

DEPARTMENT OF JUSTICE

28 CFR Part 35

[CRT Docket No. 128]

RIN 1190-AA65

Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities**AGENCY:** Civil Rights Division, Department of Justice.**ACTION:** Supplemental advance notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is considering revising the regulation implementing title II of the Americans with Disabilities Act (ADA or Act) in order to establish specific technical requirements to make accessible the services, programs, or activities State and local governments offer to the public via the Web. In 2010, the Department issued an Advance Notice of Proposed Rulemaking (2010 ANPRM) titled *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*. The purpose of this Supplemental Advance Notice of Proposed Rulemaking (SANPRM) is to solicit additional public comment specifically regarding the regulation implementing title II, which applies to State and local government entities. Specifically, the Department is issuing this SANPRM in order to solicit public comment on various issues relating to the potential application of such technical requirements to the Web sites of title II entities and to obtain information for preparing a regulatory impact analysis.

DATES: The Department invites written comments from members of the public. Written comments must be postmarked and electronic comments must be submitted on or before August 8, 2016.

ADDRESSES: You may submit comments, identified by RIN 1190-AA65 (or Docket ID No. 128), by any one of the following methods:

- *Federal eRulemaking Web site:* www.regulations.gov. Follow the Web site's instructions for submitting comments.
- *Regular U.S. mail:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031-0885.
- *Overnight, courier, or hand delivery:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue NW., Suite 4039, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Rebecca Bond, Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY). You may obtain copies of this Supplemental Advance Notice of Proposed Rulemaking (SANPRM) in an alternative format by calling the ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY). This SANPRM is also available on the ADA Web site at www.ada.gov.

Electronic Submission of Comments and Posting of Public Comments: You may submit electronic comments to www.regulations.gov. When submitting comments electronically, you must include CRT Docket No. 128 in the subject box, and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and will be made available for public inspection online at www.regulations.gov. Posting of submission will include any personal identifying information (such as your name and address) included in the text of your comment. If you include personal identifying information in the text of your comment but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also include all the personal identifying information you want redacted along with this phrase. Similarly, if you submit confidential business information as part of your comment but do not want it posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on www.regulations.gov.

SUPPLEMENTARY INFORMATION:**I. Background***A. Statutory History*

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law

prohibiting discrimination on the basis of disability. The ADA broadly protects the rights of individuals with disabilities as to employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires newly designed and constructed or altered State and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Section 204(a) of title II and section 306(b) of title III direct the Attorney General to promulgate regulations to carry out those titles, other than certain provisions dealing specifically with transportation. 42 U.S.C. 12134; 42 U.S.C. 12186(b).

Title II applies to State and local government entities, and, in subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (section 504), to all activities of State and local governments regardless of whether these entities receive Federal financial assistance. 42 U.S.C. 12131-65.

Title III prohibits discrimination on the basis of disability in the full and equal enjoyment of places of public accommodation (privately operated entities whose operations affect commerce and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreational facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities, such as factories, warehouses, or office buildings)—to comply with the ADA Standards for Accessible Design (ADA Standards). 42 U.S.C. 12181-89.

B. Rulemaking History

On July 26, 1991, the Department issued its final rules implementing title II and title III, codified at 28 CFR part 35 (title II) and part 36 (title III), which included the ADA Standards. At that time, the Web was in its infancy and was not used by State and local governments as a means of providing services or information to the public and thus was not mentioned in the Department's title II regulation.

In June 2003, in recognition of how the Internet was transforming interactions between the public and governmental entities, the Department published a document entitled *Accessibility of State and Local Government Web sites to People with Disabilities*, available at http://www.usdoj.gov/crt/ada/Web_sites2.htm, which provides State and local governments guidance on how to make their Web sites accessible to ensure that persons with disabilities have equal access to the services, programs, and activities that are provided through those Web sites. This guidance recognizes that, increasingly, State and local governments are using their Web sites to allow services, programs, and activities to be offered in a more dynamic and interconnected way, which serves to do all of the following: increase citizen participation; increase convenience and speed in obtaining information or services; reduce costs in providing programs and information about government services; reduce the amount of paperwork; and expand the possibilities of reaching new sectors of the community or offering new programs. The guidance also provides that State and local governments might be able to meet their title II obligations by providing an alternative accessible means of obtaining the Web site's information and services (e.g., a staffed telephone line). However, that guidance makes clear that alternative means would be "unlikely to provide an equal degree of access in terms of hours of operation and the range of options and programs available." *Accessibility of State and Local Government Web sites to People with Disabilities*, available at http://www.usdoj.gov/crt/ada/web_sites2.htm. This is even more true today, almost 13 years later, when the amount of information and complexity of Web sites has increased exponentially.

On September 30, 2004, the Department published an Advance Notice of Proposed Rulemaking (2004 ANPRM) to begin the process of updating the 1991 regulations to adopt revised ADA Standards based on the relevant parts of the ADA and Architectural Barriers Act Accessibility Guidelines (2004 ADA/ABA Guidelines). 69 FR 58768 (Sept. 30, 2004). On June 17, 2008, the Department issued a Notice of Proposed Rulemaking (2008 NPRM) to adopt the revised 2004 ADA/ABA Guidelines and revise the title II and title III regulations. 73 FR 34466 (June 17, 2008). The 2008 NPRM addressed the issues raised in the public's comments to the 2004 ANPRM and sought additional comment.

The Department did not propose to include Web accessibility provisions in the 2004 ANPRM or the 2008 NPRM, but the Department received numerous comments urging the Department to issue Web accessibility regulations under the ADA. Although the final title II rule, published on September 15, 2010, did not include specific requirements for Web accessibility, the guidance accompanying the final title II rule responded to these comments. See 28 CFR part 35, app. A, 75 FR 56163, 56236 (Sept. 15, 2010). In that guidance, the Department stated that since the ADA's enactment in 1990, the Internet had emerged as a critical means to provide access to public entities' programs and activities. *Id.* at 56236. The Department reiterated its position that title II covers public entities' Web sites and noted that it has enforced the ADA in this area on a case-by-case basis and that it intended to engage in future rulemaking on this topic. *Id.* The Department stated that public entities must ensure equal access to Web-based programs and activities for individuals with disabilities unless doing so would result in an undue financial and administrative burden or fundamental alteration. *Id.*

On July 26, 2010, the Department published an ANPRM titled *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*. 75 FR 43460 (July 26, 2010). The 2010 ANPRM announced that the Department was considering revising the regulations implementing titles II and III of the ADA to establish specific requirements for State and local governments and public accommodations to make their Web sites accessible to individuals with disabilities. In the 2010 ANPRM, the Department sought information regarding what standards, if any, it should adopt for Web accessibility; whether the Department should adopt coverage limitations for certain entities, like small businesses; and what resources and services were available to make existing Web sites accessible to individuals with disabilities. The Department also requested comments on the costs of making Web sites accessible; whether there are effective and reasonable alternatives to making Web sites accessible that the Department should consider permitting; and when any Web accessibility requirements adopted by the Department should become effective. The Department received approximately 400 public comments addressing issues germane to

both titles II and III in response to the 2010 ANPRM. Upon review of those comments, the Department announced in 2015 that it decided to pursue separate rulemakings addressing Web accessibility for titles II and III. See *Department of Justice—Fall 2015 Statement of Regulatory Priorities*, available at http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html (last visited Apr. 13, 2016). The Department is moving forward with rulemaking under title II first.

C. Need for Department Action

1. Use of Web sites by Title II Entities

As mentioned previously, title II entities are increasingly using the Internet to disseminate information and offer services, programs, and activities to the public. Today, among other things, public entities use Web sites to promote employment opportunities and economic growth, improve the collection of payments and fees, encourage civic participation, and enhance educational opportunities. However, individuals with disabilities are often denied equal access to many of these services, programs, and activities because many public entities' Web sites are inaccessible. Thus, there is a digital divide between the ability of citizens with disabilities and those without disabilities to access the services, programs, and activities of their State and local governments.

Public entities have created a variety of online Web portals to streamline their services, programs, and activities. Citizens can now make a number of online service requests—from requesting streetlight repairs and bulk trash pickups to reporting broken parking meters—and can often check the status of a service request online. Public entities also have improved the way citizens can obtain access to most common public services and pay fees and fines. Many States' Web sites now offer citizens the opportunity to renew their vehicle registrations, submit complaints, purchase event permits, and pay traffic fines and property taxes, making some of these otherwise time-consuming tasks easy to complete with a few clicks of a mouse at any time of the day or night. Moreover, many Federal benefits, such as unemployment benefits and food stamps, are available through State Web sites.

Public entities also use their Web sites to make civic participation easier. Many public entities allow voters to begin the voter registration process and obtain candidate information on their Web sites. Individuals interested in running

for local public offices can often find pertinent information concerning candidate qualifications and filing requirements on these Web sites as well. Citizens can watch local public hearings, read minutes from community meetings, or take part in live chats with government officials on the Web sites of State and local government entities. The Web sites of public entities also include a variety of information about issues of concern to the community and how citizens can get involved in community efforts to improve the administration of government services.

Many public entities use online resources to promote employment opportunities and economic growth for their citizens. Individuals can use Web sites of public entities to file for unemployment benefits and find and apply for job openings. Pertinent job-related information and training opportunities are increasingly being provided on the Web sites of public entities. Through the Web sites of State and local governments, business owners can register their businesses, apply for occupational and professional licenses, bid on contracts to provide products and services to public entities, and obtain information about laws and regulations with which they must comply. The Web sites of many State and local governments also allow members of the public to research and verify business licenses online and report unsavory business practices.

Public entities are also using Web sites as a gateway to education. Public schools at all levels are offering programs and classroom instruction through Web sites. Some public colleges and universities now offer degree programs online. Many public colleges and universities rely on Web sites and other Internet-related technologies to allow prospective students to apply for admission, request on-campus living assignments, register for courses, access assignments and discussion groups, and to participate in a wide variety of administrative and logistical functions required for students and staff. Similarly, in elementary and secondary public school settings, communications via the Web are increasingly becoming the way teachers and administrators notify parents and students of grades, assignments, and administrative matters. These issues are also discussed in the 2010 ANPRM, *see* 75 FR 43460 (July 26, 2010).

2. Barriers to Web Accessibility

Millions of individuals in the United States have disabilities that affect their use of the Web. Many of these individuals use assistive technology to

enable them to navigate Web sites or access information contained on those sites. For example, individuals who do not have use of their hands may use speech recognition software to navigate a Web site, while individuals who are blind may rely on a screen reader to convert the visual information on a Web site into speech. Many Web sites, however, fail to incorporate or activate features that enable users with disabilities to access all of the Web site's information or elements. For instance, individuals who are deaf are unable to access information in Web videos and other multimedia presentations that do not have captions. Individuals with low vision may be unable to read Web sites that do not allow text to be resized or do not provide sufficient contrast. Individuals with limited manual dexterity or vision disabilities who use assistive technology that enables them to interact with Web sites cannot access sites that do not support keyboard alternatives for mouse commands. These same individuals, along with individuals with intellectual and vision disabilities, often encounter difficulty using portions of Web sites that require timed responses from users but do not provide the option for users to indicate that they need more time to respond.

Individuals who are blind or have low vision often confront significant barriers to Web access. This is because many Web sites provide information visually without features that allow screen readers or other assistive technology to retrieve information on the Web site so it can be presented in an accessible manner. A common barrier to Web site accessibility is an image or photograph without corresponding text describing the image. A screen reader or similar assistive technology cannot "read" an image, leaving individuals who are blind with no way of independently knowing what information the image conveys. Similarly, complex Web sites often lack navigational headings or links that would facilitate navigation using a screen reader or may contain tables with header and row identifiers that display data but fail to provide associated cells for each header and row so that the table information can be interpreted by a screen reader.

Online forms, which are essential to accessing services on many government Web sites, are often inaccessible to individuals with disabilities who use screen readers. For example, field elements on forms, which are the empty boxes on forms that hold specific pieces of information, such as a last name or telephone number, may lack clear labels that can be read by assistive technology. Also, visual CAPTCHAs (Completely

Automated Public Turing Test To Tell Computers and Humans Apart), which is distorted text that must be inputted by a Web site user to verify that a Web submission is being completed by a human rather than a computer, is not always accompanied by an audio CAPTCHA that is accessible. Inaccessible form fields and CAPTCHAs make it difficult for persons using screen readers to pay fees or fines, submit applications, and otherwise interact with a Web site. Some governmental entities use inaccessible third-party Web sites to accept online payments, while others request public input through inaccessible Web sites. These barriers greatly impede the ability of individuals with disabilities to access the services, programs, and activities offered by public entities on the Web. In many instances, removing certain Web site barriers is neither difficult nor especially costly. For example, the addition of invisible attributes known as alternative (alt) text or tags to an image, which can be done without any specialized equipment, will help keep an individual using a screen reader oriented and allow the individual to gain access to the information on the Web site. Similarly, headings, which also can be added easily, facilitate page navigation for those using screen readers. A discussion of barriers to Web access also appears in the 2010 ANPRM, *see* 75 FR 43460 (July 26, 2010).

3. Compliance With Voluntary Technical Accessibility Standards Has Been Insufficient in Providing Access

The Internet as it is known today did not exist when Congress enacted the ADA and, therefore, neither the ADA nor the regulations the Department promulgated under the ADA specifically address access to Web sites. Congress contemplated that the Department would apply the statute in a manner that evolved over time and delegated authority to the Attorney General to promulgate regulations to carry out the Act's broad mandate. *See* H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 108 (1990); 42 U.S.C. 12186(b). Consistent with this approach, the Department stated in the preamble to the original 1991 ADA regulations that the regulations should be interpreted to keep pace with developing technologies. 28 CFR part 36, app. B. There is no doubt that the programs, services, and activities provided by State and local government entities on their Web sites are covered by title II of the ADA. *See* 28 CFR 35.102 (providing that the title II regulation "applies to all services, programs, and activities provided or made available by public entities").

Similarly, Web sites of recipients of Federal financial assistance are covered by section 504 of the Rehabilitation Act. As discussed above, the Department has affirmed the application of these statutes to Web sites in its technical assistance publication, *Accessibility of State and Local Government Web sites to People with Disabilities*, available at <http://www.usdoj.gov/crt/ada/Web sites2.htm>. Despite the clear application of the ADA to public entities' Web sites, it seems that technical Web standards under the ADA will help provide public entities with more specific guidance on how to make the services, programs, and activities they offer on their Web sites accessible. The title II ADA regulation currently has such specific guidance with regard to physical structures through the ADA Standards, which provide technical requirements on how to make physical environments accessible. It seems that similar clarifying guidance for public entities in the Web context is also needed.

It has been the policy of the United States to encourage self-regulation with regard to the Internet wherever possible and to regulate only where self-regulation is insufficient and government involvement may be necessary. See *Memorandum on Electronic Commerce*, 33 WCPD 1006, 1006–1010 (July 1, 1997), available at <http://www.gpo.gov/fdsys/pkg/WCPD-1997-07-07/html/WCPD-1997-07-07-Pg1006-2.htm> (last visited Apr. 13, 2016); *The Framework for Global Electronic Commerce*, available at <http://clinton4.nara.gov/WH/New/Commerce> (last visited Apr. 13, 2016). A variety of voluntary standards and structures have been developed for the Internet through nonprofit organizations using multinational collaborative efforts. For example, the Internet Corporation for Assigned Names and Numbers (ICANN) issues and administers domain names, the Internet Society (ISOC) publishes computer security policies and procedures for Web sites, and the World Wide Web Consortium (W3C®) develops a variety of technical standards and guidelines ranging from issues related to mobile devices and privacy to internationalization of technology. In the area of accessibility, the Web Accessibility Initiative (WAI) of the W3C® created the Web Content Accessibility Guidelines (WCAG), which cover a wide range of recommendations for making Web content more accessible not just to users with disabilities but also to users in general. There have been two versions of WCAG, beginning with WCAG 1.0,

which was developed in 1999, and an updated version, WCAG 2.0, which was released in 2008.

Voluntary standards can be sufficient in certain contexts, particularly where economic incentives align with the standards' goals. Reliance on voluntary compliance with Web site accessibility guidelines, however, has not resulted in equal access for persons with disabilities. See, e.g., National Council on Disability, *The Need for Federal Legislation and Regulation Prohibiting Telecommunications and Information Services Discrimination* (Dec. 19, 2006), available at <http://www.ncd.gov/publications/2006/Dec282006> (last visited Apr. 13, 2016) (discussing how competitive market forces have not proven sufficient to provide individuals with disabilities access to telecommunications and information services). The WAI leadership has recognized this challenge and has stated that in order to improve and accelerate Web accessibility it is important to “communicat[e] the applicability of the ADA to the Web more clearly, with updated guidance * * *.” *Achieving the Promise of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, H. Comm. On the Judiciary*, 111th Cong. 35 (Apr. 22, 2010) (statement of Judy Brewer, Director, Web Accessibility Initiative at the W3C®) available at http://judiciary.house.gov/files/hearings/printers/111th/111-95_56070.PDF (last visited Apr. 13, 2016).

Despite the availability of voluntary Web accessibility standards and the Department's clearly stated position that title II requires all services, programs, and activities of public entities, including those available on Web sites, to be accessible, individuals with disabilities continue to struggle to obtain access to the Web sites of public entities. As a result, the Department has addressed Web access in many agreements with State and local governments. Moreover, other Federal agencies have also taken enforcement action against public entities regarding the lack of access for persons with disabilities to their Web sites. In April 2013, for example, the Department of Labor cited the Florida Department of Economic Opportunity Office of Unemployment Compensation for violating Federal statutes, including title II of the ADA, for requiring unemployment compensation applicants to file claims online and complete an online skills assessment as part of the claims-filing process even

though the State's Web site was inaccessible. *In re Miami Workers Ctr.*, CRC Complaint No. 12–FL–048 (Dep't Labor 2013) (initial determination), available at http://nelp.3cdn.net/2c0ce3c2929a0ee4e1_wim6i5ynx.pdf (last visited Apr. 13, 2016).

The Department believes that adopting Web accessibility standards would provide clarity to public entities regarding how to make accessible the services, programs, and activities they offer the public via their Web sites. Adopting specific Web accessibility standards to guide public entities in maintaining accessible Web sites would also provide individuals with disabilities with consistent and predictable access to the Web sites of public entities. As noted above, many services, programs, and activities that public entities offer on their Web sites have not been accessible to individuals with disabilities. Because Web sites can be accessed at any time, these services, programs, and activities are available to the public at their convenience. Accessible alternative means for obtaining access to services, programs, and activities offered on Web sites, such as a staffed telephone line, would need to afford individuals with disabilities equivalent access to such Web-based information and services (i.e., 24 hours a day/7 days a week). As indicated in the 2003 guidance, the Department questions whether alternative means would be likely to provide an equal degree of access. As Web sites have become more interconnected, dynamic, and content heavy, it has become more difficult, if not impossible, for public entities to replicate by alternative means the services, programs, and activities offered on the Web. *Accessibility of State and Local Government Web sites to People with Disabilities*, available at <http://www.usdoj.gov/crt/ada/Web sites2.htm> (“These alternatives, however, are unlikely to provide an equal degree of access in terms of hours of operation and the range of options and programs available.”). The increasingly interconnected and dynamic nature of Web sites has allowed the public to easily and quickly partake in a public entity's programs, services, and activities via the Web. Individuals with disabilities—like other members of the public—should be able to equally engage with public entities' services, programs, and activities directly through the medium of the Web. Opportunities for such engagement, however, require that public entities' Web content be accessible to individuals with disabilities. These issues are also

discussed in the 2010 ANPRM, *see* 75 FR 43460 (July 26, 2010).

After considering the comments that it received in response to its 2010 ANPRM, the Department has refined its proposal and is issuing this SANPRM to focus on the accessibility of Web information and services of State and local government entities and to seek further public comment.

II. Request for Public Comment

The Department is seeking comments in response to this SANPRM, including the proposed framework, definitions, requirements, and timeframes for compliance under consideration, and to the specific questions posed in this SANPRM. The Department is particularly interested in receiving comments from all those who have a stake in ensuring that the Web sites of public entities are accessible to people with disabilities or who would otherwise be affected by a regulation requiring Web site access. The Department appreciates the complexity and potential impact of this initiative and therefore also seeks input from experts in the field of computer science, programming, networking, assistive technology, and other related fields whose feedback and expertise will be critical in developing a workable framework for Web site access, which respects the unique characteristics of the Internet and its transformative impact on everyday life. In your comments, please refer to each question by number. Please provide additional information not addressed by the proposed questions if you believe it would be helpful in understanding the implications of imposing ADA regulatory requirements on the Web sites of State and local government entities.

A. The Meaning of “Web Content”

The Department is generally considering including within the scope of its proposed rule all Web content public entities make available to the public on their Web sites and Web pages, regardless of whether such Web content is viewed on desktop computers, notebook computers, smart phones, or other mobile devices. WCAG 2.0 defines Web content as “information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content’s structure, presentation, and interactions.” *See Web Content Accessibility Guidelines 2.0* (Dec. 2008), available at <http://www.w3.org/TR/WCAG/#glossary> (last visited Apr. 13, 2016). For any proposed rule, the Department would consider

adding a definition for “Web content,” which would be based on the WCAG 2.0’s definition but would be slightly less technical with the intention that it could be more easily understood by the public generally. A proposed definition for “Web content” could look like the following:

Information or sensory experience—including the encoding that defines the structure, presentation, and interactions—that is communicated to the user by a Web browser or other software. Examples of Web content include text, images, sounds, videos, controls, and animations.

The above definition of “Web content” attempts to describe the different types of information and experiences available on the Web. The definition of “Web content” also would include the encoding (*i.e.*, programming code) used to create the structure, presentation, or interactions of the information or experiences on Web pages that range from static Web pages (*e.g.*, Web pages with only textual information) to dynamic Web pages (*e.g.*, Web pages with live Web chats). Examples of programming languages used to create Web pages include Hypertext Markup Language (HTML), Cascading Style Sheets (CSS), Flash, and JavaScript.

The above definition of Web content would not, however, include a Web browser or other software that retrieves and interprets the programming code and displays it as a Web site or Web page. Web browsers are a vehicle for viewing Web content and are usually separate from the information, experiences, and encoding on a Web site. Typically, a person needs a Web browser to access the information or experiences available on the Web. A Web browser is the primary software on a desktop or notebook computer, or on a smart phone or other mobile device, which enables a person to view Web sites and Web pages. Common Web browsers used on desktop computers and mobile devices include Chrome, Firefox, Internet Explorer, Opera, and Safari. Web browsers retrieve and display different types of information and experiences available from Web sites and Web pages. Web browsers display the information and experiences by retrieving and interpreting the encoding—such as HTML—that is used to create Web sites and Web pages.

The definition of “Web content” also would not include other software, such as plug-ins, that help to retrieve and display information and experiences that are available on Web sites and Web pages of public entities. For example, when a person clicks on a PDF document or link on a Web page, Adobe

Reader—which is a plug-in software—will open the PDF document either within the Web browser or directly in Adobe Reader, depending on the Web browser’s settings. Similarly, other popular plug-ins, such as Adobe Flash Player, Apple QuickTime Player, and Microsoft Windows Media Player allow users to play audio, video, and animations. The fact that plug-ins are required to open the PDF document, audio file, or video file is not always apparent to the person viewing the PDF document, listening to the audio, or watching the video.

In sum, the Department is considering proposing a rule that would cover Web content available on public entities’ Web sites and Web pages but that generally would not extend to most software, including Web browsers. The Department proposes a series of questions in section VI.B, however, regarding whether it should consider covering services, programs, and activities offered by public entities through mobile software applications (*see* section VI.B “Mobile Applications”).

Question 1: Although the definition of “Web content” that the Department is considering proposing is based on the “Web Content” definition in WCAG 2.0, it is a less technical definition. Is the Department’s definition under consideration in harmony with and does it capture accurately all that is contained in WCAG 2.0’s “Web content” definition?

B. Access Requirements to Apply to Web sites and Web Content of Public Entities

1. Standards for Web Access

In its 2010 ANPRM, the Department asked for public comment about which accessibility standard it should apply to the Web sites of covered entities. The 2010 ANPRM discussed three potential accessibility standards to apply to Web sites of covered entities: (1) WCAG 2.0; (2) the Electronic and Information Technology Accessibility Standards, more commonly known as the section 508 standards; and (3) general performance-based standards. As explained below, the Department is considering proposing WCAG 2.0 Level AA as the accessibility standard that would apply to Web sites and Web content of title II entities.

Since 1994, the W3C® has been the principal international organization involved in developing protocols and guidelines for the Web. The W3C® develops a variety of technical standards and guidelines, including ones relating to privacy, internationalization of technology, and,

relevant to this rulemaking, accessibility. The W3C®'s WAI has developed voluntary guidelines for Web accessibility, known as WCAG, to help Web developers create Web content that is accessible to individuals with disabilities. The first version of WCAG (hereinafter referred to as WCAG 1.0) was published in 1999. The most recent and updated version of WCAG (hereinafter referred to as WCAG 2.0) was published in December 2008, and is available at <http://www.w3.org/TR/2008/REC-WCAG20-20081211/> (last visited Apr. 13, 2016).

WCAG 2.0 has become the internationally recognized benchmark for Web accessibility. In October 2012, WCAG 2.0 was approved as an international standard by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). Several nations, including Australia, Canada, France, Germany, Hong Kong, Japan, New Zealand, and South Korea, have either adopted WCAG 2.0 as their standard for Web accessibility or developed standards based on WCAG 2.0. Within the United States, some States, including Alaska, Georgia, Hawaii, and Minnesota, are also using WCAG 2.0 as their standard for Web accessibility. The Web accessibility standards in other States, such as California, Florida, Illinois, Maryland, New York, and Texas, are based on the section 508 standards (which are currently based on WCAG 1.0), and efforts are underway in at least one of these States to review and transition to WCAG 2.0.

WCAG 2.0 was designed to be "technology neutral" (*i.e.*, it does not rely on the use of specific Web technologies) in order to accommodate the constantly evolving Web environment and to be usable with current and future Web technologies. Thus, while WCAG 2.0 sets an improved level of accessibility and testability over WCAG 1.0, it also allows Web developers more flexibility and potential for innovation.

WCAG 2.0 contains four principles that provide the foundation for Web accessibility. Under these four principles, there are 12 guidelines setting forth basic goals to ensure accessibility of Web sites. For each guideline, testable success criteria (*i.e.*, requirements for Web accessibility that are measurable) are provided "to allow WCAG 2.0 to be used where requirements and conformance testing are necessary such as in design specification, purchasing, regulation and contractual agreements." See *WCAG 2.0 Layers of Guidance, Web*

Content Accessibility Guidelines 2.0 (Dec. 2008), available at <http://www.w3.org/TR/WCAG/#intro-layers-guidance> (last visited Apr. 13, 2016).

In order for a Web page to conform to WCAG 2.0, the Web page must satisfy all success criteria under one of the three levels of conformance: A, AA, or AAA. The three levels of conformance indicate a measure of accessibility. Level A, which is the minimum level of conformance, contains criteria that provide basic Web accessibility. Level AA, which is the intermediate level of conformance, includes all of the Level A criteria as well as enhanced criteria that provide more comprehensive Web accessibility. Level AAA, which is the maximum level of conformance, includes all Level A and Level AA criteria as well as additional criteria that can provide a more enriched user experience. At this time, the W3C® does not recommend that Level AAA conformance be required as a general policy for entire Web sites because it is not possible to satisfy all Level AAA criteria for some content. See *Understanding Requirement 1, Understanding WCAG 2.0: A Guide to Understanding and Implementing WCAG 2.0* (last revised Jan. 2012), available at <http://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conformance-requirements-head> (last visited Apr. 13, 2016).

The 2010 ANPRM asked the public to provide input on which of the three conformance levels the Department should adopt if it decided to use WCAG 2.0 as the standard for Web accessibility. Most of the comments the Department received overwhelmingly supported adopting Level AA conformance. Commenters emphasized that Level AA conformance has been widely recognized and accepted as providing an adequate level of Web accessibility without being too burdensome or expensive. Some commenters urged the Department to adopt Level A conformance under WCAG 2.0, stating that requiring any higher level of conformance would result in hardship for smaller entities because of their lack of resources and technical expertise. The commenters supporting the adoption of Level A conformance asserted that some Level AA criteria, such as the provision to caption all live-audio content in synchronized media, are expensive and technically difficult to implement. The W3C®, the creator of WCAG 2.0, submitted comments stating that the adoption of Level AA conformance is appropriate and necessary to ensure a sufficient level of accessibility for

individuals with different kinds of disabilities and is feasible to implement for Web sites ranging from the most simple to the most complex. No commenters suggested that the Department adopt Level AAA in its entirety.

Based on its review of public comments and independent research, the Department is considering proposing WCAG 2.0 Level AA as the technical standard for public entity Web sites because it includes criteria that provide more comprehensive Web accessibility to individuals with disabilities—including those with visual, auditory, physical, speech, cognitive, developmental, learning, and neurological disabilities. In addition, Level AA conformance is widely used, indicating that it is generally feasible for Web developers to implement. Level A conformance does not include criteria for providing Web accessibility that some commenters generally considered important, such as minimum levels of contrast, text resizable up to 200 percent without loss of content, headings and labels, or visible keyboard focus (*e.g.*, a visible border showing keyboard navigation users the part of the Web page with which they are interacting).¹ Also, while Level AAA conformance provides a better and enriched user experience for individuals with disabilities, it is not possible to satisfy all Level AAA Success Criteria for some content. Therefore, the Department believes that Level AA conformance is the most appropriate standard.

Note that while WCAG 2.0 provides that for "Level AA conformance, the Web page [must] satisf[y] all the Level A and Level AA Success Criteria," individual Success Criteria in WCAG 2.0 are labeled only as Level A or Level AA. See *Conformance Requirements, Web Content Accessibility Guidelines 2.0* (Dec. 2008), available at <http://www.w3.org/TR/WCAG/#conformance-reqs> (last visited Apr. 13, 2016). A person reviewing individual requirements in WCAG 2.0, accordingly, may not understand that both Level A and Level AA Success Criteria must be met in order to attain Level AA. Therefore, for clarity, the Department is considering that any specific regulatory text it proposes regarding compliance with WCAG 2.0 Level AA should provide that covered entities must comply with both Level A and Level AA Success Criteria and Conformance Requirements specified in WCAG 2.0.

¹ W3C®, *Focus Visible: Understanding SC 2.4.7.*, available at <https://www.w3.org/TR/UNDERSTANDING-WCAG20/navigation-mechanisms-focus-visible.html> (last visited Apr. 13, 2016).

Adoption of WCAG 2.0 Level AA would make the ADA requirements consistent with the standard that has been most widely accepted internationally. As noted earlier, several nations have selected Level AA conformance under WCAG 2.0 as their standard for Web accessibility. Additionally, in 2012, the European Commission issued a proposal for member countries to adopt Level AA conformance under WCAG 2.0 as the accessibility standard for public sector Web sites, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0721:FIN:EN:PDF> (last visited Apr. 13, 2016). The Web sites of Federal agencies that are governed by section 508 may soon also need to comply with WCAG 2.0. The U.S. Access Board (Access Board) has proposed to update and revise the section 508 standards by adopting the Level AA conformance requirements under WCAG 2.0. *See* 80 FR 10880 (Feb. 27, 2015); 76 FR 76640 (Dec. 8, 2011); 75 FR 13457 (Mar. 22, 2010).

The Department also considered whether it should propose adoption of the current section 508 standards instead of WCAG 2.0. The 2010 ANPRM sought public comment on this question. Section 508 of the Rehabilitation Act requires the Federal government to ensure that the electronic and information technology that it develops, procures, maintains, or uses—including Web sites—is accessible to persons with disabilities. *See* 29 U.S.C. 794(d). In 2000, the Access Board adopted and published the section 508 standards, 36 CFR part 1194, available at <http://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-section-508-standards/section-508-standards> (last visited Apr. 13, 2016), to implement section 508. The section 508 standards, among other things, provide specific technical requirements to ensure that Federal government Web sites are accessible to individuals with disabilities. These technical requirements for Web accessibility are based on WCAG 1.0. Public commenters on the 2010 ANPRM overwhelmingly supported the Department's adoption of WCAG 2.0 over the current section 508 standards. Commenters emphasized that because the Web accessibility requirements in the current section 508 standards are based on the almost 14-year-old WCAG 1.0, they are outdated and inappropriate to address the evolving and increasingly dynamic Web

environment. The Department agrees that since WCAG 1.0 and the section 508 standards were issued, Web technologies and online services have evolved and changed, and, thus, the Department does not believe that either one would be the appropriate standard for any title II ADA Web accessibility requirements. By contrast, WCAG 2.0 provides an improved level of accessibility and testability. Also, unlike WCAG 1.0, WCAG 2.0 has been designed to be technology neutral to provide Web developers more flexibility to address accessibility of current as well as future Web technologies. In addition, as mentioned previously, the Department is aware that the Access Board issued a recent NPRM in 2015 and two ANPRMs—one in 2010 and another in 2011—proposing to update and revise the section 508 standards by adopting WCAG 2.0 as the standard for Web accessibility. 80 FR 10880 (Feb. 27, 2015); 76 FR 76640 (Dec. 8, 2011); 75 FR 13457 (Mar. 22, 2010).

The Department's 2010 ANPRM also sought public comment on whether the Department should adopt performance standards instead of specific technical standards for accessibility of Web sites. Performance standards establish general expectations or goals for Web accessibility and allow for compliance via a variety of unspecified methods and means. While some commenters supported the adoption of performance standards for Web accessibility, pointing out that they provide greater flexibility in ensuring accessibility as Web technologies change, a vast majority of commenters supported the adoption of WCAG 2.0 instead. The majority of commenters stressed that performance standards are likely too vague and subjective and would prove insufficient in providing consistent and testable requirements for Web accessibility. Several commenters who supported the adoption of WCAG 2.0 also noted that, similar to a performance standard, WCAG 2.0 has been designed to allow for flexibility and innovation in the evolving Web environment. The Department recognizes the importance of adopting a standard for Web accessibility that provides not only specific and testable requirements, but also sufficient flexibility to develop accessibility solutions for new Web technologies. The Department believes that WCAG 2.0 achieves this balance because it provides flexibility similar to a performance standard, but also provides more clarity, consistency, and

objectivity. Using WCAG 2.0 would also enable public entities to know precisely what is expected of them under title II, which may be of particular benefit to jurisdictions with less technological experience. It would also harmonize with the requirements adopted by certain other nations, some State and local governments in the U.S., and with the standard proposed by the U.S. Access Board that would apply to Federal agency Web sites. Thus, the Department is considering proposing that public entities comply with WCAG 2.0 Level AA.

Question 2: Are there other issues or concerns that the Department should consider regarding the accessibility standard—WCAG 2.0 Level A and Level AA Success Criteria and Conformance Requirements—the Department is considering applying to Web sites and Web content of public entities? Please provide as much detail as possible in your response.

2. Timeframe for Compliance

The 2010 ANPRM asked for public comment regarding the effective date of compliance with any Web accessibility requirements the Department would adopt. Comments regarding the compliance date were extremely varied—ranging from requiring compliance upon publication to allowing a five-year window for compliance—with no clear consensus favored. Many of the comments advocating for shorter timeframes came from individuals with disabilities or disability advocacy organizations. These commenters argued that Web accessibility has long been required by the ADA and that an extended deadline for compliance rewards entities that have not made efforts to make their Web sites accessible. A similar number of commenters responded asking for longer timeframes to comply. Commenters representing public entities were particularly concerned about shorter compliance deadlines, often citing budgets and staffing as major limitations. Many public entities stated that they lack qualified personnel to implement Web accessibility requirements. The commenters stated that in addition to needing time to implement the changes to their Web sites, they also need time to train staff or contract with professionals who are proficient in developing accessible Web sites.

Despite the absence of a regulation, many public entities have some familiarity with Web accessibility. For over a decade, the Department has provided technical assistance materials, and engaged in concerted enforcement efforts, that specifically have addressed Web accessibility.² Additionally, while not all covered entities have adopted WCAG 2.0 Level AA, it is likely that there is some degree of familiarity with that standard in the regulated community, which may help mitigate the time needed for compliance. Therefore, the Department is considering a two-year implementation timeframe for most public entities in an effort to balance the importance of accessibility for individuals with disabilities with the resource challenges faced by public entities. The Department is considering the following proposal to address specific standards and timeframes for compliance:

Effective two years from the publication of this rule in final form, a public entity shall ensure that the Web sites and Web content it makes available to members of the public comply with Level A and Level AA Success Criteria and Conformance Requirements specified in 2008 WCAG 2.0, except for Success Criterion 1.2.4 on live-audio content in synchronized media,³ unless the public entity can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

Under such a proposal, public entities would have two years after the publication of a final rule to make their Web sites and Web content accessible in conformance with WCAG 2.0 Level AA, unless compliance with the requirements would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. (The limitations on a public

entity's obligation to comply with the proposed requirements are discussed in more detail in section V. "Compliance Limitations and Other Duties" below.)

Question 3: Does an effective date of two years after the publication of a final rule strike an appropriate balance of stakeholder interests? Why or why not? Should the Department consider a shorter or longer effective date? If so, what should those timeframes be and why? Please provide support for your view. Should the Department consider different approaches for phasing in compliance? For example, should the Department consider permitting public entities to make certain Web pages (e.g., most frequently used or necessary to participate in the public entity's service, program, or activity) compliant by an initial deadline, and other Web pages compliant by a later deadline? If so, how should the Department define the Web pages that would be made accessible first, and what timeframes should the Department consider? Please provide support for your view.

Question 4: Some 2010 ANPRM commenters expressed concern that there is likely to be a shortage of professionals who are proficient in Web accessibility to assist covered entities in bringing their Web sites into compliance. Please provide any data that the Department should consider that supports your view.

3. Captions for Live-Audio Content in Synchronized Media

Level AA Success Criterion 1.2.4 under WCAG 2.0 requires synchronized captions for all live-audio content in synchronized media. The intent of Success Criterion 1.2.4 is to "enable people who are deaf or hard of hearing to watch *real-time* presentations. Captions provide the part of the content available via the audio track. Captions not only include dialogue, but also identify who is speaking and notate sound effects and other significant audio." *See Captions (Live), Understanding WCAG 2.0: A Guide to Understanding and Implementing WCAG 2.0* (last revised Jan. 2012), available at <http://www.w3.org/TR/UNDERSTANDING-WCAG20/media-equiv-real-time-captions.html> (last visited Apr. 13, 2016) (emphasis in original).

Because of the added cost of, and the lack of mature technologies for, providing real-time captions for live performances or events presented on the Web, some countries that have adopted WCAG 2.0 Level AA as their standards for Web accessibility, such as Canada and New Zealand, have specifically exempted the requirement for

captioning of live-audio content in synchronized media. Also, as mentioned previously, several commenters urged the Department to not adopt Level AA conformance under WCAG 2.0 because of their concern that providing synchronized captions for all live-audio content in synchronized media on the Web would be technically difficult to implement.

The Department recognizes commenters' concerns that providing real-time captions for live performances or events may be technically difficult to implement and may create additional costs and burdens for public entities. However, the Department also recognizes that technologies used to provide real-time captions for Web content are improving and that covered entities are increasingly providing live Webcasts (*i.e.*, broadcasts of live performances or events on the Web) of public hearings and committee meetings, the majority of which are not accessible to individuals with disabilities. In order for individuals with disabilities to participate in civic life more fully, public entities need to provide real-time captions for public hearings or committee meetings they broadcast on the Web as technology improves and providing captions becomes easier. Still, the information gathered from public comments and independent research suggests that public entities may need more time to make this type of Web content accessible. Accordingly, the Department is considering a longer compliance schedule for public entities to comply with the WCAG 2.0 Level AA conformance requirements to provide captions for live-audio content in synchronized media on Web sites and seeks public input on how it should frame those proposed requirements. The Department is considering the following proposal for captions for live-audio content in synchronized media:

Effective three years from the publication of this final rule, a public entity shall ensure that live-audio content in synchronized media it makes available to members of the public complies with Level AA Success Criteria and Conformance Requirements specified in 2008 WCAG 2.0, unless the public entity can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

Question 5: Is there technology available now that would allow public entities to efficiently and effectively provide captioning of live-audio content in synchronized media in compliance with WCAG 2.0 Level AA conformance? If so, what is the technology and how

² See, e.g., *The ADA Best Practices Tool Kit for State and Local Governments* (July 26, 2007), available at <http://www.ada.gov/pcatoolkit/toolkitmain.htm>; *Chapter 5: Web site Accessibility under Title II of the ADA* (May 7, 2007), available at http://www.ada.gov/pcatoolkit/ch5_toolkit.pdf; *Chapter 5 Addendum: Title II Checklist (Web site Accessibility)* (May 4, 2007), available at http://www.ada.gov/pcatoolkit/ch5_chklist.pdf; *Cities and Counties: First Steps toward Solving Common ADA Problems*, available at <http://www.ada.gov/civiccommonprobs.htm>; *Accessibility of State and Local Government Web sites to People with Disabilities* (June 2003), available at http://www.usdoj.gov/crt/ada/Web_sites2.htm; *Settlement Agreement Between the United States and Pennington County, South Dakota, Under the Americans with Disabilities Act* (effective June 1, 2015), available at http://www.ada.gov/pennington_co/pennington_sa.html.

³ Live-audio content in synchronized media, addressed in Level AA Success Criterion 1.2.4, is discussed in section II.B.3. "Captions for Live-Audio Content in Synchronized Media" below.

much does it cost? If public entities currently provide captioning for live-audio content, what method, process, or technology do they use to provide the captions? If such technology is not currently available, when is it likely to become available?

Question 6: What are the availability and the cost of hiring and using trained professionals who could provide captions for live-audio content in synchronized media? What are the additional costs associated with producing captions for live-audio content in synchronized media, such as the technological components to ensuring that the captions are visible on the Web site and are synchronized with the live-audio content?

Question 7: Should the Department consider a shorter or longer effective date for the captioning of live-audio content in synchronized media requirement, or defer this requirement until effective and efficient technology is available? Please provide detailed data and information for the Department to consider in your response.

4. Equivalent Facilitation

The Department recognizes that a public entity should be permitted to use designs, products, or technologies as alternatives to those prescribed for any Web accessibility requirements, provided that such alternatives result in substantially equivalent or greater accessibility and usability. The Department is considering including a provision in a proposed Web access rule that addresses this principle, which is known as equivalent facilitation. The 1991 and 2010 ADA Standards for Accessible Design both contain a similar equivalent facilitation provision. The purpose of allowing for equivalent facilitation is to encourage flexibility and innovation by covered entities while still ensuring substantially equivalent or greater accessibility and usability. The Department believes, however, the responsibility for demonstrating equivalent facilitation rests with the covered entity.

Question 8: Are there any existing designs, products, or technologies (whether individually or in combination with others) that would result in accessibility and usability that is either substantially equivalent to or greater than WCAG 2.0 Level AA?

Question 9: Are there any issues or concerns that the Department should consider in determining how a covered entity would demonstrate equivalent facilitation?

C. Alternative Requirements

1. Small Public Entities

The Department is also interested in exploring and receiving public comment about whether to consider proposing alternate conformance levels, compliance date requirements, or other methods to minimize any significant economic impact on small public entities. The discussion in this section provides the Department's thinking regarding potential ways to minimize any significant economic impact on small entities. However, the Department is open to other alternatives for achieving this purpose and that satisfy the requirements and purposes of title II of the Americans with Disabilities Act.

For the purpose of this rulemaking, a "small public entity" is one that qualifies as a "small governmental jurisdiction" under the Regulatory Flexibility Act of 1980 (RFA), which defines the term to mean "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand * * *"). 5 U.S.C. 601(5). In order to make the distinction between the population sizes of public entities clear for the purposes of a rulemaking, the Department is considering proposing that the population of a public entity should be determined by reference to the total general population of the jurisdiction as calculated by the U.S. Census Bureau, not the population that is eligible for or that takes advantage of the public entity's specific services. For example, a county school district in a county with a population of 60,000 would not be considered a small public entity regardless of the number of students enrolled in or eligible for services. As another example, individual county schools also would not be considered small public entities if they are components of a county government that has a population of over 50,000 (*i.e.*, the individual county schools are not separate legal entities). While the individual county school in this example may create and maintain a Web site, like in any other matter involving that school, it is a county entity that is ultimately legally responsible for what happens in the individual school.

In the 2010 ANPRM, the Department solicited public comment on whether it should consider different compliance requirements or a different timetable for small entities in order to reduce the impact on them as required by the RFA and Executive Order 13272. *See* 75 FR 43460, 43467 (July 26, 2010). Many disability organizations and individual commenters did not support having a

different timetable or different accessibility requirements for smaller entities, stating that such a proposal would be confusing because people with disabilities would be uncertain about which Web sites they visit should be accessible and by when. Those commenters further emphasized that access to Web content of small entities is important and that many small entities have smaller Web sites with fewer Web pages, which would make compliance easier and therefore require fewer resources. Commenters opposing different timetables or accessibility requirements for smaller entities also noted that small entities are protected from excessive burdens deriving from rigorous compliance dates or stringent accessibility standards by the ADA's undue burden compliance limitations.

Many commenters, especially Web developers and those representing covered entities, stated that compliance in incremental timeframes would be helpful in allowing covered entities—especially smaller ones—to allocate resources (both financial and personnel) to bring their Web sites into compliance. These commenters noted that many small entities do not have a dedicated Web master or staff. Even when these small entities develop or maintain their own Web sites, commenters stated that they often do so with staff or volunteers who have only a cursory knowledge of Web design and merely use manufactured Web templates or software, which may not be accessible, to create Web pages. Additionally, even when small entities do use outside help, a few commenters expressed concern that there is likely to be a shortage of professionals who are proficient in Web accessibility to assist all covered entities in bringing their Web sites into compliance all at once. Some commenters also expressed concern that smaller entities would need to take down their Web sites because they would not be able to comply with the accessibility requirements. Accordingly, the Department is interested in receiving comment on whether "small public entities"—again those with a population of 50,000 or less—should have an additional year (*i.e.*, three years total) or other expanded timeframe to comply with the specific Web requirements the Department proposes.

In addition to a longer timeline for compliance, the Department is considering whether to propose applying WCAG 2.0 Level A to certain very small public entities. As mentioned previously, in the 2010 ANPRM the Department asked for public comment regarding what compliance alternatives the Department should consider for

small public entities. Comments received in response to the 2010 ANPRM indicate that many small public entities should be able to comply with Level A and Level AA Success Criteria and Conformance Requirements specified in WCAG 2.0. However, the Department is interested in public comment regarding whether it should consider applying a different WCAG 2.0 conformance level to very small public entities (e.g., entities with populations below 2,500, 1,000, etc.) that may initially face more technical and resource challenges in complying than larger public entities. The Department seeks public comment on whether it should consider requiring WCAG 2.0 Level A conformance for very small public entities. In addition, the Department is interested in whether there are certain population thresholds within the category of small public entities or other criteria that should be used to define these very small public entities. Also, the Department is interested in public comment on whether there is a certain subset of very small public entities (e.g., entities with populations below 500, 250, etc.) for which compliance with even Level A would be too burdensome and, thus, the Department should consider deferring compliance with WCAG 2.0 altogether at this time for those entities.

WCAG 2.0 Level A does not include the requirement to provide captioning of live-audio content in synchronized media. However, were the Department to require WCAG 2.0 Level AA conformance for very small public entities, the Department is considering whether the requirement to provide captioning of live-audio content in synchronized media should be deferred for very small public entities. Also, the Department is considering whether the requirement to provide captioning of live-audio content in synchronized media should be deferred for all small public entities at this time.

Question 10: Would the Department be correct to adopt the RFA's definition for a "small governmental jurisdiction" (i.e., governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000) as its population threshold for small public entities? Are there other definitions for "small governmental jurisdiction" the Department should consider using to define the population threshold for small public entities for purposes of this rulemaking? Please provide as much information as possible, including any supporting data for your views.

Question 11: Are there technical and resource challenges that smaller entities

might face in meeting Level AA conformance? At what level are small public entities currently providing accessibility on their Web sites? Do small public entities have internal staff to modify their Web sites, or do they utilize outside consulting staff to modify and maintain their Web sites? Are small public entities facing budget constraints that may impair their ability to comply with this regulation?

Question 12: Are there other issues or considerations regarding the accessibility standard—WCAG 2.0 Level A Success Criteria and Conformance Requirements—that the Department is considering applying to Web sites and Web content of very small public entities that the Department should consider? Please provide as much detail as possible in your response.

Question 13: If the Department were to apply a lower compliance standard to very small public entities (WCAG 2.0 Level A), what would be the appropriate population threshold or other appropriate criteria for defining that category? Should the Department consider factors other than population size, such as annual budget, when establishing different or tiered compliance requirements? If so, what should those factors be, why are they more appropriate than population size, and how should they be used to determine regulatory requirements? What would be the consequences for individuals with disabilities if the Department applied a lower compliance standard, WCAG 2.0 Level A, to very small public entities?

Question 14: Would applying to very small public entities an effective date of three years after the publication of the final rule strike an appropriate balance of stakeholder interests? Why or why not? Should the Department consider a shorter or longer effective date for very small public entities? Please provide specific examples or data in support of your response.

Question 15: Should the Department defer compliance with WCAG 2.0 altogether for a subset of very small public entities? Why or why not? If so, what would be the appropriate population threshold or other appropriate criteria for defining that subset of very small public entities? Should the Department consider factors other than population size, such as annual budget, when establishing the subset of public entities subject to deferral? If so, what should those factors be, why are they more appropriate than population size, and how should they be used to determine regulatory requirements? What would be the consequences to individuals with

disabilities if the Department deferred compliance with WCAG 2.0 for a subset of very small public entities?

Question 16: If the Department were not to apply a lower compliance standard to very small public entities (WCAG 2.0 Level A), should the Department consider a deferral of the requirement to provide captioning of live-audio content in synchronized media for very small public entities? Additionally, should the Department consider a deferral of the requirement to provide captioning of live-audio content in synchronized media for all small public entities? Why or why not?

2. Special Districts

The Department is also interested in gathering information and comments on how it should frame the requirements for Web access for special district governments. For the purposes of the Department's rulemaking, a special district government is a public entity—other than a county, municipality, township, or independent school district—authorized by State law to provide one function or a limited number of designated functions with sufficient administrative and fiscal autonomy to qualify as a separate government and with a population that is not calculated by the United States Census Bureau in the most recent decennial Census or Small Area Income and Poverty Estimates.⁴ The Department is considering whether special district governments should be required to meet a lower conformance standard, WCAG 2.0 Level A, and be allotted three years for compliance or another extended compliance date.

A lower conformance standard and a longer timeframe for compliance for special district governments may be appropriate for two reasons. First, because the U.S. Census Bureau does not provide population estimates for special district governments, it would be difficult for these limited-purpose public entities to obtain population estimates that are objective and reliable to determine their duties under any proposed rule that differentiates among public entities based on population size. While some special district governments may estimate their total populations, these entities may use varying methodologies to calculate population estimations leading to possible confusion and inconsistency in the application of the proposed accessibility requirements. Second, special district

⁴ See U.S. Census Bureau, *Lists and Structure of Governments: Population of Interest—Special Districts*, available at https://www.census.gov/govs/go/special_district_governments.html (last visited Apr. 13, 2016).

governments are generally formed to perform a single function or a very limited number of functions (e.g., provide mosquito abatement or water and sewer services) and have more limited or specialized budgets. Therefore, the Department is interested in gathering information and comments regarding whether special district governments should comply with WCAG 2.0 Level A instead of Level AA. The Department is also interested in receiving comment on whether an extended date for compliance of three years for special district governments is warranted and necessary.

Question 17: Are there technical and resource challenges that special districts might face in meeting Level AA conformance? At what level are special districts currently providing accessibility on their Web sites? Do special districts have internal staff to modify their Web sites, or do they utilize outside consulting staff to modify and maintain their Web sites? Are special districts facing budget constraints that may impair their ability to comply with a proposed regulation requiring compliance with Level AA?

Question 18: Are there other issues or considerations regarding the accessibility standard—WCAG 2.0 Level A Success Criteria and Conformance Requirements—that the Department is considering applying to Web sites and Web content of special district governments that the Department should consider? Please provide as much detail as possible in your response.

Question 19: Does the description of special district governments above make clear which public entities are captured by that category? Is there any additional information on calculating the populations of special district governments that the Department should consider?

III. Exceptions to the Web Access Requirements

In the 2010 ANPRM, the Department requested public comment on whether it should adopt certain coverage limitations when it develops its proposed ADA Web regulations. The Department was particularly interested in hearing about the challenges covered entities might face in making existing Web content accessible, whether it should except from any rule Web content posted by third parties, and whether it should except content on Web sites linked from the Web sites of public entities. Commenters that supported providing exceptions suggested that materials on the public entities' Web sites prior to the effective

date of a regulation should not be subject to a Web access rule, as long as the materials are not subsequently modified or updated after any regulation becomes effective. These commenters believed that it would be burdensome to require public agencies to retroactively make all documents on their Web site accessible, noting that many of the outdated documents were hundreds of pages long and were scanned images. Several commenters requested that the Department except from any Web access rule links on public entities' Web sites to other Web sites unless either the public entities operate or control the other Web site or access to the linked content is important or necessary to participate in the public entities' services. Many commenters supported exceptions for Web content posted by third parties on public entities' Web sites and at least one commenter suggested that where practicable, public entities should make and publicize the availability of alternative accessible means for accessing the third-party Web content. On the other hand, a small number of comments—mostly from advocacy groups and private citizens—suggested that the title II regulation should not include any exceptions because the undue administrative and financial burdens compliance limitations would protect public entities from overly burdensome requirements resulting from such a regulation. Finally, a number of commenters urged the Department to require public entities to develop and deploy Web platforms (i.e., a Web site framework with services, tools, and interfaces that enable users to interact with a Web site) that are accessible so that third parties would have the ability to make the Web content they post on public entities' Web sites accessible. After consideration of these comments and after conducting independent research, as described in more detail below, the Department is currently of the view that some exceptions to any Web access standards may be warranted and should therefore be part of any Department rulemaking.

At this juncture, the Department is considering a number of categories of Web content for potential exceptions: (1) Archived Web content; (2) certain preexisting conventional electronic documents; (3) third-party Web content linked from a public entity's Web site; and (4) certain Web content posted by third parties on a public entity's Web site.

A. Archived Web Content

The Web sites of many public entities often include a significant amount of

archived Web content, which may contain information that is outdated, superfluous, or replicated elsewhere. Generally, this historic information is of interest to only a small segment of the general population. Still, the information may be of interest to some members of the public, including some individuals with disabilities, who are conducting research or are otherwise interested in these historic documents. The Department is concerned, however, that public entities would need to expend considerable resources to retroactively make accessible the large quantity of historic information available on public entities' Web sites. Thus, the Department believes providing an exception from the Web access requirements for Web content that meets a definition it is considering proposing for "archived Web content" is appropriate. A proposed definition of "archived Web content" may look like the following:

Archived Web content means Web 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.

Under the proposal presently under consideration by the Department, in order for archived Web content to be excepted from the Web access requirements of any proposed rule, all three prongs of the definition would have to be satisfied.

An archived Web content exception would allow public entities to keep and maintain historic Web content, while utilizing their resources to make accessible the many current and up-to-date materials that all citizens need to access for existing public services or to participate in civic life. As discussed below, despite any exception the Department might propose regarding archived Web content, individual requests for access to these excepted documents would still need to be addressed on a case-by-case basis in order to ensure that individuals with disabilities are able to receive the benefits or services of the public entity's archived Web content through other effective means. Under title II of the ADA, it is the responsibility of the public entity to make these documents accessible to individuals with disabilities, *see generally*, 42 U.S.C. 12132 and 28 CFR 35.160, and, "[i]n order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and

independence of the individual with a disability.” 28 CFR 35.160(b)(2).

Question 20: Is the definition the Department is considering for archived Web content appropriate?

Question 21: Does the archived Web content definition and exception under consideration take into account how public entities manage outdated content on their Web sites? How often do individuals seek access to such documents and how long would it take public entities to provide these documents in an accessible format? Are there other issues that the Department should consider in formulating an archived Web content definition or an exception for archived materials on Web sites of public entities?

B. Preexisting Conventional Electronic Documents

The Department is considering excepting from any Web access rule, conventional electronic documents (e.g., Microsoft Word documents) that exist on public entities’ Web sites prior to the compliance date of any proposed rule (preexisting conventional electronic documents). In the past, documents created by or for a public entity were only available in traditional paper format; however, today most documents are created electronically via word processor software, such as Corel WordPerfect or Microsoft Word, or spreadsheet software, such as Corel Quattro Pro or Microsoft Excel. The Department’s research indicates that most Web sites of public entities contain large amounts of current electronic documents that are intended to be used by members of the public in either an electronic form or as printed output, which are not suitable to be archived. The types of electronic documents can range from a single-page meeting notice containing only text to a comprehensive report containing text, images, charts, graphs, and maps. The majority of these electronic documents are in Adobe PDF format, but many electronic documents are formatted as word processor files (e.g., Corel WordPerfect or Microsoft Word files), presentation files (e.g., Apple Keynote or Microsoft PowerPoint files), spreadsheet files (e.g., Corel Quattro Pro or Microsoft Excel files), and database files (e.g., FileMaker Pro or Microsoft Access files). A proposed definition of “conventional electronic documents” may look like the following:

Conventional electronic documents means electronic files available on a public entity’s Web site that are in the following electronic file formats: portable document file (PDF) formats, word processor file formats,

presentation file formats, spreadsheet file formats, and database file formats.

Because of the substantial number of conventional electronic documents on public entities’ Web sites, and because of the difficulty of remediating complex types of information and data to make them accessible after-the-fact, the Department is considering a proposal to except certain preexisting conventional electronic documents from the Web access requirements. The Department is considering such an exception because it believes covered entities should focus their limited personnel and financial resources on developing new conventional electronic documents that are accessible and remediating existing electronic documents that are used by members of the public to apply for or gain access to the public entity’s services, programs, or activities. The Department believes this approach may reduce the burdens on covered entities but still provide Web access to key documents. An exception for “preexisting conventional electronic documents” could then provide the following:

Conventional electronic documents created by or for a public entity that are available on a public entity’s Web site before the date the public entity is required to comply with this rule are not required to comply with the Web access standards, unless such documents are to be used by members of the public to apply for, gain access to, or participate in a public entity’s services, programs, or activities.

Under such a proposal, the Department would anticipate requiring any preexisting document to be used by members of the public to apply for or gain access to the public entity’s services, programs, or activities, including documents that provide instructions or guidance, would also need to be made accessible. For example, a public entity would not only need to make an application for a business license accessible, but it would also need to make accessible other materials that may be needed to obtain the license, complete the application, understand the process, or otherwise take part in the program. Accordingly, documents necessary to understand the process of obtaining the business license, such as business license application instructions, manuals, sample knowledge tests, and guides, such as “Questions and Answers” documents, would also be required to be accessible under such an exception. However, the Department believes that under such a proposal, if the public entity’s Web site has the same information contained in multiple conventional electronic documents, the Department would expect that the

public entity should only be required to ensure that a single complete set of instructions or guidance be available in an accessible format on the Web.

Question 22: Would such a definition and exception under consideration make clear the types of documents needed to apply for or gain access to services, programs, or activities? If some versions of documents are accessible and others are not, should the Department require that accessible documents be labeled as such? Are there other issues that the Department should take into consideration with regard to a proposed exception for conventional electronic documents?

C. Third-Party Web Content

The Department received a variety of comments regarding whether or not covered entities should be responsible for ensuring that third-party Web content and Web content public entities link to is accessible. For purposes of the proposals under consideration herein, “third party” refers to someone other than the public entity. Many commenters maintained that covered entities cannot be held accountable for third-party content on their Web sites because many entities do not control such content. A number of commenters also suggested that public entities be responsible for providing a platform that would allow users to post accessible content, but the public entities should not be responsible for guaranteeing the accessibility of the resulting user-generated content. Several commenters suggested that covered entities should not be responsible for third-party content and links unless they are necessary for individuals to access the services, programs, or activities of the public entities. A number of commenters expressed the view, however, that covered entities should be responsible for all third-party content. These commenters stated that the boundaries between Web content generated by a covered entity and a third party are often difficult to discern and cited the undue burden defense as a factor favoring coverage of third-party content. Additionally, these commenters took the position that excluding the Web content of these third parties was a “loophole” to providing full access and that covered entities must be responsible for the content on their Web site, regardless of its origin.

After considering these comments, the Department is considering proposing certain limited exceptions related to third-party content. It is important to note, however, that even if the Department were to except Web content

posted by third parties on public entities' Web sites, the Department is considering proposing that public entities would still be responsible for ensuring that the platforms they provide for posting third-party Web content comply with any Web access rule.

1. Linked Third-Party Web Content

Many public entities' Web sites include links to other Web sites that contain information or resources in the community offered by third parties that are not affiliated with the public entity. Clicking on one of these links will take an individual away from the public entity's Web site and send the individual to the Web site of a third party. Typically, the public entity has no responsibility for the Web content or the operation of the third party's Web site. The Department is considering proposing an exception to a Web access rule so that a public entity would not be responsible for the accessibility of a third-party Web site or Web content linked from the public entity's Web site unless the public entity uses the third-party Web sites or Web content to allow members of the public to participate in or benefit from its services, programs, or activities. A proposed exception may look like the following:

Third-party Web content linked from the public entity's Web site is not required to comply with the Web access standards unless the public entity uses the third-party Web site or Web content to allow members of the public to participate in or benefit from the public entity's services, programs, or activities.

Such an exception generally would allow public entities to provide relevant links to third-party Web sites or Web content that may be helpful without making them liable for the third party's Web content. However, the Department's title II regulation prohibits discrimination in the provision of any aid, benefit, or service provided by public entities directly or through contractual, licensing, or other arrangements. *See generally* 28 CFR 35.130(b)(1). Therefore, if a public entity uses the third-party Web site or Web content to allow members of the public to participate in or benefit from its services, programs, or activities, under any exception the Department may propose the public entity would be required to use third-party Web sites or Web content that comply with the Web access requirements of a final rule. Thus, a public entity that uses online payment processing services offered by a third party to accept the payment of fees, parking tickets, or taxes would be required to ensure that the third-party Web site and Web content complies

with the Web access requirements. Similarly, if a public entity contracts or otherwise uses a third party to process applications for benefits, to sign up for classes, or to attend programs the public entity offers, the public entity would be required to ensure that the third party's Web site and Web content complies with the Web access rule. On the other hand, if a public entity provides a link to third-party Web content for informational or resource purposes only, then access by constituents is not required in order to participate in the public entity's services, programs, or activities, and the linked third-party Web content would not be required to be accessible.

Question 23: Are there additional issues that the Department should take into consideration with regard to linked third-party Web content? Has the Department made clear which linked third-party Web content it is considering covering and which linked third-party Web content the Department is considering excepting from coverage under a proposed rule? Why or why not?

2. Web Content Posted by a Third Party

The Department is considering generally excepting Web content posted by third parties on public entities' Web sites from compliance with WCAG 2.0 Level AA. However, the Department is considering requiring Web content posted by a third party that is essential for engaging in civic participation to comply with WCAG 2.0 Level AA.

The basis for this exception is that a public entity generally does not have control over the volume or substance of content posted by a third party on the public entity's Web site. To the extent that any content is reviewed by the public entity before it is posted, such review often is cursory or limited to automated pre-screening to prevent fraud, abusive language, or spamming. Public entities may not even be aware of when third parties post content on the public entities' Web sites. Where the posting of third-party Web content occurs in such an automated fashion, without notice to the public entity, the public entity may lack the practical capacity under these circumstances to make such material accessible.

The Department believes, however, that there are times when access to content posted by third parties on a public entity's Web site may be so essential for engaging in civic participation that the public entity should be required to make the Web content accessible. An example of third-party content which the Department would consider essential to engaging in civic participation is when a State seeks

formal public comment on a proposed regulation and those comments are posted on the State Web site. Often the period for public comment is time sensitive, transparency is crucial, and a State will review and consider all such comments in finalizing its regulation. As such, it is vitally important that individuals with disabilities have access to that Web content, whether for framing their own comments, raising important points, reviewing and responding to comments posted by others, or evaluating the basis for the State's ultimate decision.

The Department notes that Web content created by a third party that a public entity decides to post itself would still be subject to WCAG 2.0 Level AA. The Department believes that a public entity should be responsible for Web content that it posts on its own initiative, even if the content is originally created or authored by a third party. In addition, if the Department were to except Web content posted by third parties as above, such an exception would provide public entities with a greater ability to direct their resources toward ensuring that the Web content the public entities themselves make available to the public is accessible.

Question 24: The Department intends the phrase "content posted by a third party on a public entity's Web site" to mean content that a third party creates and elects to make available on the public entity's Web site. Does the Department's use of the term "posted" in this context create confusion, and if so, is there another term that would be more appropriate for purposes of this exception?

Question 25: The Department requests public comment on whether the Department's rule should except from coverage almost all Web content posted by third parties on public entities' Web sites. The Department is also interested in obtaining information about what type of Web content is posted by third parties on Web sites of public entities (e.g., whether it contains only text, or includes images, videos, audio content, and other forms of media)?

Question 26: How much content is posted by third parties on public entities' Web sites and how frequently? Please provide as much information as possible, including any supporting data.

Question 27: To what extent are public entities on notice of postings by third parties on their Web sites? To what extent do public entities affirmatively decide what, or how much, third-party Web content can be posted on their Web sites? If public entities do affirmatively decide what, or how much, third-party

Web content to post on their Web sites, please describe how that process works and what factors public entities consider when making such decisions?

Question 28: What Web content posted by third parties do you consider essential to access in order to engage in civic participation? Is "essential for engaging in civic participation" the appropriate standard for determining whether Web content posted by third parties needs to be made accessible to individuals with disabilities? Please provide as much information as possible, including any supporting material for your views.

Question 29: What factors should the Department consider when framing the obligation for public entities to make accessible the Web content posted by third parties that is essential for engaging in civic participation? Please provide as much information as possible, including any supporting data.

Question 30: Is there other third-party Web content that, while not essential for engaging in civic participation, the public entity controls and should not be included within such an exception? How would the Department define that control? How would the Department measure and evaluate that control? Why, in your view, should that third-party Web content be excluded from any such exception? Please provide as much information as possible, including any supporting data.

Question 31: If the Department adopts an exception along the lines currently under consideration, will it prevent constituents with disabilities from accessing important information on public entities' Web sites concerning public entities' services, programs, or activities? Please provide as much information as possible, including any supporting data for your views.

Question 32: Are there other issues that the Department should take into consideration with regard to the exception under consideration?

3. Third-Party Filings in Judicial and Quasi-Judicial Administrative Proceedings

While access to third-party filings in judicial and quasi-judicial administrative proceedings would seemingly fit within the category of information essential to access in order to engage in civic participation, the Department is considering including these types of filings within the exception for third-party content posted on a public entity's Web site. Courts and administrative agencies can receive vast amounts of third-party filings (*i.e.*, filings made by third parties, not by public entities) in these types of

proceedings each year. Some public entities have either implemented an automated process for electronic filing of court documents in legal proceedings via their Web sites or are now beginning to require such a process. After these documents are submitted, some public entities make the electronic record of a case or administrative adjudicatory proceeding available on their Web sites. These conventional electronic documents, submitted by third parties, often include lengthy appendices, exhibits, or other similar supplementary materials that may not be accessible. For example, in a court proceeding, a litigant may submit a brief and exhibits in support of the brief. The exhibits can include a variety of materials (*e.g.*, a written contract, a receipt, a handwritten note, a photograph, a map, or a schematic drawing of a building) to provide support for the propositions asserted in the brief. Items, such as maps or schematic drawings, are inherently visual and cannot easily be made accessible or, in some instances, cannot be made completely accessible. Even when submissions are purely textual documents that are created electronically using word processing software, which can be made accessible easily, the submission may not be in compliance with the accessibility standards contemplated by the Department for its proposed rule, WCAG 2.0 Level AA, if the author of the document did not format the document correctly. Because of the sheer volume of documents public entities receive from third parties in these judicial proceedings and quasi-judicial administrative proceedings, the Department is concerned that it would not be practical to make public entities responsible for ensuring that these kinds of filings by third parties are accessible. Moreover, the need for immediate access to these kinds of documents may generally be confined to a small group, such as parties to a particular proceeding.

However, if the Department were to include within the exception from any Web access requirements third-party filings in judicial proceedings or quasi-judicial administrative proceedings, the Department would make clear that individual requests for access to these excepted documents would need to be addressed on a case-by-case basis in order to ensure that individuals with disabilities are able to receive the benefits or services of the public entity's records program through other effective means. Under title II, it is the responsibility of the public entity that is making the electronic record available

to the public to also make these documents accessible to individuals with disabilities. In some instances, third parties that create or submit individual documents may also have an independent obligation to make these documents accessible to individuals with disabilities. However, that independent obligation would not extinguish the duty of public entities under such a proposed exception to provide alternative access to third-party documents that are posted on their Web sites to individuals with disabilities that request access to them. As noted earlier, the current ADA regulation states that "[i]n order to be effective, auxiliary aids and services must be provided in accessible formats, *in a timely manner*, and in such a way as to protect the privacy and independence of the individual with a disability." 28 CFR 35.160(b)(2) (*emphasis added*). Because of the nature of legal proceedings, it is imperative that individuals with disabilities be provided timely access to the documents to which they request access so that they can take part in the legal process in a manner equal to that afforded to others.

The Department seeks public comment on the exception it is considering and has posed several questions.

Question 33: On average, how many third-party submissions in judicial proceedings or quasi-judicial administrative proceedings does a public entity receive each week or each month? How much staff do public entities have available with the expertise to make such documents accessible? How many staff hours would need to be devoted to making such documents accessible? Please provide as much information as possible, including any supporting data. Has the Department made clear that if an exception were to provide that this content would not need to be made accessible on a public entity's Web site, public entities would continue to have obligations under the current title II requirements to make individual documents accessible to an individual with a disability on a case-by-case basis? If not, why not?

*Question 34: The Department is also interested in obtaining information about what types of third-party Web content in judicial and quasi-judicial administrative proceedings are posted on public entities' Web sites (*e.g.*, how much of it is text, how much contains images, videos, audio content, or other forms of media)? Please provide as much information as possible, including any supporting data.*

Question 35: If the Department adopts an exception along the lines currently under consideration, will it prevent citizens with disabilities from accessing important information concerning public entities' services, programs, or activities on public entities' Web sites? Please provide as much information as possible, including any supporting data for your views.

Question 36: Are there other issues or other factors that the Department should take into consideration with regard to this proposal regarding third-party filings in judicial and quasi-judicial administrative proceedings?

4. Third-Party Social Media Platforms

Public entities are increasingly using third-party platforms, including social media platforms, to host forums for public discourse or to provide information about their services, programs, and activities in lieu of or in addition to hosting such forums and information on their own Web sites. At this time, the Department is considering deferring, in any proposed rule for Web access for public entities, proposing a specific technical accessibility standard that would apply to public entities' use of third-party social media platforms until the Department issues a rulemaking for public accommodations addressing Web site accessibility under title III. For the purposes of this possible deferral, third-party social media platforms would refer to Web sites of third parties whose primary purpose is to enable users to create and share content in order to participate in social networking (*i.e.*, the creation and maintenance of personal and business relationships online through Web sites such as, for example, Facebook, YouTube, Twitter, and LinkedIn). The only social media platforms that the Department is aware of are public accommodations covered by title III, thus, the Department believes it may be appropriate to defer addressing social media platforms for this title II rulemaking until it issues a proposed title III Web accessibility regulation.

Although the Department is considering deferring application of a technical standard to third-party social media Web sites that public entities use to provide services, programs, or activities, public entities would continue to have obligations under title II of the ADA to provide persons with disabilities access to these online services, programs, or activities. Under title II, a public entity must ensure that "[n]o 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," and must refrain from using methods of administration that would subject qualified individuals with disabilities to discrimination on the basis of disability. See 35 CFR 35.130(a) and 35.130(b)(3). Thus, when using a third-party social media Web site to implement its services, programs, or activities, a public entity is required to ensure access to that content for individuals with disabilities through other means. For example, if a public entity publishes information about an upcoming event on a third-party social media Web site, it must ensure that the same information about the event is also available to individuals with disabilities elsewhere, such as on the public entity's accessible Web site. Likewise, if a public entity solicits public feedback on an issue via a social media platform, the public entity must provide an alternative way to invite and receive feedback from person with disabilities on that topic.

Question 37: Are there any social media platforms that are covered by title II of the ADA that the Department should be aware of? Please provide as much information as possible in your response.

Question 38: Please provide any other information or issues that the Department should consider with regard to a proposal to defer applying a technical standard to public entities' use of social media Web sites.

D. Password-Protected Web Content of Public Educational Institutions

Public educational institutions (*i.e.*, public elementary and secondary schools and public postsecondary institutions), like many other public institutions, use their Web sites to provide a variety of services, programs, and activities to members of the public. Many of the services, programs, and activities on these Web sites are available to anyone—access simply requires an Internet connection and the relevant Web site address, which can be obtained using a search engine. The content on these public Web sites can include such general information as the academic calendar, enrollment process, admission requirements, school lunch menus, school policies and procedures, and contact information of school, college, or university administrators. Under the Web access rule under consideration by the Department, all such services, programs, or activities available to the public on the Web sites of public educational institutions would be required to comply with the

technical standards the Department adopts.

In addition to the information available to the general public on the Web sites of public educational institutions, however, the Web sites of many schools, colleges, and universities also make certain services, programs, and activities available to a discrete and targeted audience of individuals (*e.g.*, students taking particular classes or courses). This information is often provided using a Learning Management System (LMS) or similar platform that can provide secure online access and allow the exchange of educational and administrative information in real time. LMSs allow public educational institutions and institutions' faculty and staff to exchange with students specific information about the course, class, or student's progress. For example, faculty and staff can create and collect assignments, post grades, provide real-time feedback, and share subject-specific media, documents, and other resources to supplement and enrich the curriculum. Parents can track their children's attendance, assignments, individualized education programs (IEPs), grades, and upcoming class events. To access the information available on these platforms, students—and parents in certain contexts—generally must obtain password or login credentials from the educational institution.

Under the ADA, public entities are prohibited from providing any aid, benefit, or service directly, or through contracting, that discriminates against individuals with disabilities. See 28 CFR 35.130(b). The Department is therefore considering proposing a provision that would require that the LMS or other educational platforms that public elementary and secondary schools, colleges, and universities use be readily accessible in accordance with a Web access rule. However, because access to password-protected class or course Web content is limited to a discrete population, which may not always include a person with a disability, the Department is also considering a provision that would not require the content available on these password-protected class or course pages to be made accessible unless and until a student with a disability enrolls in such a class or course. For example, a blind university student may not have enrolled in a psychology course, or a deaf high school student may not have enrolled in a particular ninth grade world history class. As such, the Department is considering a proposal to except content available on password-protected Web sites for specific classes

or courses unless and until a student enrolls in that particular class or course and, because of a disability, that student would be unable to access the content posted on the password-protected Web site for that class or course. However, under the proposal under consideration by the Department, once a student with a disability has enrolled in a particular class or course, the content available on the password-protected Web site for the specific class or course would need to be made accessible in a timely manner.

The Department is also concerned about the rights of parents with disabilities, particularly in the public elementary and secondary school context. Because parents of students in these contexts have greater rights, roles, and responsibilities with regard to their children and their children's education than may be present in the postsecondary education setting, and because these parents interact with such schools much more and in much greater depth and detail, the Department currently is considering expressly including parents with disabilities in any proposed exception and subsequent limitation for password-protected Web content. (The Department notes that the term "parent" in any proposed regulation would be intended to include, at present, natural, adoptive, step-, or foster parents, legal guardians, or other individuals recognized under Federal or State law as having parental rights.) Parents use educational platforms to access progress reports and grades, track homework and long-term project assignments, interact regularly with their children's teachers and administrators, and follow IEP plans and progress. Thus, under the proposal currently under consideration by the Department, once a student is enrolled in a particular class or course and that student has a parent with a disability, the content available on the password-protected Web site would also be required to be made accessible in a timely manner.

Public educational institutions are required to make the appropriate modifications and provide the necessary auxiliary aids and services to students with disabilities. It is the public institution, not the student, that is responsible for ensuring that the required modifications are made and necessary auxiliary aids and services are provided once it is on notice of a student's need. Such institutions, therefore, must think prospectively regarding the access needs of its students with disabilities, including those who would be unable to access course content on an inaccessible Web site. This also means that institutions

should not expect or require that a student with a disability, whom the institution knows is unable to access content on an inaccessible Web site, first attempt to access the information and be unable to do so before the institution's obligation to make the content accessible arises.

The Department believes that considering a proposal for public educational institutions along these lines would provide a balanced approach, ensuring access to students with disabilities enrolled in a public educational institution while recognizing that there are large amounts of class or course content that may never need to be accessed by individuals with disabilities because they have not enrolled in a particular class or course.

The exception under consideration by the Department is not intended to apply to password-protected content for classes or courses, that are made available to the general public without enrolling at a particular educational institution and that generally only require perfunctory, if any, registration or payment to participate in the classes or courses, including those offered exclusively online (e.g., many Massive Open Online Courses (MOOCs)). Access to the content on these password-protected Web sites is not confined to a discrete student population within an educational institution, but is instead widely available to the general public—sometimes without limits as to enrollment. Accordingly, any individual, including one with a disability, may enroll or participate at almost any time. Under these circumstances, it is the Department's position that the public entity should make such class or course content accessible from the outset of the class or course regardless of whether a student with a disability is known to be participating in the class or course because a student with a disability, like any other student, may enroll at any time. The Department seeks public comment on a number of issues implicated by the proposed exception that the Department is considering for public educational institutions' password-protected Web content.

Question 39: Does the Department's exception, as contemplated, take into account how public educational institutions use password-protected Web content? What kinds of tasks are students with disabilities or parents with disabilities performing on public educational institutions' Web sites?

Question 40: How do public educational institutions communicate general information to their student

bodies and how do they communicate class- or course-specific information to their students via Web sites?

Question 41: On average, how much and what type of content do password-protected course Web sites contain? How much time does it take a public entity to make the content on a password-protected course Web site accessible? Once a public educational institution is on notice that a student is enrolled in a class or course, how much time should a public educational institution be given to make the content on a password-protected course Web site accessible? How much delay in accessing course content can a student reasonably overcome in order to have an equal opportunity to succeed in a course?

Question 42: Do public elementary or secondary schools combine and make available content for all students in a particular grade or particular classes (e.g., all ninth graders in a school or all secondary students taking chemistry in the same semester) using a single password-protected Web site?

Question 43: Is the Department's proposed terminology to explain who it considers to be a parent in the educational context clear? If not, why not? If alternate terminology is appropriate, please provide that terminology and data to support your position that an alternate term should be used.

Question 44: Should the Department require that password-protected Web content be accessible to parents with disabilities who have a postsecondary student enrolled in a particular class or course?

Question 45: How and when do public postsecondary educational institutions receive notice that a student who, because of a disability, would be unable to access content on an inaccessible Web site is newly enrolled in a school, class, or course?

Question 46: When are public elementary and secondary students generally assigned or enrolled in classes or courses? For all but new students to a public elementary or secondary school, does such enrollment generally occur in the previous semester? If not, when do such enrollments and assignments generally occur?

Question 47: Are there other factors the Department should consider with regard to password-protected Web content of public educational institutions? Please provide as much detail as possible in your response.

IV. Conforming Alternate Versions

The Department is considering allowing the use of conforming alternate

versions to provide access to Web content for individuals with disabilities in two limited circumstances that are discussed below. In order to comply with WCAG 2.0, Web content must satisfy one of the defined levels of conformance (*i.e.*, Level A, Level AA, or Level AAA) or a separate accessible Web page must be provided that satisfies one of the defined levels of conformance as an alternative to the inaccessible Web page. These separate accessible Web pages are referred to as “conforming alternate versions” in WCAG 2.0. WCAG 2.0 describes “conforming alternate version” as a separate Web page that is accessible, up-to-date, contains the same information and functionality as the inaccessible Web page, and, therefore, can provide individuals with disabilities equivalent access to the information and functionality provided to individuals without disabilities. See W3C®, *Understanding WCAG 2.0: Understanding Conforming Alternate Versions* (Dec. 2012), available at <http://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conforming-alt-versions-head> (last visited Apr. 13, 2016). The W3C® explains that providing a conforming alternate version of a Web page is intended to be a “fallback option for conformance to WCAG and the preferred method of conformance is to make all content directly accessible.” *Id.*

The Department is concerned that WCAG 2.0 will be interpreted to permit the development of two separate Web sites—one for individuals with disabilities and another for individuals without disabilities—even when doing so is unnecessary. The Department is also concerned that the creation of separate Web sites for individuals with disabilities may result in unequal access to information and functionality. However, as the W3C® explains, certain limited circumstances may warrant the use of conforming alternate versions of Web pages. For example, a conforming alternate Web page may be necessary when a new emerging technology is used on a Web page, but the technology is not yet accessibility supported (*i.e.*, the technology is not yet able to be made accessible) or when a Web site owner is legally prohibited from modifying the Web content. *Id.* The Department is considering permitting the use of conforming alternate versions of Web page and Web content, as defined by 2008 WCAG 2.0, to comply with Web accessibility requirements only under the following two circumstances:

- (1) when it is not possible to make Web content directly accessible due to technical or legal limitations; or
- (2) when used to provide access to conventional electronic documents.

Under this approach, it would not be permissible for public entities to provide conforming alternate versions in cases where making the main Web site accessible would result in an undue financial and administrative burden. As discussed below, in section V. “Compliance Limitations and Other Duties,” public entities are required to make their main Web sites accessible up to the point that full compliance with the proposed technical standard is an undue financial and administrative burden. The Department would not, at that point, also require the public entity to expend significant additional resources to develop a separate accessible and up-to-date Web site that contains the same information and functionality as the inaccessible Web content.

A. Technical or Legal Limitations

The Department believes persons with disabilities must be provided access to the same Web content that is available to persons without disabilities unless providing direct access to that Web content to persons with disabilities is not possible due to technical or legal limitations. The Department’s proposed approach under the ADA would be slightly different than WCAG 2.0 because under WCAG 2.0 public entities, despite the W3C® guidance, can always choose to provide a conforming alternate version of a Web page to conform to WCAG 2.0 rather than providing Web content on the Web page that is directly accessible, even when doing so is unnecessary. Thus, the Department’s proposal under consideration would permit the use of conforming alternate versions of Web pages and Web content to comply with Web accessibility requirements only where it is not possible to make Web pages and Web content directly accessible due to technical limitations (*e.g.*, technology is not yet accessibility supported) or legal limitations (*e.g.*, Web content is protected by copyright). The responsibility for demonstrating a technical or legal limitation would rest with the covered entity.

For many individuals with disabilities, having direct access to a main Web page that is accessible is likely to provide the best user experience; however, the Department is aware that for some individuals with disabilities a Web page specifically tailored to accommodate their specific disability may provide a better

experience. Nonetheless, requiring all individuals with disabilities who could have a better experience using the main Web page to use a separate or segregated Web page created to accommodate certain disabilities is concerning and inconsistent with the ADA’s integration principles. 28 CFR 35.130(b)(2). Still, the Department’s proposal under consideration would not prohibit public entities from providing alternate versions of Web pages in addition to its accessible main Web page to provide users with certain types of disabilities a better experience.

B. Providing Access to Conventional Electronic Documents

With regard to conventional electronic documents (*e.g.*, PDFs, word processing documents, or other similar electronic documents) the Department is considering proposing that where a public entity provides more than one version of a single document, only one version of the document would need to be accessible and, thus, that accessible version would be the conforming alternate version for the inaccessible version. For example, if a public entity provides both PDF and Microsoft Word versions of a single document, either the PDF or the Microsoft Word document would need to comply with WCAG 2.0, but both would not need to comply. Therefore, in this example, a public entity would not be required to remediate an inaccessible PDF where a WCAG 2.0-compliant Microsoft Word version is also provided on the public entity’s Web site (*i.e.*, the Microsoft Word document acts as a conforming alternate version providing accessible information to individuals with disabilities).

The Department is concerned about the work it may take to make multiple versions of the same conventional electronic documents accessible, particularly when public entities are already providing persons with disabilities access to the information contained in those documents. Additionally, making more than one format accessible may not improve the access to or experience of the document’s content for individuals with disabilities. In the context of conventional electronic documents, the Department does not believe the same risks of separate and unequal access are necessarily present that may occur when using conforming alternate versions for other types of Web content and Web pages, which can lead to the unnecessary development of separate Web sites or unequal services for individuals with disabilities. It seems to the Department that conventional

electronic documents are updated less frequently than Web pages and are often replaced in their entirety by new versions of the documents. In contrast, it appears that other types of Web content and Web pages are often updated piecemeal, increasing the possibility that the content on the alternate accessible Web page may not be updated concurrently and therefore would not be the same as that provided on the primary Web page. Because conventional electronic documents do not appear to be updated as frequently as Web pages and generally do not change unless they are replaced in their entirety by another version of the document, the risk that individuals with disabilities would not get the same content or services as those without disabilities seems relatively low. The approach with regard to conforming alternate versions the Department is considering is consistent with the U.S. Access Board's approach in its Notice of Proposed Rulemaking on section 508. 80 FR 10880 (Feb. 27, 2015).

Question 48: Has the Department made clear the two circumstances under which conforming alternate versions of Web pages or Web content would be permissible? Please provide as much detail as possible in your response.

Question 49: Are there other instances where the Department should consider permitting the use of conforming alternate versions of Web pages or Web content? Please provide as much detail as possible in your response.

Question 50: Are there any issues or considerations the Department should take into account regarding its proposal to permit the use of conforming alternate versions of Web pages or Web content only where it is not possible to make Web pages and Web content directly accessible to persons with disabilities due to technical or legal limitations? Are there any additional issues or information regarding conforming alternate versions of a Web page or Web content that the Department should consider? Please provide as much detail as possible in your response.

Question 51: Should the Department consider permitting the use of conforming alternate versions to provide access to conventional electronic documents when multiple versions of the document exist? If so, why? Are there considerations or concerns regarding whether allowing conforming alternate versions in these specific instances would subject individuals with disabilities to different or inferior services? Please provide as much detail as possible in your response.

V. Compliance Limitations and Other Duties

The Department is considering a proposal that would provide that in meeting any access requirements in a Web accessibility rule, a public entity would not be required to take any action that would result in a fundamental alteration or undue financial and administrative burden. The limitations under consideration would be consistent with the compliance limitations currently provided in the title II regulation in 28 CFR 35.130(b)(7) (reasonable modifications in policies, practices, or procedures), 35.150(a)(3) (program accessibility), and 35.164 (effective communication) and, thus, are familiar to public entities. The regulatory text under consideration may look like the following:

(a) Where a public entity can demonstrate that full compliance with Web accessibility requirements would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, compliance with Web accessibility requirements is required to the extent that it does not result in a fundamental alteration or undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with Web accessibility requirements would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible.

(b) A public entity that has complied with (a) above is not required to make any further modifications to its Web site to accommodate an individual with a disability who cannot access the information, service, program, or activity on the public entity's Web site. However, the public entity must utilize an alternative method of providing the individual with a disability equal access to that information, service, program, or activity unless the public entity can demonstrate that alternative methods of access would result in a fundamental alteration in the nature of a service, program, or activity or undue financial and administrative burdens.

Generally, the Department believes that it would not be a fundamental

alteration of a public entity's online services, programs or activities to modify a Web site or Web content in order to make it accessible and ensure access for individuals with disabilities to such services, programs or activities. Moreover, like the limitations in the title II regulation referenced above, the Department does not believe that such a proposal would relieve a public entity of all obligations to individuals with disabilities. Although a public entity would not be required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless would be required to comply with the Web accessibility requirements under consideration *to the extent* they do not result in a fundamental alteration or undue financial and administrative burdens. For instance, a public entity might determine that full compliance with WCAG 2.0 Level AA would result in a fundamental alteration or undue financial and administrative burdens. However, this same public entity would then be required to determine whether it can bring its Web content into partial compliance with Level AA. To the extent it can, the public entity would be required to do so.

The Department believes that there are many steps a public entity could take to comply with WCAG 2.0 Level AA that would not result in undue financial and administrative burdens and that most entities that would assert a claim that full compliance would result in undue financial and administrative burdens would be able to attain compliance with at least some of the requirements of WCAG 2.0 Level AA. For instance, a public entity may be able to edit its Web content so that all non-text content (e.g., images) has a text alternative that contains an equivalent written description enabling an individual's screen reader to interpret the image or non-text to allow the individual to access the information. A public entity may also be able to provide skip navigation links so users with screen readers can skip past the navigation headers to the main information on the Web page. Most public entities also could easily ensure that each Web page has a title that describes the topic or purpose of that page, making it easier for individuals navigating the Web content with a screen reader to determine if a particular Web page has the content they are looking for without having the screen reader read through all the content on the page. These and other

requirements of WCAG 2.0 Level AA are not, in the Department's view, likely to be difficult or unduly burdensome for a public entity.

In determining whether an action constitutes undue financial and administrative burdens, all of a public entity's resources available for use in the funding and operation of the service, program, or activity would need to be considered. The burden of proving that compliance with Web accessibility requirements under consideration would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity. As the title II regulation has provided since the Department's adoption in 1991, the decision that compliance would result in a fundamental alteration or impose undue burdens must be made by the head of the public entity or the head's designee and must be memorialized with a written statement of the reasons for reaching that conclusion. See 28 CFR 35.150(a)(3) and *The Americans with Disabilities Act Title II Technical Assistance Manual: Covering State and Local Government Programs and Services* (Nov. 1993), available at <http://www.ada.gov/taman2.html>. The Department recognizes that some public entities may have difficulty identifying the official responsible for this determination, given the variety of organizational structures among public entities and their components. 28 CFR part 35, app. B, 695 (2015). The proposal the Department is considering would make it clear that the determination must be made by a high level official, no lower than a department head, having budgetary authority and responsibility for making spending decisions, as is true under the existing title II regulation.

As contemplated by the Department in paragraph (b) above, once a public entity has complied with WCAG 2.0 Level AA, it would not be required to make further modifications to its Web page or Web content to accommodate an individual who is still unable to access the Web page or Web content due to a disability. While the Department realizes that the Web accessibility requirements under consideration may not meet the needs of and provide access to every individual with a disability, it believes that setting a consistent and enforceable Web accessibility standard that meets the needs of a majority of individuals with disabilities would provide greater predictability for public entities, as well as greater assurance of accessibility for individuals with disabilities.

As noted above, full compliance with the Web accessibility requirements under consideration means a public entity would not be required to make any further modifications to its Web page or Web content if an individual with a disability is still unable to access information on the public entity's accessible Web page. However, public entities would still have an obligation to provide the individual with a disability an alternative method of access to that information, service, program, or activity unless the public entity could demonstrate that alternative methods of access would result in a fundamental alteration or in undue financial and administrative burdens. Thus, full compliance with the Web accessibility standards would not mean necessarily full compliance with all of a public entity's obligations under the ADA. In these circumstances, a public entity would still need to take other steps to ensure that an individual with a disability is able to gain access through other effective means, although no further changes to its Web site would be required. This could be accomplished in a variety of ways, including ensuring that the information or services could be accessed by telephone or in person.

The Department would emphasize in a proposed rule that the public entity must make the determination on a case-by-case basis of how best to accommodate those individuals who cannot access the information or services through the public entity's fully compliant Web site. The Department also intends to convey that a public entity should refer to the existing title II regulation at 28 CFR 35.160 (effective communication) to determine its obligations to provide individuals with communication disabilities with the appropriate auxiliary aids and services necessary to afford them an equal opportunity to participate in, and enjoy the benefits of, the public entity's service, program, or activity. For individuals with other disabilities who are unable to access all the information or services provided through a public entity's fully compliant Web site, a public entity should refer to 28 CFR 35.130(b)(7) (reasonable modifications) to determine what reasonable modifications in policies, practices, or procedures are necessary to avoid discrimination on the basis of disability. Under any proposal it advances, the Department will strongly recommend that the public entity provide notice to the public on how an individual who cannot use the Web site because of a disability can request other means of effective communication or reasonable

modifications in order to access the information or to participate in the public entity's services, programs, or activities that are being provided on the public entity's Web site. For example, a public entity could provide an email address, link, Web page, or other means of contacting the public entity to address issues that individuals with disabilities may encounter when accessing Web content. The Department seeks additional information with regard to compliance limitations and other duties. Please refer to Question 100 in section VI.C.8 "Compliance Limitations."

VI. Additional Issues for Public Comment

A. Measuring Compliance

As noted in the 2010 ANPRM, the Department believes that while there is a need to adopt specific standards for public entities to use in order to ensure that their Web content is accessible to individuals with disabilities, the Department must move forward with care, weighing the interests of all stakeholders, so that as accessibility for individuals with disabilities is improved, innovation in the use of the Web by covered entities is not hampered. See 75 FR 43460, 43464 (July 26, 2010). The Department appreciates that the dynamic nature of Web sites presents unique compliance challenges. Therefore, the Department is also seeking public comment on issues concerning how best to measure compliance with the Web accessibility requirements it is considering proposing.

The Department is concerned that the type of ADA compliance measures it currently uses, such as the one used to assess compliance with the ADA Standards, may not be practical in the Web context. The ADA requires the facilities of public entities to be designed and constructed in such a manner that the facilities are readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12146. Public entities must ensure that newly designed and constructed State and local government facilities are in full compliance with the scoping and technical specifications in the ADA Standards unless it is structurally impracticable to do so. 28 CFR 35.151(a). When making an alteration to a facility that affects or could affect usability, public entities are required to make those alterations accessible to the maximum extent feasible. 28 CFR 35.151(b).

Because of the dynamic and interconnected nature of Web sites and

the large amount of and wide variety of Web content contained on those sites, the Department is concerned that a compliance measure similar to the one used for buildings—where State and local government facilities are to be 100-percent compliant at all times with all of the applicable provisions of the ADA Standards, subject to a few applicable compliance limitations—may not work well in the Web context. Accordingly, the Department is considering what should be the appropriate measure for determining compliance with WCAG 2.0 Level AA.

Question 52: The Department is seeking public comment on how compliance with WCAG 2.0 Level AA should be assessed or measured, particularly for minor or temporary noncompliance. Should the Department consider adopting percentages of Web content that need to be accessible or other similar means of measuring compliance? Is there a minimum threshold that is an acceptable level of noncompliance for purposes of complaint filing or enforcement action? Are there circumstances where Web accessibility errors may not be significant barriers to accessing the information or functions of the Web site? Please provide as much detail as possible in your response.

B. Mobile Applications

The Department is considering whether it should address the accessibility of mobile applications (mobile apps) and, if so, what standard it should consider adopting to address the accessibility of these mobile apps. As mentioned in section II.A “The Meaning of ‘Web Content’” above, although the Department’s proposal under consideration would generally not cover software, the Department is soliciting public comment on whether it should address the accessibility of mobile apps because public entities seem to be turning to mobile apps to provide their services, programs, and activities.

A mobile app is a software application designed to run on smart phones, tablets, or other mobile devices. Today, public entities are increasingly using mobile apps to provide services more effectively and to reach citizens in new ways. For example, using a city’s mobile app, residents are able to submit to the city nonemergency service requests, such as cleaning graffiti or repairing a streetlight outage, and track the status of these requests. Public entities’ apps take advantage of common features of mobile devices, such as Global Positioning System (GPS) and camera functions, so citizens can

provide public entities with a precise description and location of street-based issues, such as potholes or physical barriers created by illegal dumping or parking. Some public transit authorities have transit apps that use a mobile device’s GPS function to provide bus riders with the location of nearby bus stops and real-time arrival and departure times. In addition, public entities are not only using mobile apps as a new way to provide civil services, but are also using them to promote tourism, culture, and community initiatives.

One option for a standard would be to apply WCAG 2.0 Level AA to mobile apps of public entities as is being proposed by the Access Board in its update to the section 508 standards. See 80 FR 10880 (Feb. 27, 2015). WCAG 2.0 is designed to apply to Web content available on standard Web sites designed for desktop, laptop, or notebook computers, as well as Web content available on mobile Web sites designed for smart phones, tablets, or other mobile devices. See *W3C WAI Addresses Mobile Accessibility*, WAI Education and Outreach Working Group (Sept. 26, 2013), available at <http://www.w3.org/WAI/mobile/#covered> (last visited Apr. 13, 2016). WCAG 2.0 is not intended to apply to software, including mobile apps; however, as noted by the Access Board in its proposed revision to the section 508 standards, the W3C® developed WCAG 2.0 to be technology neutral and there is some support suggested for its application to other technologies, including mobile apps. See 80 FR 10880, 10895 (Feb. 27, 2015). In fact, the WCAG2ICT Task Force developed a W3C® Working Group Note that addressed the issue of applying WCAG 2.0’s Success Criteria to offline content and software. See *Guidance on Applying WCAG 2.0 to Non-Web Information and Communications Technologies (WCAG2ICT)*, WCAG2ICT Task Force, (Sept. 5, 2013), available at <http://www.w3.org/TR/wcag2ict/> (last visited Apr. 13, 2016). The WCAG2ICT Task Force found that the majority of WCAG 2.0’s Success Criteria could be applied to software with minimal or no changes. *Id.* However, the WCAG2ICT Task Force acknowledged that the W3C® Working Group Note is a work in progress and does not imply endorsement by the W3C®. *Id.* (set forth under section titled “Status of this Document,” available at <http://www.w3.org/TR/wcag2ict/#sotd>) (last visited Apr. 13, 2016).

Additionally, the Mobile A11Y Task Force, another task force of the WAI, developed a W3C® First Public Working Draft that addressed the issue of

applying WCAG 2.0 and other W3C® guidelines to mobile apps. See *Mobile Accessibility: How WCAG 2.0 and Other W3C/WAI Guidelines Apply to Mobile*, Mobile A11Y Task Force, (Feb. 26, 2015), available at <http://www.w3.org/TR/2015/WD-mobile-accessibility-mapping-20150226/> (last visited Apr. 13, 2016). The Mobile A11Y Task Force found that although the majority of the WCAG 2.0 Success Criteria can be applied to mobile apps, WCAG 2.0 did not provide testable success criteria for some of the mobile-specific accessibility issues because mobile devices present a mix of accessibility issues that are different from typical desktop and notebook computers. The Mobile A11Y Task Force recommended supplementing WCAG 2.0 with other W3C® guidelines such as the User Agent Accessibility Guidelines (UAAG) 2.0, available at <http://www.w3.org/TR/UAAG20/> (last visited Apr. 13, 2016), and the Authoring Tool Accessibility Guidelines (ATAG) 2.0, available at <http://www.w3.org/TR/ATAG20/> (last visited Apr. 13, 2016). Similar to the WCAG2ICT Task Force above, the Mobile A11Y Task Force also acknowledged that the W3C® First Public Working Draft is a work in progress and does not imply endorsement by the W3C®. *Id.* (set forth under section titled *Status of this Document*, available at <http://www.w3.org/TR/2015/WD-mobile-accessibility-mapping-20150226/#sotd>) (last visited Apr. 13, 2016).

A second possible option for an accessibility standard to apply to mobile apps would be to apply the UAAG, which is also published by the W3C®. The W3C® has published a draft UAAG 2.0, which addresses the accessibility of Web browser software, mobile apps, and other software. See *User Agent Accessibility Guidelines (UAAG) 2.0*, W3C® Working Group Note, (Dec. 15, 2015), available at <http://www.w3.org/TR/UAAG20/> (last visited Apr. 13, 2016). UAAG 2.0 is currently under development, but the guidelines will likely be finalized before the Department publishes a final rule. Once UAAG 2.0 is finalized, the Department could consider the guidelines for adoption as an accessibility standard for mobile apps. Unlike WCAG, however, UAAG does not appear to have been widely accepted, but this may be attributable to the fact that the most recent final version of the guidelines, UAAG 1.0, which was published in 2002, may not be as useful in making more current software accessible.

A third possible option for an accessibility standard to apply to mobile apps would be to apply the ATAG,

which is also published by the W3C®. The W3C® published the final version of ATAG 2.0 on September 24, 2015. See *Authoring Tool Accessibility Guidelines (ATAG) 2.0*, (Sep. 24, 2015), available at <http://www.w3.org/TR/ATAG20/> (last visited Apr. 13, 2016). ATAG 2.0 provides guidelines that address the accessibility of Web content authoring tools (*i.e.*, the accessibility of specialized software that Web developers and designers use to produce Web content). Like the UAAG, ATAG does not appear to have been as widely accepted as WCAG.

A fourth possible option for an accessibility standard to apply to mobile apps would be the Human Factors and Ergonomics Society's ANSI/HFES 200. See *ANSI/HFES 200 Human Factors Engineering of Software User Interfaces*, Human Factors and Ergonomics Society (2008), available at <http://www.hfes.org/Publications/ProductDetail.aspx?ProductID=76> (last visited Apr. 13, 2016). ANSI/HFES 200 provides requirements to design user interfaces of software that are more usable, accessible, and consistent. However, like the UAAG and ATAG, ANSI/HFES 200 does not appear to be as widely accepted as WCAG.

Question 53: Should the Department consider adopting accessibility requirements for mobile software applications to ensure that services, programs, and activities offered by public entities via mobile apps are accessible? Please provide any information or issues the Department should consider regarding accessibility requirements for mobile apps provided by public entities.

Question 54: The Department is seeking public comment regarding the use of WCAG 2.0, UAAG 2.0, ATAG 2.0, or ANSI/HFES 200 as accessibility requirements for mobile apps. Are there any issues the Department should consider in applying WCAG 2.0, UAAG 2.0, ATAG 2.0, or ANSI/HFES 200 as accessibility requirements for mobile apps? Is there a difference in compliance burdens and costs between the standards? Please provide as much detail as possible in your response.

Question 55: Are there any other accessibility standards or effective and feasible alternatives to making the mobile apps of public entities accessible that the Department should consider? If so, please provide as much detail as possible about these alternatives, including information regarding their costs and effectiveness, in your response.

C. Benefits and Costs of Web Access Regulations

The Department anticipates that any proposed or final rule that the Department issues regarding the accessibility of Web information and services of public entities would likely have an economically significant impact. A proposed regulatory action is deemed to be "economically significant" under section 3(f)(1) of Executive Order 12866 if it has an annual effect on the economy of \$100 million or more or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Under Executive Order 12866, regulatory actions that are deemed to be economically significant must include a regulatory analysis—a report that documents an agency's analysis of the benefits and costs of the regulatory action. A benefit-cost analysis must include both qualitative and quantitative measurements of the benefits and costs of the proposed rule as well as a discussion of each potentially effective and reasonably feasible alternative.

Because this is a SANPRM, the Department is not required to conduct a benefit-cost analysis required for other more formal types of agency regulatory actions (*e.g.*, notices of proposed rulemaking or final rules). The Department, however, is soliciting input from the public in this SANPRM to gather information and data that will help the Department prepare a regulatory analysis at the next stage of the rulemaking process.

In its 2010 ANPRM, the Department requested public comment on the benefits and costs of a proposed rule regarding the accessibility of Web information and services of public entities and public accommodations. The Department received very little specific information or data on the anticipated costs or benefits of such a rule in response to the 2010 ANPRM. The Department therefore seeks additional information that will enable it to more precisely quantify and monetize the economic impact of a rule requiring public entity Web sites to be accessible. The Department asks that any responses to these requests for public comment on the potential benefits and costs of this rule include as much detail as possible and be supported by specific data, information, or research where applicable.

1. Web Accessibility Benefits

Millions of individuals in the United States have disabilities that could affect their use of the Web. Individuals who have vision disabilities often confront significant barriers to Web access because, among other limitations, many Web sites provide information visually without features that enable screen readers or other assistive technology to retrieve the information on the Web site so it can be presented in an audio or tactile form. Individuals with hearing disabilities face accessibility challenges when, for example, audio content is not presented in a visual form such as captions or transcripts. Individuals with cognitive disabilities can experience difficulties in accessing Web content when information cannot be presented in a text or audio form, distractions cannot be reduced, or time limitations cannot be extended. Individuals with disabilities that affect manual dexterity might, for example, need Web sites to allow input from specialized hardware and software.

Lack of accessibility prevents individuals with disabilities from taking full advantage of Web-implemented governmental programs, services, and activities, which are becoming increasingly common and important. The Department believes that Web accessibility will provide significant benefits to individuals with disabilities, such as the ability to access additional information about government services, programs, or activities, and to access this information more quickly, easily, and independently. The Department has obtained limited information, however, that would enable it to quantify and monetize these and other benefits of Web accessibility for individuals with disabilities, particularly those with disabilities other than visual impairments. For example, it is unclear how much time an individual with a hearing disability would save by using an accessible Web site to access information about city council hearings instead of attempting to obtain this information on an inaccessible Web site or by using a video relay service. Similarly, it is unclear what monetary value should be associated with this time savings, whether time savings is the most appropriate way to measure the monetary value of Web accessibility, or if not, how a monetary value could be assigned to the many benefits Web accessibility provides to individuals with disabilities.

As described above, because the Department expects that any proposed or final rule it issues regarding the accessibility of Web information and

services of public entities is likely to have an economically significant impact, the Department will be required to prepare a benefit-cost analysis that assesses the qualitative and quantitative benefits of the proposed rule. The Department therefore seeks additional information about the benefits of Web accessibility for various disability groups that will assist the Department in preparing this required benefit-cost analysis. Please include as much information as possible to support each of your responses, including specific data or research where possible.

a. Benefits for People With Disabilities

Question 56: How should the monetary value of the benefits of Web accessibility to persons with disabilities be measured? What methodology should the Department use to calculate the monetary value of these benefits? Please provide any available data or research regarding the benefits of Web accessibility and the monetary value of these benefits.

Question 57: Are there particular benefits of Web accessibility for persons with disabilities that are difficult to quantify (e.g., increased independence, autonomy, flexibility, access to information, civic engagement, educational attainment, or employment opportunities)? Please describe these benefits and provide any information or data that could assist the Department in estimating their monetary value.

Question 58: People with vision disabilities: What data should the Department use for estimating the number of people with vision disabilities who would benefit from a Web access regulation (e.g., the Survey of Income and Program Participation, available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>, or the American Community Survey, available at <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=1>)? How does Web accessibility benefit people with vision disabilities? Please provide any information that can assist the Department in quantifying these benefits.

Question 59: People who are deaf or hard of hearing: What data should the Department use for estimating the number of people with hearing disabilities who would benefit from a Web access regulation (e.g., the Survey of Income and Program Participation, available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>, or the American Community Survey, available at <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=1>)? How does Web accessibility benefit people who are deaf or hard of hearing? Is there any

data or studies available that examine how often people seek and use sound Web sites? Please provide any information that can assist the Department in quantifying these benefits.

Question 60: People who have disabilities that impair manual dexterity: What data should the Department use for estimating the number of people with manual dexterity disabilities who would benefit from a Web access regulation (e.g., the Survey of Income and Program Participation, available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>, or the American Community Survey, available at <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=1>)? How does Web accessibility benefit people who have disabilities that impair manual dexterity? Please provide any information that can assist the Department in quantifying these benefits.

Question 61: People with cognitive disabilities: What data should the Department use for estimating the number of people with cognitive disabilities who would benefit from a Web access regulation (e.g., the Survey of Income and Program Participation, available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>, or the American Community Survey, available at <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=1>)? How does Web accessibility benefit people with cognitive disabilities? Clinical diagnoses of cognitive disabilities can sometimes include a wide spectrum of disabilities including learning disabilities, developmental disabilities, neurological disabilities, and intellectual disabilities. Please provide any information that can assist the Department in quantifying these benefits. For purposes of quantifying the benefits of a Web accessibility rule, should the benefits to individuals with cognitive disabilities be treated as one category, or calculated for several separate categories (e.g., learning disabilities, developmental disabilities, neurological disabilities, intellectual disabilities)? If you suggest analyzing different types of cognitive disabilities separately, please explain how the benefits for these groups would differ (e.g., would someone with dyslexia benefit from Web accessibility in ways that someone with a traumatic brain injury would not, and if so, how?) and provide any information that can assist the Department in quantifying benefits for these groups.

For the following question, please note that the Department is seeking this information for the sole purposes of

estimating the rule's benefits. The information sought has no bearing on whether an individual with a vision or hearing disability or a manual dexterity limitation is covered under the ADA and in no way limits coverage of these individuals.

Question 62: The Survey of Income and Program Participation classifies people with difficulty seeing, hearing, and grasping into "severe" and "nonsevere" categories, and defines each category. Should the Department's regulatory impact analysis consider differences in disability severity when estimating benefits? Why or why not? If disability severity should be taken into account, are there available studies or data that address time savings for people with different severities of disabilities? If there are no available data or studies addressing this issue, how should estimates of time savings appropriately account for differences in disability severity, if at all?

Question 63: Are there any other disability groups not mentioned above that would benefit from Web accessibility? If so, how would they benefit, and how can these benefits be assigned a monetary value?

b. Benefits of Web Usage

Question 64: What data is available about usage of public entities' Web sites by the general population and by persons with disabilities? For example, what percentage of the population with disabilities and without disabilities accesses public entities' Web sites, and how often do they do so? If barriers to Web site accessibility were removed, would individuals with disabilities use the Internet at the same rate as the general population? Why or why not?

Question 65: To what extent do persons with disabilities choose not to use public entities' Web sites due to accessibility barriers, but obtain information or access services available on these Web sites in another way? Does this vary between disability groups? If so, how and why does it vary?

Question 66: What are the most common reasons for using public entities' Web sites (e.g., to gather information; apply for the public entity's services, programs, or activities; communicate with officials; request services; make payments)?

Question 67: If a person with a disability is using a public entity's Web site and encounters content that is inaccessible, what do they do (e.g., spend longer trying to complete the task online themselves, ask someone they know for assistance, call the entity, visit the entity in person, abandon the attempt to access the information)?

Question 68: How often are persons with disabilities entirely prevented, due to accessibility barriers, from obtaining access to information or services available on public entities' Web sites, including through alternate means (i.e., how often do persons with disabilities never receive information in any form because it is not available on an accessible Web site)? Are there certain services, programs, or activities that public entities only provide online? How would the Department quantify or monetize the information and services not received by people with disabilities because public entities' Web sites are inaccessible?

Question 69: Would more people with disabilities become employed, remain employed, be more productive employees, or get promoted if public entities' Web sites were accessible? If so, what impact would any proposed rule have on the employment rate, productivity, or earnings of people with disabilities? How would the Department quantify or monetize these benefits? Are there other employment-related benefits of Web accessibility for people with disabilities that the Department should consider?

Question 70: Are the educational opportunities available to people with disabilities limited because public entities' Web sites are inaccessible? For example, are the high school or college graduation rates of people with disabilities reduced because public educational institutions' Web sites are inaccessible? Would more people with disabilities graduate high school or college if public educational institutions' Web sites were accessible? If so, what impact would any proposed rule have on the graduation rate of people with disabilities? How would the Department quantify or monetize the value of this increased graduation rate? For example, are there financial benefits that accrue throughout an individual's life as a result of high school or college graduation, and how should these benefits be calculated? Are there other educational benefits of Web accessibility for people with disabilities that the Department should consider?

c. Benefits of WCAG 2.0 Level AA

Question 71: Are there specific provisions of WCAG 2.0 Level AA that are particularly beneficial for individuals with certain types of disabilities (e.g., the requirement for captioning live-audio content in synchronized media provides certain important benefits to individuals with hearing disabilities and auditory processing disorders)? Which provisions

provide the most benefits, to whom, and why?

Question 72: Are there specific provisions of WCAG 2.0 Level AA that are difficult or costly to implement? Are there specific provisions of WCAG 2.0 Level AA for which the costs outweigh the accessibility benefits?

d. Benefits to Other Individuals and Entities

Question 73: How would the Department quantify or monetize the resources expended by public entities to assist persons with disabilities by phone or in person? For example, would public entities experience reduced staffing costs due to Web accessibility requirements because fewer staff will be needed to respond to calls or in-person visits from persons with disabilities who will be able to access information via an accessible Web site? How should any reduction in staffing costs be calculated?

Question 74: Are there any additional groups that would benefit from Web accessibility (e.g., individuals without disabilities, senior citizens, caregivers and family members of persons with disabilities)? Please explain how these groups would benefit (e.g., improved navigation enables everyone to find information on Web sites more efficiently, caregivers are able to perform other tasks because the individual with a disability for whom they provide care will need less assistance) and provide any information or data that could assist the Department in quantifying these benefits.

Question 75: Would users without disabilities who currently access a public entity's services via an inaccessible Web site save time if the Web site became accessible (for example, because it is easier to find information on the site once the navigation is clearer)? If so, how much time would they save? Please provide any available data or research to support your responses on the time savings for individuals without disabilities from using accessible Web sites instead of inaccessible Web sites.

2. Time Savings Benefits

The Department is considering monetizing many of the benefits of the Web accessibility rule in terms of time savings—time saved by those current Web users with disabilities who must spend additional time performing tasks because the Web site is not accessible, as well as time saved by those individuals with disabilities who are currently accessing government services via another method but could do so more quickly via an accessible Web site.

For example, if a Web site conforms with WCAG 2.0 by providing navigation information in a form that allows screen readers or other assistive technology to retrieve the information, it could take a person with a vision disability less time to locate information on the Web site than it would if the Web site were not accessible. It could also take less time for that individual to access the information on an accessible Web site than it would take them to call the public entity and ask an employee for the same information. The Department has been able to obtain some research on time savings for individuals with vision impairments due to Web accessibility, with one study (prepared in 2004 for the U.K. Disability Rights Commission) finding that users who were blind took approximately 34 percent less time to complete a task on an accessible Web site. U.K. Disability Rights Commission, *The Web: Access and Inclusion for Disabled People* (2004), available at https://www.city.ac.uk/_data/assets/pdf_file/0004/72670/DRC_Report.pdf (last visited Apr. 13, 2016). Though this study is helpful for estimating the time savings benefits of Web access regulations, it has some limitations. For example, the study included only people who are blind and people without disabilities, used a small sample size (i.e., it examined 6 Web sites, 12 people who are blind, and 12 people without disabilities), did not detail the types of tasks participants were asked to complete, and was not formally peer reviewed. The Department has also reviewed some research indicating that individuals in general saved over one hour per transaction by completing tasks online. Shari McDaid and Kevin Cullen, *ICT Accessibility and Social Inclusion of People with Disabilities and Older People in Ireland: The Economic and Business Dimensions* (Aug. 18, 2008), available at http://www.academia.edu/2465494/ICT_accessibility_and_social_inclusion_of_people_with_disabilities_and_older_people_in_Ireland_The_economic_and_business_dimensions (last visited Apr. 13, 2016). The Department is also considering calculating the potential resources saved by public entities in terms of reduced staff time if many requests for assistance that are currently being made by persons with disabilities by phone or in person instead were handled independently via an accessible Web site.

The Department seeks additional information regarding time savings for users with disabilities, other users, and public entities due to Web site

accessibility. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 76: Should the Department evaluate benefits of a Web accessibility rule by considering time savings? Other than those discussed above, are there other studies that can be used to estimate time savings from accessible public entity Web sites? Please provide comments on the appropriate method for using time savings to calculate benefits?

Question 77: Would users with disabilities who currently access a public entity's services by phone or in person save time if they were able to access the public entity's services via an accessible Web site? If so, how much time would they save? Should this time savings be calculated on an annual basis or for a certain number of interactions with the public entity? Please provide any available data or research on time savings from using accessible online services instead of offline methods.

Question 78: Would users with disabilities who currently access a public entity's services via an inaccessible Web site save time if the Web site became accessible? If so, how much time would they save? Would this time savings be limited to users with vision disabilities? If not, is there a difference in the time savings based on type of disability? How would the time savings vary between disability groups (e.g., will individuals with vision disabilities save more time than individuals with manual dexterity disabilities)? Please provide any available data or research to support your responses on time savings for individuals with vision disabilities and other types of disabilities (e.g., hearing disabilities, manual dexterity disabilities, cognitive disabilities, etc.) from using accessible Web sites instead of inaccessible Web sites.

3. Methods of Compliance With Web Accessibility Requirements

As discussed above, generally, the Department is considering proposing that public entities would have two years after the publication of a final rule to make their Web sites and Web content accessible in conformance with WCAG 2.0 Level AA. The Department is also considering whether to allow alternative conformance levels or compliance dates for small public entities or special districts.

The Department seeks information regarding the efforts public entities would need to undertake to comply with a Web accessibility rule, if such a

rule were promulgated as framed in this SANPRM. The Department expects that public entities would be able to comply with a Web accessibility rule in several different ways. For example, they might choose to remediate their existing Web site by page or section, or they might instead choose to create a new Web site with accessibility incorporated during its creation. Public entities might choose to use existing staff to perform any needed testing and remediation or hire outside consultants who would do so. The Department seeks information regarding the various options public entities would consider for achieving compliance, and the financial impact of these choices, so that the Department can more precisely estimate the costs of a Web accessibility rule.

In each of your responses, please provide information about how a public entity would comply with WCAG 2.0 Level AA within two years after the publication of a final rule, and explain how your responses would vary if the Department required conformance with WCAG Level A instead of WCAG Level AA, or if the Department allowed additional time for compliance. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 79: How do public entities currently design and maintain their Web sites? Do they use in-house staff or outside contractors, service providers, or consultants? Do they use templates for Web site design, and if so, would these templates comply with a Web accessibility rule? Is there technology, such as templates or software, that could assist public entities in complying with a Web accessibility rule? Please describe this technology and provide information about how much it costs. What are the current costs of Web site design and maintenance? Does the method or cost of Web site design and maintenance vary significantly by size or type of entity?

Question 80: How are public entities likely to comply with any rule the Department issues regarding Web accessibility? Would public entities be more likely to use in-house staff or hire an outside information technology consultant? Would training be required for in-house staff, and if so, what are the costs of any anticipated training? Would the likelihood of using outside contractors and consultants vary significantly by size or type of entity? Would increased demand for outside experts lead to a temporary increase in the costs incurred to hire information technology professionals? If so, how much of an increase, and for how long?

Aside from the cost of labor, what are the additional costs, if any, related to the procurement process for hiring an outside consultant or firm to test and remediate a Web site?

Question 81: Are public entities likely to remediate their existing Web site or create a new Web site that complies with the proposed Web accessibility requirements? Does this decision vary significantly by size or type of entity? What are the cost differences between building a new accessible Web site with accessibility incorporated during its creation and remediating an existing Web site? Do those cost differences vary significantly by size or type of entity? Would public entities comply with a Web accessibility rule in other ways?

Question 82: If public entities choose to remediate their existing Web content, is there a cost threshold for the expected costs of accessibility testing and remediation above which it becomes more cost effective or otherwise more beneficial for an entity to build a new Web site instead of remediating an existing one? If so, what is that cost threshold? How likely are entities of various types and sizes to cross this threshold?

Question 83: Would public entities choose to remove existing Web content or refrain from posting new Web content instead of remediating the content to comply with a Web accessibility rule? How would public entities decide whether to remove or refrain from posting Web content instead of remediating the content? Are public entities more likely to remove or refrain from posting certain types of content? Is there a cost threshold above which entities are likely to remove or refrain from posting Web content instead of remediating the content? If so, what is that cost threshold?

Question 84: In the absence of a Web accessibility rule, how often do public entities redesign their Web sites? Do they usually redesign their entire Web site or just sections (e.g., the most frequently used sections, sections of the Web site that are more interactive)? What are the benefits of Web site redesign? What are the costs to redesign a Web site? If a Web site is redesigned with accessibility incorporated, how much of the costs of the redesign are due to incorporating accessibility?

4. Assessing Compliance Costs

The Department is attempting to estimate the costs a public entity would incur to make and maintain an accessible Web site in conformance with the technical standard under consideration by the Department. Several governmental entities in the

U.S. and abroad have already undertaken efforts to estimate the likely costs of requiring that Web sites meet certain accessibility standards. A Preliminary Regulatory Analysis of a proposed rule regarding accessible kiosks and Web sites of air carriers prepared for the U.S. Department of Transportation sought to estimate the costs to carriers using a per-page methodology. U.S. Department of Transportation, *Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web sites and Automated Kiosks at U.S. Airports*, Preliminary Regulatory Analysis (Sept. 19, 2011), available at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0177-0002> (last visited Apr. 13, 2016). A per-page methodology is a methodology that multiplies the number of pages on a Web site by an established cost value. The Final Regulatory Analysis prepared for that rule took a different approach and derived estimates for three size categories of carriers based on comments to the Preliminary Regulatory Analysis. U.S. Department of Transportation, *Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web sites and Automated Kiosks at U.S. Airports*, Final Regulatory Analysis on the Final Rule on Accessible Kiosks and Web sites (Nov. 4, 2013), available at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0177-0108> (last visited Apr. 13, 2016). In 2012, the European Commission sponsored a study to quantify evidence on the socioeconomic impact of Web accessibility. Technosite *et al.*, *Study on Economic Assessment for Improving e-Accessibility Services and Products*, (2012) available at <http://www.eaccessibility-impacts.eu/> (last visited Apr. 13, 2016). That report used a level of effort approach, in which costs were estimated based on an average number of hours needed to remediate a typical Web site in several specified size groupings. *Id.*

At present, the Department is considering three different approaches for estimating costs. The first is a per-page methodology that multiplies the average number of pages on a Web site by an established testing, remediation, or operation and maintenance cost per page (and possibly by type of page). The second approach under consideration is a level of effort methodology, which would estimate costs based on Web site size groupings or size 'bins' (such as less than 100 pages, 100 to 500 pages, etc.). The third potential approach would combine the per-page and level of effort

methodologies. The Department will also consider other feasible approaches to estimating costs that are proposed.

The Department seeks public comment on these potential methodologies, any alternative methodologies for estimating compliance costs that the Department should consider, and the appropriate input values that the Department should use for testing, remediation, and operation and maintenance if it chose one of these methodologies. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 85: Should the Department estimate testing, remediation, and operation and maintenance costs on a cost-per-page basis? If so, how should the average cost per page be determined for testing, remediation, and operation and maintenance? How should these costs be calculated? Should different per-page estimates be used for entities of different sizes or types, and if so how would they vary? Should different per-page cost estimates be used for different types of page content (text, images, live or prerecorded synchronized media) or for static and dynamic content? If you propose using different per-page cost estimates for different types of content, what are the appropriate types of content that should be used to estimate costs (e.g., text, images, synchronized media (live or prerecorded), forms, static content, dynamic content), how much content should be allocated to each category, and what are the appropriate time and cost estimates for remediation of each category?

Question 86: If the Department were to use a cost-per-page methodology, how would the average number of pages per Web site be determined? Should the Department seek to estimate Web site size by sampling a set number of public entities and estimating the number of pages on those Web sites? When presenting costs for different categories of Web sites by size, how should Web sites be categorized (i.e., what should be considered a small, medium, or large Web site)? Should Web site size be discussed in terms of the number of pages, or is there a different metric that should be used to discuss size?

Question 87: If a level of effort methodology is used, what are the appropriate Web site size categories that should be used to estimate costs and what are the different categories of Web elements for which remediation time should be estimated (e.g., informative, interactive, transactional, multimedia)? What are appropriate time estimates for remediation for each category of Web

elements? What wage rates should be used to monetize the time (e.g., government staff, private contractor, other)?

Question 88: Do the testing, remediation, and operation and maintenance costs vary depending on whether compliance with WCAG 2.0 Level A or Level AA is required, and if so, how?

Question 89: What other methods could the Department use to estimate the costs to public entities of compliance? Which methodology would allow the Department to estimate most accurately the entities' costs for making their Web sites accessible?

5. Indirect Costs Associated With Compliance

The Department is also attempting to ascertain whether there are other types of compliance costs associated with the Web accessibility rule presently under consideration, such as the cost of "down time," systems change, regulatory familiarization costs, or administrative costs. Regulatory familiarization and other administrative costs include the time a public entity spends evaluating and understanding the requirements of the rule and determining how to comply with those requirements, and time which might be needed for making or adjusting short- and long-term plans and strategies and assessing the public entity's resources. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 90: If public entities remediate their Web sites to comply with a Web accessibility rule, would they do so in such a way that accessible Web pages are created and tested before the original Web pages are removed, such that there is no "down time" during the upgrade? If not, how much "down time" would occur, and what are the associated costs?

Question 91: Would public entities incur additional costs related to modifying their current methods for processing online transactions if those are inaccessible due to applications or software currently used? If so, what are these costs, and how many public entities would incur them?

Question 92: Would there be additional indirect administrative costs associated with compliance with a Web accessibility rule, and if so, what are these costs?

Question 93: Would there be any costs related to familiarization with the new regulations, and if so, what are these costs? How much time would be needed for regulatory familiarization, and how much would this cost?

Question 94: Are there other considerations the Department should take into account when evaluating the time and cost required for compliance with a Web accessibility rule, and if so, what are these costs?

6. Current Levels of Accessibility for Public Entity Web Sites

The benefits and costs of proposed regulations are commonly defined relative to a no-action baseline that reflects what the world would look like if the proposed rule is not adopted. In the case of a Web accessibility rule, the no-action baseline should reflect the extent to which public entities' Web sites would comply with accessibility requirements even in the absence of the proposed rule. In an attempt to establish this baseline, the Department considered studies regarding existing public entity Web site accessibility; the extent to which some public entities have adopted statutes or policies that require their Web sites to conform to accessibility requirements under section 508 of the Rehabilitation Act, WCAG 1.0, or WCAG 2.0; and the extent to which some public entities' Web sites have been made accessible due to settlement agreements with the Department of Justice, other agencies, or disability advocacy groups, and publicity surrounding these enforcement efforts. Based on this research, the Department is considering evaluating the benefits and costs of a Web accessibility rule relative to a no-action baseline that assumes that some percentage of Web sites are already accessible and that some percentage of pages on other Web sites are accessible, and therefore either would not incur testing or remediation costs at all, or would only incur these costs for a portion of the Web site.

Question 95: Which public entities have statutes and/or policies that require or encourage their Web sites to be accessible to persons with disabilities and/or to conform to accessibility requirements under section 508, WCAG 1.0, and/or WCAG 2.0? Do these laws and/or policies require (not just suggest) conformance with a particular Web accessibility standard, and if so, which one? Are these laws and/or policies being implemented, and, if so, are they being implemented at just the State level of government or at the local levels as well? The Department asks that the public provide additional information on current State or local policies on Web accessibility, including links or copies of requirements or policies, when possible.

Question 96: What percentage of public entities' Web sites and Web pages are already compliant with Web

accessibility standards, or have plans to become compliant even in the absence of a Web accessibility rule? What would be a reasonable "no-action" baseline accessibility assumption (i.e., what percentage of Web sites and Web pages should the Department assume are already compliant with Web accessibility standards or will be even in the absence of a rule)? Should this assumption be different for different sizes or types of public entities (e.g., should a different percentage be used for small public entities)? Please provide as much information as possible to support your response, including specific data or research where possible.

Question 97: If State or local entities already comply with WCAG 2.0, what were the costs associated with compliance? Please provide as much information as possible to support your response, including specific data where possible.

7. Public Entity Resources

In an attempt to evaluate the impact of a Web accessibility rule on public entities, the Department may consider publicly reported information about the annual revenues of public entities with different population sizes. Because this information is necessarily reported in the aggregate, it provides a limited view of the resources available to individual public entities for specific purposes, since many funds are targeted or restricted for certain uses. The Department is therefore seeking additional, specific information from public entities that explains, in detail, the impact of a proposed Web accessibility rule like the proposal currently under consideration by the Department, based on public entities' available resources. This information will enable the Department to strike an appropriate balance between access for individuals with disabilities and burdens on public entities when fashioning a proposed rule. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 98: Is the Department correct to evaluate the resources of public entities by examining their annual revenue? Is annual revenue an effective measure of the potential burdens a Web accessibility rule could impose on public entities? Is there other publicly available data that the Department should consider in addition to, or instead of, annual revenue when considering the burdens on public entities to comply with a Web accessibility rule?

Question 99: Are there resources that a public entity would need to comply with a Web accessibility rule that they would not be able to purchase (e.g., staff or contractors with expertise that are not available in the geographic area)? Are there other constraints on public entities' ability to comply with a Web accessibility rule that the Department should consider?

8. Compliance Limitations

The Department is considering proposing that, as with other ADA requirements, compliance with any technical Web accessibility standard the Department adopts would not be required to the extent that such compliance imposes undue financial and administrative burdens, or results in a fundamental alteration of the services, programs, or activities of the public entity. When compliance with the applicable standard would be an undue burden or fundamental alteration, a covered entity would still be required to provide effective communication or reasonable modifications to individuals with disabilities through other means upon request (e.g., via telephone assistance), unless such other means constitute an undue burden or fundamental alteration.

The Department seeks additional information about how these compliance limitations would apply, as well as proposals for less burdensome alternatives to consider. The data that commenters provide to help answer these questions should be well supported and explain whether public entities could comply to some extent with the Web accessibility requirements. It should also explain what provisions of the proposed requirements, if any, would result in undue burdens for certain public entities, and why. In each of your responses, please assume that the proposed rule would require compliance with WCAG 2.0 Level AA within two years after the publication of a final rule, and explain how your responses would vary if the Department required conformance with WCAG Level A instead of WCAG Level AA, or if the Department allowed additional time for compliance. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 100: Are there any other effective and reasonably feasible alternatives to making the Web sites of public entities accessible that the Department should consider? If so, please provide as much detail as possible about these alternatives in your

answer, including information regarding their costs and effectiveness.

9. Conventional Electronic Documents

In order to assess the potential costs of making conventional electronic documents accessible, the Department would like to know, on average, how many conventional electronic documents are currently on public entities' Web sites, and, on average, what percentage of these documents is being used to apply for, gain access to, or participate in a public entity's services, programs, or activities. In addition, the Department would like to know, on average, how many new conventional electronic documents are placed on public entities' Web sites annually, and whether additional compliance costs (beyond staff time) would be needed to make new documents accessible after the compliance date. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 101: How many conventional electronic documents currently exist on public entities' Web sites? What is the purpose of these conventional electronic documents (e.g., educational, informational, news, entertainment)? What percentage of these documents, on average, is used to apply for, gain access to, or participate in the public entity's services, programs, or activities?

Question 102: How many new conventional electronic documents are added to public entities' Web sites, on average, each year and how many, on average, are updated each year? Will the number of documents added or updated each year change over time?

Question 103: What are the costs associated with remediating existing conventional electronic documents? How should these costs be calculated? Do these costs vary by document type, and if so, how? Would these costs vary if compliance with WCAG 2.0 Level A was required instead of compliance with WCAG 2.0 Level AA, and if so, how?

Question 104: What costs do public entities anticipate incurring to ensure that the conventional electronic documents placed on their Web sites after the compliance date of any Web accessibility rule are accessible (e.g., will they be created with accessibility built in, or will they need to be remediated)? Would public entities use any specific type of software to ensure accessibility? What is the cost of this software, including the costs of any licenses? What kind of training about accessible conventional electronic documents would be needed, if any, and

what would the training cost? How many hours per year would it take public entities to ensure that the conventional electronic documents posted on their Web sites are accessible after the compliance date of any Web accessibility rule?

10. Captioning and Audio Description

WCAG 2.0 Level AA Success Criteria require captions for all recorded-audio and live-audio content in synchronized media, as well as audio description. Synchronized media refers to "audio or video synchronized with another format for presenting information and/or with time-based interactive components. . . ." See W3C®, *Understanding WCAG 2.0: Understanding Guideline 1.2*, (Feb. 2015) available at <http://www.w3.org/TR/UNDERSTANDING-WCAG20/media-equiv.html> (last visited Apr. 13, 2016). A common example of synchronized media is a video clip that presents both audio and video together. At present, little information exists regarding the current quantities of synchronized media on public entities' Web sites or their size or length. The Department has been able to collect data on the average cost of captioning audio content or audio describing video content (mostly on a per-hour or per-minute basis), but data to estimate which public entities might incur these costs and the amount of these costs were not found. The fact that some recorded and live media on public entities' Web sites are also being broadcast on public access channels by the public entity and, thus, might already be captioned or audio described further complicates the Department's ability to collect detailed estimates of the costs of captioning and audio description. Thus, the Department seeks specific information that will enable it to more precisely estimate the costs public entities would incur if requirements for captioning and audio description were proposed. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 105: How much synchronized media (live or prerecorded) is available on public entities' Web sites? How much of this synchronized media is live (i.e., streaming) and how much is prerecorded? What is the running time of such media? What portion of the media contains speech, and how much speech does it contain? What is the purpose of the synchronized media (e.g., educational, informational, civic participation, news, entertainment)?

Question 106: How often do individuals with vision or hearing disabilities attempt to access synchronized media on public entities' Web sites? How much of the synchronized media that individuals with vision or hearing disabilities attempt to access is live and how much is prerecorded? What is the purpose of attempting to access this synchronized media (e.g., educational, informational, civic participation, news, entertainment)? What percentage of the synchronized media is not captioned or audio described, and what portion of the media that is not captioned or audio described is live versus prerecorded?

Question 107: What do individuals with vision or hearing disabilities do when synchronized media is not captioned or audio described? Do they spend additional time seeking the information or content in other ways (e.g., do they need to make a phone call and remain on hold)? If so, how much additional time do they spend trying to obtain it? How do they actually obtain this information or content? How much additional time, other than the individual's own time spent seeking the information, does it take to obtain the information or content (e.g., does it take several days after their request for the information to arrive in the mail)?

Question 108: To what extent do persons with vision or hearing disabilities refrain from using public entities' Web sites due to a lack of captioning or audio description? Would persons with vision or hearing disabilities use public entities' Web sites more frequently if content were captioned or audio described? To what extent does the lack of captioning or audio description make using public entities' Web sites more difficult and/or time consuming?

Question 109: Would people with cognitive or other disabilities benefit from captioning or audio description of synchronized media on public entities' Web sites? If so, how, and how can a monetary value be assigned to these benefits?

Question 110: Currently, what are the specific costs associated with captioning prerecorded and live-audio content in synchronized media, including the costs of hiring professionals to perform the captioning, the costs associated with the technology, and other components involved with the captioning process? Aside from inflation, are these costs expected to change over time? If so, why will they change, when will they begin to do so, and by how much?

Question 111: Currently, how much synchronized media content are public entities providing that would need to be

audio described due to the presence of important visual aspects that would not be conveyed via sound? What types of content on public entities' Web sites would need to be audio described?

Question 112: Currently, what are the specific costs associated with audio describing content in synchronized media, including the costs of hiring professionals to perform the description, the costs associated with the technology, and other components involved with the audio description process? Aside from inflation, are these costs expected to change over time? If so, why will they change, when will they begin to do so, and by how much?

11. Public Educational Institutions

The Department is considering whether public educational institutions (*i.e.*, public elementary and secondary schools and public postsecondary institutions) may face unique challenges in complying with a Web accessibility rule. Public educational institutions' Web sites may be more complex and interactive than other public entities' Web sites, primarily because of the characteristics of online education and the use of LMSs. Many aspects of public educational institutions' Web sites are accessed via a secure Web portal. The secured portions of public educational institutions' Web sites may require more regular access and interaction for completing essential tasks such as course registration and course participation. Because these portions of the Web sites require individualized usernames and passwords, the Department has been unable to evaluate the characteristics of these Web sites to date, thus making it difficult to monetize the benefits and costs of making the secured portions of the Web sites accessible in accordance with the proposal currently under consideration by the Department. The Department seeks additional information regarding the benefits and costs of Web accessibility for public educational institutions. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 113: Do public educational institutions face additional or different costs associated with making their Web sites accessible due to the specialized nature of the software used to facilitate online education, or for other reasons? If so, please describe these additional costs, and discuss how they are likely to be apportioned between public educational institutions, consumers, and software developers.

Question 114: How should the monetary value of the benefits and costs

of making the secured portions of public educational institutions' Web sites accessible be measured? What methodology should the Department use to calculate these benefits and costs?

*Question 115: Is there a cost threshold for the expected costs of accessibility testing and remediation above which it becomes more cost effective or otherwise more beneficial for a public educational institution to build a new Web site instead of remediating an existing one? If so, what is that cost threshold for each type of public educational institution (*e.g.*, public elementary school, public secondary school, public school district, public postsecondary institution)? How likely is each type of public educational institution to cross this threshold?*

12. Impact on Small Entities

Consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including small governmental jurisdictions ("small public entities"). See 5 U.S.C. 603–04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002). At the next rulemaking stage, the Department will make an initial determination as to whether any rule it proposes is likely to have a significant economic impact on a substantial number of small public entities. If so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small public entities and the regulatory alternatives the Department considered to reduce the regulatory burden on small public entities while achieving the goals of the regulation. At this stage, the Department seeks information on the potential impact of a Web accessibility rule on small public entities (*i.e.*, governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000) to assist it to more precisely conduct an initial regulatory flexibility analysis at the next rulemaking stage.

The Department recognizes that small public entities may face resource constraints that could make compliance with some Web accessibility standards difficult. The Department therefore seeks additional, specific information regarding these constraints. The Department encourages small public entities to provide cost data on the potential economic impact of adopting the specific requirements for Web site accessibility under consideration by the Department. The Department also encourages small public entities to provide recommendations on less burdensome alternatives, with relevant cost information. The Department also

seeks additional information that will enable it to quantify the benefits of any such rule for individuals with disabilities residing in small public entities. For example, individuals with manual dexterity limitations residing in small public entities may find Web accessibility more important than individuals with similar disabilities residing in larger public entities that may have more accessible public transportation and greater physical accessibility. However, it is also possible that Web accessibility is less important for individuals with manual dexterity limitations residing in small public entities because they do not need to travel very far to access government services in-person, or very little information is available on their town's Web site. In each of your responses, please assume that the proposed rule would require compliance with WCAG 2.0 Level AA within two years after the publication of a final rule, and explain how your responses would vary if the Department required conformance with WCAG Level A instead of WCAG Level AA, or if the Department allowed additional time for compliance. Please include as much information as possible to support each of your responses, including specific data or research where possible.

Question 116: Do all or most small public entities have Web sites? Is there a certain population threshold below which a public entity is unlikely to have a Web site?

*Question 117: How large and complex are small public entities' Web sites? How, if at all, do the Web sites of small public entities differ from Web sites of larger public entities? Do small public entities tend to have Web sites with fewer pages? Do small public entities tend to have Web sites that are less complex? Are small public entities less likely to provide information about or access to government services, programs, and activities on their Web sites? Do the Web sites of small public entities allow residents to access government services online (*e.g.*, filling out forms, paying bills, requesting services)?*

Question 118: Are persons with disabilities residing in small public entities more or less likely to use the public entities' Web sites to access government services? Why or why not?

Question 119: Is annual revenue an effective measure of the potential burdens a Web accessibility rule could impose on small public entities? Is there other publicly available data that the Department should consider in addition to, or instead of, annual revenue when considering the burdens on small public

entities to comply with a Web accessibility rule?

Question 120: Are there resources that a small public entity would need to comply with a Web accessibility rule that they would not be able to purchase (e.g., staff or contractors with expertise that are not available in the geographic area)?

Question 121: Do small public entities face particular obstacles to compliance due to their size (e.g., limited revenue, small technology staff, limited technological expertise)? Do small public entities of different sizes and

different types face different obstacles? Are there other constraints on small public entities' ability to comply with a Web accessibility rule that the Department should consider?

Question 122: Are small public entities likely to determine that compliance with a Web accessibility rule would result in undue financial and administrative burdens or a fundamental alteration of the services, programs, or activities of the public entity? If so, why would these compliance limitations result?

Question 123: Are there alternatives that the Department could consider adopting that were not previously discussed that could alleviate the potential burden on small public entities? Please provide as much detail as possible in your response.

Dated: April 29, 2016.

Vanita Gupta,

*Principal Deputy Assistant Attorney General,
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