

ADA COMPLIANCE AND WEBSITES

BACKGROUND

This year, many companies, including community banks, have received demand letters from plaintiffs' law firms alleging the company is violating Title III of the Americans with Disabilities Act ("ADA") because their websites are not sufficiently accessible to individuals with visual disabilities.

The letters claim that unless the company modifies its website to meet the standards in the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG), the company will continue to violate Title III.

The Department of Justice (DOJ) has not yet established rules and regulations governing website accessibility. In November 2016, ICBA sent a letter to DOJ requesting 1) their intervention to stop this unethical and harassing behavior by plaintiffs' law firms, and 2) to confirm whether they plan to adopt WCAG as official guidelines. The DOJ's January 2017 response indicates that

intervention is outside their authority and that the responsibility to address such behavior lies within the "State Bar or the judiciary system in which litigation is pending." ICBA has provided our affiliated state association partners with a sample letter to write to their attorneys general and other state-appropriate individuals. Considering the DOJ's lack of authority, we encourage bankers to discuss with their legal counsel merits of filing bar claims.

Regarding WCAG standards, the DOJ acknowledges that it has yet to determine guidance but is leaning towards adopting WCAG. In the meantime, it remains on DOJ's regulatory agenda.

The DOJ makes clear in its response that ADA requirements to provide accessible technology is an "already-existing obligation" and compliance is expected unless a business, including community banks, can prove an undue burden.

ICBA's ADA Website Demand Letter Survey revealed that as of December 6, 2016, 19% of the 582 community bank respondents received a demand letter and took the following actions:

- 85% sought legal advice
- 58% developed plans to bring their websites into compliance
- 39% conducted a review of their websites
- Some respondents expressed confusion as to their level of compliance with the WCAG standard
- None settled
- Several contacted their insurance company or fidelity bond company
- Several contacted their website vendors and core processors

What to do if your community bank receives an ADA demand letter?

1. Do not ignore the letter.

There are numerous litigation-related reasons to send demand letters. There is a strong likelihood that a community bank is targeted

for litigation if it receives a demand letter. The question is often when, not if, the bank will be sued. Ignoring the letter, therefore, is not likely to make the problem go away.

2. Seek legal counsel, and check with area community banks and other businesses.

The demand letter may encourage you to contact the plaintiff's law firm immediately, however, ICBA strongly recommends that you contact legal counsel so that counsel can research the plaintiff, their law firm, and their litigation history.

Demand letters are often sent in batches, meaning that other local community banks and businesses have received similar letters. This provides an opportunity to coordinate defense efforts.

ICBA strongly recommends the retention of legal counsel.

3. Conduct an ADA compliance review of your bank's website.

While the demand letter is under review by counsel, community banks should

assess their websites and implement updates that meet WCAG's guidelines. Further, DOJ indicates in their response letter that compliance is an "already-existing obligation."

If the website complies with the ADA by the time a lawsuit is filed, there is a chance that the claim can be dismissed.

4. Check vendor contracts with online banking/web-hosting companies to ensure they comply with the ADA.

Many web designers and online banking providers strive to develop their services in compliance with the ADA and WCAG standard. Review your vendor's contract to ensure that the vendor does, in fact, understand and comply with ADA requirements.

Additionally, review your contracts to understand the role and responsibility of your vendor in the event of a violation.

Finally, notify the vendor of the demand letter and determine how they plan to respond.

5. Assess the claim and ask the plaintiff's law firm for additional information.

Your bank and its counsel should assess each alleged violation and develop strategies for addressing them. In many cases, the alleged violations may not be actual violations.

ICBA recommends that you communicate to the plaintiff's law firm through your counsel and not directly.

6. Evaluate the quality of the plaintiff's law firm response and decide on a course of action.

When the plaintiff's law firm responds, your bank and its counsel should carefully examine the claim and decide on a course of action. The plaintiff's law firm may request you to hire them to consult on ADA accessibility issues; however, ICBA recommends that you decline. Instead, work with a vendor that addresses ADA

compliance that is not connected with the plaintiff's law firm.

7. If your bank hires a company to update your website, conduct a follow-up independent review of the website to ensure the company did what it said it would do.

Many companies will promise to get your websites up to compliance. Given the lack of guidance and clarity, the risks are too high to take their word for it. Your bank should have an independent review conducted on the website to make sure all deliverables have been met.

8. Limited website functionality does not absolve your bank's compliance responsibility.

Any website is a target for non-compliance regardless of function, services, or access provided. If your bank has a website, even with just minimal information, review the website to ensure all content is accessible.

9. Do not wait for a demand letter.

Community banks should not

wait for a demand letter to start reviewing and/or addressing ADA website compliance. **Start the process now.**

10. Take heed to DOJ's response.

In addition to No. 9 above, DOJ views website compliance as an "already-existing obligation." The DOJ does acknowledge an exception if the bank can prove compliance will result in an undue burden. However, before making this assertion, ICBA strongly advises each bank to discuss with counsel and substantiate the burden.

List of Vendors with ADA WCAG 2.0 Solutions. *

Audioeye- audioeye.com
BankSITE- banksite.com
Banno - banno.com
ProfitStars - profitstars.com
COMPLYFirst - odellus.com
Kasasa - kasasa.com
Siteimprove - siteimprove.com
WebAIM - webaim.org
WSI - www.poweredbywsi.com

*ICBA does not endorse, recommend, or make representations with respect to due diligence, services, claims, or certifications of the Vendor(s), their products and/or services.