guidance on Web Accessibility and the ADA* (Mar. 18, 2022), <https://www.ada.gov/resources/web-guidance/>; Proposed Rule, *supra* note 1, at 51,948.

¹³ 5 U.S.C. § 601(5).

¹⁴ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (ANPRM proposed Jul. 26, 2010).

¹⁵ U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Web Information and Services of State and Local Government Entities and Public Accommodations (Jan. 24, 2011), <https://www.regulations.gov/comment/DOJ-CRT-2010-0005-0359>.

¹⁶ *Id.*

¹⁷ W3C Web Accessibility Initiative, *Web Content Accessibility Guidelines (WCAG) 2.0* (Dec.11, 2008), <https://www.w3.org/TR/2008/REC-WCAG20-20081211/>.

¹⁸ W3C Web Accessibility Initiative, *Web Content Accessibility Guidelines (WCAG) 2.1*, <https://www.w3.org/TR/WCAG21/> (last updated Sept. 21, 2023) [hereinafter *WCAG 2.1*].

additional criteria to improve accessibility for mobile web content and apps.¹⁹ This standard includes making the website more perceivable to assistive technology by adding text under photos and converting conventional documents.²⁰ This standard also requires adding captions to time-based media like live videos and prerecorded video and audio.²¹

This proposed rule is the first time the agency is proposing technical standards for web content and mobile applications for state and local governments. DOJ proposes to adopt the WCAG 2.1 Level AA accessibility standard for web access.²² Federal agencies, under section 508 of the Rehabilitation Act of 1973, are currently required to follow the WCAG 2.0 Level A and AA Success Criteria and Conformance Requirements.²³

DOJ is proposing different compliance dates for this rule by population size of the public entity. Public entities with a total population of 50,000 or more must comply with this standard in two years after the publication of this rule. Small public entities with a population of less than 50,000 would have three years to comply with these requirements.²⁴

II. Advocacy's Small Business Concerns

On September 14, 2023, Advocacy held a virtual roundtable with DOJ officials and over 200 small governments from 31 states, including counties, cities, townships, parishes, and community colleges. Also in attendance were officials from state governments, small businesses, and accessibility vendors. The following comments reflect the issues raised during this roundtable and in other conversations with small governments and their representatives.

A. DOJ's Small Business Analysis Underestimates Compliance Costs of Rule

Advocacy is concerned that DOJ's Initial Regulatory Flexibility Analysis (IRFA) underestimates the economic impact of the proposed requirements on small entities, particularly to the smallest governmental jurisdictions. DOJ estimates the following average annual costs per small entity using a 3 percent discount rate: county (\$9,601), municipality (\$18,269), township (\$15,135), school district (\$31,964), and community college (\$449,163).²⁵ In the IRFA, the agency estimates that the costs are less than 1 percent of revenues for every entity type, noting that "the department believes that the costs of this proposed regulation would not be overly burdensome for the regulated small governments."²⁶ DOJ's Preliminary Regulatory Impact Analysis (RIA) estimates high upfront costs that small governments face in the initial website testing and remediation phases per small entity: county (\$29,541), municipality (\$90,847), township

¹⁹ Proposed Rule, *supra* note 1, at 51,959.

²⁰ See *WCAG 2.1*, *supra* note 18, at Success Criterion 1.1.1 Non-text Content. This provision requires all non-text content that is presented to the user has a text alternative that serves the equivalent purpose.

²¹ *Id.* at Success Criterion 1.2, Time-based Media.

²² See *WCAG 2.1*, *supra* note 18.

²³ Information and Communication Technology (ICT) Standard and Guidelines, 82 Fed. Reg. 5790 (proposed Jan. 18, 2017).

²⁴ Proposed Rule, *supra* note 1, at 51,949.

²⁵ *Id.* at 52,015 tbl.37: Number of Small Entities and Ratio of Costs to Government Revenues.

²⁶ *Id.* at 52,014.

(\$74,100), school district (\$94,644), and community college (\$554,385).²⁷ Small governments believe that the compliance costs from this rule will be even higher than DOJ's estimates.

DOJ's analysis also fails to estimate the compliance costs of the rule by small entity size and revenue, as required by the RFA.²⁸ For example, DOJ averages the economic impacts of this rule on all small cities with a population of under 50,000, whether the city has a population of 2,500, 10,000, or a population of 45,000. Averaging impacts across all affected small entities can miss the burdens of a regulation on the smallest governments with limited budgets. By failing to analyze the different size and types of governments affected, the impacts to the smallest entities can be hidden, and agencies cannot craft alternatives to minimize the economic impacts to these entities.²⁹ To fully understand the impact of the rule, Advocacy recommends that DOJ complete a Supplemental Regulatory Flexibility Analysis to examine the impacts of this rule on small governmental entities of different population sizes.

According to Advocacy's RFA compliance guide, a measure for determining the economic impact on small entities is whether the cost of a rule exceeds one to three percent of gross revenues of affected small entities.³⁰ In this IRFA, Advocacy cannot determine the impact of the rule on small governments with different population sizes. To study the potential economic impact of this rule on smaller governments, Advocacy reviewed recent Minnesota city population data and revenue data. Table 1 shows the city population, city revenue, and the estimated costs as a percentage of city revenue. The table shows the DOJ's estimates of the average annual cost for small cities (\$18,000) and the initial testing and remediation for small cities (\$90,000). This preliminary data demonstrates the importance of examining the impact on different sized small entities. Table 1 below shows how the smallest entities experience a disproportionate impact from the rule, particularly for cities with populations of fewer than 2,500 and up to 22,000.

²⁷ U.S. Dep't of Just., *Preliminary Regulatory Impact Analysis*, 29 tbl.20: Initial Website Testing and Remediation Costs Per Entity, <https://www.regulations.gov/document/DOJ-CRT-2023-0007-0002> (posted Aug. 4, 2023) [hereinafter *PRIA*]. This is a longer Regulatory Impact Analysis than the one included in the proposed rule.

²⁸ U.S. SMALL BUS. ADMIN., OFF. OF ADVOC., A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 17 (Aug. 2017), <https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf> [hereinafter *ADVOCACY RFA GUIDE*] ("Agencies should identify and examine various economically similar small regulated entities so that they will have a baseline from which to determine whether a significant regulatory cost will have an impact on a substantial number of entities. An understanding of the differences in economic impacts across the various regulated communities often generates different regulatory alternatives.").

²⁹ Michael J. McManus, *Examining Small Business Impacts in the Regulatory Development Process: The Drawbacks of Averaging* 6 (Aug. 30, 2018), <https://advocacy.sba.gov/2018/08/30/examining-small-business-impacts-in-the-regulatory-development-process-the-drawbacks-of-aver/>.

³⁰ *ADVOCACY RFA GUIDE*, *supra* note 28, at 19 ("Other measures may be used; to illustrate, the impact could be significant if the cost of the proposed regulation (a) eliminates more than 10 percent of the business' profits; (b) exceeds 1 percent of the gross revenues of the entities in a particular sector or (c) exceeds 5 percent of the labor costs of the entities in the sector.").

Table 1: ADA Proposed Rule Impact on Selected Minnesota Cities: Compliance Costs to Budgeted Governmental Revenues

City	Population	Revenue	18k/Revenue	90k/Revenue
Heidelberg	132	\$37,875	47.52%	237.62%
Geneva	505	\$474,200	3.80%	18.98%
Rock Creek	1,765	\$555,942	3.24%	16.19%
Crosby	2,366	\$2,717,681	0.66%	3.31%
Rice Lake	4,169	\$2,502,385	0.72%	3.60%
Oak Grove	9,130	\$3,246,605	0.55%	2.77%
Arden Hills	9,592	\$5,563,920	0.32%	1.62%
Vadnais Heights	12,713	\$8,085,311	0.22%	1.11%
Sauk Rapids	13,801	\$8,021,900	0.22%	1.12%
Hugo	16,408	\$8,885,899	0.20%	1.01%
Ham Lake	16,613	\$9,562,788	0.19%	0.94%
Otsego	22,424	\$9,196,601	0.20%	0.98%

Selected sample of Minnesota cities across different population sizes. Cities were selected based on their population size, whether they have a website subject to the rule, and severity of cost to revenue to demonstrate the importance of examining different sized small entities. Sources: Population data from the [U.S. Census Annual Estimates of the Resident Population for Incorporated Places in the United States](#); April 1, 2020 to July 1, 2022 for Minnesota; Revenue data from [Minnesota City 2023 Summary Budget Data Together With 2022 Summary Budget Data](#)

B. DOJ Should Consider Regulatory Alternatives for Small Governments

1. DOJ Should Adopt WCAG Level 2.0 Standard for Title II of the ADA

Advocacy recommends that DOJ adopt the Web Content Accessibility Guidelines (WCAG) Level 2.0 as the standard for Title II of the ADA regarding website and mobile application accessibility, and not the higher requirement under WCAG 2.1. The United States Access Board has adopted the WCAG Level 2.0 Level as the standard for federal government accessibility.³¹ DOJ should attempt to harmonize these federal requirements for accessibility with the new state and local requirements. Small governments with limited resources should not be held to a higher standard than the federal government.³²

Advocacy is also concerned that DOJ has not examined the current baseline of ADA accessibility of small governments to properly measure the economic impact of this rulemaking. The agency only cites one 2021 study, which found that 71 percent of county websites evaluated did not conform to WCAG 2.0 and the remaining 29 percent only partially conformed to the standards.³³ Advocacy is concerned that a majority of small government websites are not ADA

³¹ *WCAG 2.1*, *supra* note 18.

³² Nat'l Fed'n of Indep. Bus., Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Web Information and Services of State and Local Government Entities, 88 Fed. Reg. 51948 (Sept. 27, 2023), <https://www.regulations.gov/comment/DOJ-CRT-2023-0007-0133>. [hereinafter NFIB]

³³ Proposed Rule, *supra* note 1, at 51,990.

compliant, but the agency is requiring a tremendous amount of expensive technology overhaul in a short amount of time.

Advocacy recommends that the DOJ provide more guidance on how the agency will measure compliance with the proposed WCAG 2.1 standard. DOJ is seeking public comment on whether a different framework for measuring compliance may be needed to address the difficulty that public entities may have in achieving 100 percent conformance with a technical standard, 100 percent of the time.³⁴ Advocacy agrees with DOJ's assumption that 100 percent compliance with this technical standard is not feasible. Vendors and government IT staff have shared with Advocacy that each vendor has its own accessibility checker tool, and small entity websites can receive different compliance grades on website elements based on the tool they utilize. Roundtable participants were confused by the process to make their websites ADA accessible. They were also concerned that they would always be vulnerable to a lawsuit.

2. DOJ Should Consider Exempting Certain Population Thresholds from Rule

Advocacy also recommends that the DOJ complete a Supplemental Regulatory Flexibility Analysis to evaluate the compliance costs of the regulation, and to explore exempting certain population thresholds from compliance with the WCAG standard or the most expensive provisions of this standard. In Advocacy's preliminary review of the economic impact of this rule on certain Minnesota cities, we found that many cities spend more than they earn annually, and this is likely to be the case broadly. Roundtable participants noted that their cities or counties lacked extra discretionary funds to spend on these large technology expenditures. These funds would have to be diverted from other important services like transportation, sanitation, and a police force. Funding must also be budgeted over a year ahead of time and approved by officials, and these governments may have to raise funds through a tax to their citizens. For example, the city of Heidelberg has a population of 132 and a revenue of \$37,875.³⁵ This regulation is estimated to cost \$18,000, it would not benefit this city and its 132 citizens to spend almost half of their budget on this one expense. In another example, the city of Crosby has a population of 2,366, revenues of \$2.7 million dollars, and expenditures of \$2.8 million dollars.³⁶ It would be hard for this city to pay \$18,000 or more for this regulation when it does not have extra funding. These small entities believe that the federal government should also provide funding or grants for these technology upgrades.

³⁴ *Id.* at 51,981.

³⁵ U.S. Census Bureau, *City and Town Population Totals: 2020-2022*, <https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html> (last updated June 13, 2023) (population data from the U.S. Census Annual Estimates of the Resident Population for Incorporated Places in the United States for April 1, 2020 to July 1, 2022 for Minnesota); State of Minn., Off. of the State Auditor, MINNESOTA CITY BUDGETS: 2023 SUMMARY BUDGET DATA TOGETHER WITH 2022 SUMMARY BUDGET DATA (Apr. 27, 2023), https://www.osa.state.mn.us/media/oocfcmac/cibudget_23_report.pdf.

³⁶ *Id.*

3. DOJ Should Create Flexibilities and a Safe Harbor for Small Entities

Advocacy is concerned that the adoption of the stringent WCAG 2.1 AA standard will make small entities vulnerable to a wave of abusive litigation challenges. The U.S. Supreme Court has granted certiorari and heard oral arguments in *Acheson Hotels LLC v. Laufer*, a case that may decide who has standing to sue a business or an entity under the ADA.³⁷ In this case, an individual tested and sued over 600 hotels for ADA accessibility violations on their websites without any intent of visiting these establishments.³⁸ This type of frivolous litigation creates opportunities for predatory lawsuit behavior that small governments cannot afford without any benefits to the public.³⁹ A roundtable participant also reported that their county was a target of a lawsuit filed by an individual who had filed over 100 lawsuits against government entities and businesses in Florida. This county settled and paid hundreds of thousands of dollars to settle this case and to remediate their website. A city representative was concerned that this rule would also encourage similar “testers” to visit hundreds of city websites or try to download parking apps to find ADA website violations.

Advocacy believes that a more nuanced definition of compliance might be appropriate because in some instances of nonconformance with WCAG, success criteria may not impede access to services, programs, or activities offered through a public entity’s web content or mobile app.⁴⁰ DOJ’s regulations allow for governments to have an exception if “the public entity can demonstrate that compliance would result in . . . undue financial and administrative burdens.”⁴¹

The proposed rule notes that if the entity cannot bring web content or a mobile app in compliance without a fundamental alteration or an undue burden, “it must take other steps to ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible.”⁴² Small governments seek additional guidance on the undue burden defense, examples on how this would be calculated or proved, and how entities can protect themselves from liability. The current definition is too broad and puts small entities at greater risk of legal retaliation. Small governments report having to settle these cases for thousands of dollars, rather than having to provide evidence in court on whether they have met the undue burden standard.

Advocacy also recommends that the DOJ create a safe harbor from liability if an entity can demonstrate that it is affirmatively establishing and following robust policies and practices for accessibility, testing, and remediation. Small entities also seek a chance to remediate or cure any accessibility problems before being subject to litigation. Advocacy also recommends that DOJ allow small governments to provide the services, programs, and activities in alternate ways. For

³⁷ *Acheson Hotels, LLC v. Deborah Laufer*, No. 22-429 (U.S. argued Oct. 4, 2023).

³⁸ *See id.*

³⁹ Nat’l League of Cities, Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Web Information and Services of State and Local Government Entities, 88 Fed. Reg. 51948 (Oct. 3, 2023).

⁴⁰ Proposed Rule, *supra* note 1, at 51,982.

⁴¹ *Id.* at 52,018, (stating the proposed §35.2000 (b)(1) requirements).

⁴² *Id.* at 51,979.

example, small entities note that they often have accessibility statements on their websites which allow individuals with disabilities to obtain a particular document or form in an accessible format. Individuals with disabilities can also request that captioning be provided for a particular live event or pre-recorded event. Small entities can also respond to phone calls and emails to provide this accessibility.

4. DOJ Should Give Small Governments More Time to Comply with WCAG 2.0

Advocacy recommends that DOJ provide four or five years for small public entities with a population fewer than 50,000, or a subset of these small entities, to meet Advocacy's recommended WCAG 2.0 technical standard. Advocacy is concerned that small governments will be unable to meet this technical standard within the proposed three-year compliance timeline due to the lack of staffing and the excessive vendor costs associated with this proposal.

Roundtable participants told Advocacy that it will take longer than the agency estimated three hours to read, understand, and train employees with this regulation due to the lack of internal technical staff in these small entities.⁴³ Small governments often do not have a dedicated IT person, and many participants noted that they may have to hire extra staff to comply with this rule. A staff member from a small parish in Louisiana with a population of 5,000 commented that the website responsibilities are decentralized, and different departments and multiple individuals manage their own websites and post material and live meetings on these sites. Small governments would have to train many personnel annually to ensure sufficient knowledge of WCAG and ADA standards at a cost of thousands of dollars and many hours of staff time. A representative from the Vermont League of Cities and Towns noted that 72 percent of municipalities in their state have a population of under 2,500. Most of these very small governments rely on volunteers to post material on the websites and would also have to train many of these volunteers. Roundtable participants commented that this rule may have a chilling effect on transparency and accessibility. Smaller governments may remove documents, live events, and tools from their websites to avoid liability.

Small governments have shared with Advocacy that the costs and hours involved in making their websites ADA accessible are much higher than estimated by the agency at every step of the process, and they seek more time to comply with these requirements. Roundtable participants believe that the proposed rule's focus on meeting this high technical standard is forcing small governments without technical knowledge to be reliant on expensive vendors to provide accessibility tools. For example, the rule does not consider that the government may be required to purchase a new content management system to create a new website, which can be estimated at \$10,000 or more depending on the size of the website. A vendor who makes websites for many small governments noted that they may provide an accessible website on day one. However, it is up to the government staffers to post accessible content and continually test and remediate any inaccessible information. A city representative noted that governments normally update their

⁴³ *PRIA*, *supra* note 27, at 26-28 (discussing regulatory familiarization costs).

systems every five years, and it would make a huge difference to incorporate these changes early in the process with the next normal upgrade and purchase.

Small governments and vendors commented that the DOJ's IRFA has low estimates for average annual cost for small entities. However, there are higher estimates in the Preliminary Regulatory Impact Analysis for just two steps of the accessibility process: the initial testing and remediation costs. DOJ should consider providing more time to comply with these costly provisions. In the RIA, DOJ estimated that the initial website testing cost per small entity was \$4,327 for counties and \$14,349 for municipalities. DOJ estimated the initial website remediation costs per small entity at \$16,836 for counties and \$67,280 for municipalities.⁴⁴

Small entities have indicated that the compliance costs of the rule are substantially higher. Advocacy received multiple quotes for automatic testing of a website as a yearly service to identify inaccessible website elements at \$5,000 to \$20,000 a year. However, vendors noted that these automatic testing can only find 30 to 40 percent of the errors on a website. A government will likely have to pay for manual testing to find other errors, where a vendor and individuals with disabilities functionally test the operation of the website utilizing assistive technology. A vendor commented that manual testing could cost \$15,000 to \$25,000 for an initial assessment, and an additional 50 percent of that cost to test any remediations that were completed by another vendor. Vendors noted that small governments often hire outside vendors at high hourly rates to complete the automatic and manual remediation of website errors found. For example, the remediation rates can be \$75 to \$150 per hour for freelance vendors and \$250 to \$300 per hour for more established vendors. Many governmental entities reported utilizing more affordable website overlays, which are automated software solutions that fix a website's source code. However, roundtable participants noted these are not preferred by the disability community and may not meet the technical compliance requirements of the WCAG. DOJ should provide guidance on whether overlay technology would fulfill these technical standards.

5. DOJ Should Provide More Flexibility for Captioning Requirements

Small governments are most concerned with the high compliance costs from the proposed rule's requirements to caption audio and video materials, whether it is providing synchronized captions and audio description for live events or adding captions and audio description to prerecorded events or older event files.⁴⁵ Advocacy recommends that DOJ provide small government jurisdictions with a population of fewer than 50,000, or a subset of these small entities, four or five years to comply with the live captioning requirements of the AA Success Criteria.⁴⁶ Advocacy also recommends that DOJ consider providing small governments with a population of fewer than 50,000, or a subset of these small entities, four or five years to comply with the other captioning requirements for pre-recorded audio and video materials.⁴⁷ Participants at

⁴⁴ *Id.* at 29 tbl.20: Initial Website Testing and Remediation Costs.

⁴⁵ *WCAG 2.1*, *supra* note 18 at sec.1.2.1 Time-based media (includes: audio-only and video-only (pre-recorded), captions (prerecorded), captions (live), audio description (pre-recorded), and audio-only (live)).

⁴⁶ *Id.*

⁴⁷ *Id.*

Advocacy's roundtable commented that these high costs may result in many small governments removing these live events and existing videos and audio materials from websites, removing accessibility and participation to these important civic events to the entire public.

DOJ's analysis underestimates the costs of video and audio captioning, estimating the following cost per small entity: county (\$802), municipality (\$3,203), township (\$2,591), special district (\$305), and community college (\$20,082).⁴⁸ In its analysis, DOJ estimates that the upper bound for caption costs is \$15 per minute of video requiring captions.⁴⁹

Small governments have shared with Advocacy that these estimates are very low because they have reoccurring live events and hundreds of past pre-recorded events on their websites. Small entities also host live events on social media sites like YouTube or Facebook and store years of past event videos. For example, a staffer at a small city in Georgia with a population of 18,000 reported that his city holds two live council meetings a month that are two hours long on its website, along with various board and historic preservation meetings. This city has videos and audios of pre-recorded meetings, agendas, and meeting minutes since 2018. It would cost this city up to \$40,000 a year to live-caption just their bi-monthly council meetings, utilizing the DOJ estimates that the upper bound for caption costs is \$15 per minute of video requiring captions. Small governments report that they may be forced to remove this live and pre-recorded content from websites.

Advocacy recommends that governments be allowed to utilize technologies that provide automatic captioning on their websites and on external websites like YouTube or Facebook Live. Vendors commented that automatic captioning does not capture the text exactly and does not provide audio description of the actions happening in video. Providing extra compliance time may allow time for this technology to develop and become more precise. Advocacy also recommends that governments be allowed to archive older videos and audio materials on their websites and on external social media pages. Archived web content should be defined as web content that: (1) was placed on the public entity's website or a third-party website prior to the effective date of this rule and (2) has not been altered or updated after the effective date of the rule.⁵⁰ If providing live captions or providing captions on pre-recorded materials is an undue burden for small governments, they should take other steps to ensure that individuals with disabilities receive this information, whether it is through providing meeting minutes or an agenda.

6. DOJ Should Provide More Compliance Materials for Small Governments

If the final rule will have a significant economic impact on a substantial number of small entities, DOJ must publish a small entity compliance guide for this regulation.⁵¹ Agencies are required to publish the guides with publication of the final rule, post them to websites, distribute them to

⁴⁸ *PRIA*, *supra* note 27 at 51 tbl.30: Total Video and Audio Captioning Costs.

⁴⁹ *Id.* at 50.

⁵⁰ See NFIB *supra* note 32, at 5 (modifying NFIB's proposed definition for Archived Web Content).

⁵¹ Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 212, 110 Stat. 857, 858 (1996) (codified at 5 U.S.C. §601 note).

industry contacts, and report annually to Congress.⁵² Advocacy is available to help DOJ in the writing and dissemination of this guide. Roundtable participants also recommended that DOJ provide more compliance materials and assistance to help small governments comply with this regulation, such as webinars and trainings on the ADA and WCAG requirements.

C. Small Government Feedback on Exceptions

1. Archived Web Content and Preexisting Conventional Electronic Documents

DOJ has created an exception from the web accessibility requirements for “archived web content” that (1) is maintained exclusively for reference, research, and recordkeeping; (2) is not altered or updated after the date of achieving; and (3) is organized and stored in a dedicated area or areas clearly identify as being archived.⁵³

Small governments report having thousands of older files, which are very expensive to convert to accessible documents. For example, one vendor commented that it would cost \$5 to \$10 a page, or \$75 to \$150 an hour to make older PDFs accessible. Small cities also report estimates of \$2,000 to \$7,500 to make one older report or budget ADA accessible. Small governments commented that they would not recommend having a dedicated archive page because they have thousands of documents and other materials on their websites. It would be expensive to create an archival process and a dedicated archival area, identify the archived documents, and create an index that allows users to locate these documents. Some small entities commented that they store older materials on other third-party websites, like court documents and budget materials.

Advocacy recommends that DOJ revise the definition of “archived web content” to read: Archived web content means web content that- (1) was placed on the public entity’s website or a third-party website prior to the effective date of this rule and (2) has not been altered or updated after the effective date of the rule.⁵⁴ Small governments should have the option of creating an accessibility disclaimer on the website to inform the public that they can request a particular document to be made accessible.

Advocacy also supports the DOJ exception that conventional electronic documents created by or for a public entity that are available on a public entity’s website or mobile app before the date the public entity is required to comply with this rule do not have to comply with accessibility requirements. The proposal would require that these older documents would have to be made accessible if they “are currently used by members of the public to apply for, gain access to, or participate in a public entity’s services, programs or activities.”⁵⁵ This exception conforms to Advocacy’s recommended exception for “archived web content” above. This provision is important because it allows the agency to further the goal of providing accessibility to services,

⁵² The Small Business and Work Opportunity Act of 2007, Pub. L. No. 110-28, § 8302, 121 Stat. 204-05 (codified at 15 USC § 631 note) added these additional requirements for agency compliance to SBREFA.

⁵³ Proposed Rule, *supra* note 1, at 52,018 (stating the proposed §35.104 definitions for archived web content).

⁵⁴ See NFIB *supra* note 32, at 5.

⁵⁵ Proposed Rule, *supra* note 1, at 52,019 (stating the proposed § 35.201 for exceptions).

programs, and activities while minimizing the economic impact to small governments. Small governments recommended that DOJ provide more guidance on this provision.

2. Third-party Content Linked from a Public Entity Website

The proposed rule provides that a public entity is not responsible for the accessibility of third-party web content linked from the public entity's website unless the public entity uses the third-party web content to allow members of the public to participate in or benefit from the public entity's services, programs, or activities.⁵⁶ Advocacy supports this exception, as small governments have no control over third party websites.

Advocacy recommends that DOJ provide small governments with a population of fewer than 50,000, or a subset of these small entities, more time to comply with the requirement for third party content to be accessible if it allows members of the public to participate in or benefit from the public entity's services, programs, or activities.

Small governments are concerned about this provision because they report utilizing third party websites and mobile applications for payment systems (such as tax, water, and sewer), online forms, parking fees, libraries, job applications, court dockets, recreation programs, and permitting systems. These are all important public services. However, small governments have no control over these websites. A county manager noted that it would cost an astronomical amount of money to pay each vendor to customize code for their county. These entities would need to find new accessible vendors (if they exist) and a data migration option to ensure operational continuity. A small city technology staffer noted that they just spent \$50,000 on a new permitting system that is web based, and they do not know if that vendor can make this system accessible. They may not be able to recoup these funds. Small entities need more time to work with third-party websites and vendors on achieving compliance, or to obtain new accessible vendors and migrate their material.

II. Conclusion

Advocacy is concerned that small governments with a population of fewer than 50,000 will face significant financial and operational challenges in complying with the proposed rule. Small governments will have difficulty updating their websites and mobile applications to be ADA accessible to the WCAG 2.1 AA technical standard within the proposed three-year compliance deadline. Advocacy believes that DOJ has significantly underestimated the compliance costs and burden hours of this rule for small entities, particularly the smallest government jurisdictions. Small governments seek to provide accessibility for their constituents but have limited revenues and a lack of internal technical staff to meet this high technical standard.

⁵⁶ *Id.*

Advocacy provides the comments and recommendations in this letter to assist DOJ in developing a final regulation that offers flexibility to small governments while improving accessibility to the public. Advocacy recommends that DOJ adopt the WCAG Level 2.0 standard for Title II of the ADA, to harmonize with the current federal requirements. Advocacy also recommends that DOJ create a safe harbor from abusive litigation challenges. The agency should adopt compliance flexibilities for the smallest governments, if compliance is an undue financial and administrative burden. Advocacy also recommends that DOJ provide more flexibility for captioning requirements and provide more compliance and assistance to help small entities.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis Reyes at (202) 798-5798 or by email at Janis.Reyes@sba.gov.

Sincerely,

/s/

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/s/

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Copy to: The Honorable Richard L. Revesz, Administrator
 Office of Information and Regulatory Affairs
 Office of Management and Budget