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MAKING A VIRTUAL BANK ADA COMPLIANT

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This article outlines the reasons website disability access should be addressed by banks — not only as good business practice, but to mitigate litigation risk, reputational damage, regulatory enforcement action and the potential new Department of Justice regulations expanding the coverage of the Americans with Disabilities Act to websites.

Millions of people have disabilities that affect their use of the Internet. People who are blind or have low vision may be the most affected by inaccessible information in electronic technology but people with auditory, physical, speech, cognitive and motor disabilities may also be affected. There are assistive technologies that allow people with disabilities to access websites, for example, people with mobility impairments may use assistive technology that allows them to control software with verbal commands. Screen readers read text aloud as it appears on the computer screen. However web developers must specifically design websites to be compatible with these tools. Not all disabilities can be addressed by assistive technology. Individuals who are deaf or hard of hearing may require captioning of streaming videos and people with memory or cognitive impairments may be affected by complex websites that lack navigational headings or links that would make them accessible — both which can be addressed by website design.

Over half of adults in the United States currently bank online, establishing this as an important and a desired banking service. Yet many banks

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do not include disability access as an element in their website design. This article outlines the reasons website disability access should be addressed by banks — not only as good business practice, but to mitigate litigation risk, reputational damage, regulatory enforcement action and the potential new Department of Justice (“DOJ”) regulations expanding the coverage of the Americans with Disabilities Act (“ADA”) to websites.

FEDERAL LAW

Congress enacted the ADA in 1990 to ensure access by the disabled to places of public accommodation and related services. Since the Internet did not exist in 1990, the ADA and its legislative history did not address access to websites by the disabled. The DOJ is the agency responsible for interpreting and writing rules to implement the ADA and for enforcing the ADA. As banks are aware, the ADA has been used to require modifications to bank buildings to make them accessible to the disabled, including the additions of ramps and wider doorways, and to ATMs to meet accessibility and usability standards, including speech output, tactilely discernible keypad controls and Braille instructions.

Congress held hearings on the applicability of the ADA to private websites in 2000 but declined to take action to amend the ADA. In 2008, Congress amended the ADA to state that Congress intended the ADA to provide broad coverage to eliminate discrimination against individuals with disabilities, but once again Congress did not specifically address the Internet.

DEPARTMENT OF JUSTICE

The DOJ has applied the ADA and the Rehabilitation Act of 1973 to state and local governments requiring these governmental entities to make their websites fully accessible to people with disabilities. The DOJ publishes technical guidelines to be used by governmental entities in their compliance efforts.

Even without specific Congressional authority, as early as 1996, the DOJ stated in a letter in response to an inquiry from Senator Tom Harkin about accessibility for the visually impaired that the accessibility requirements of the ADA apply to public and private Internet websites and services. Since 1996, the DOJ has made this assertion in various testimonies before House

and Senate committees. And finally, in 2010, the DOJ published an Advance Notice of Proposed Rulemaking (“ANPRM”) to solicit public comment on its proposal to establish requirements to make goods and services offered via the Internet accessible to the disabled. The DOJ acknowledged that the Internet plays a critical role in the daily personal and business life of Americans and that many websites are not readily accessible to individuals with disabilities. The DOJ referenced inconsistent court decisions, public and federal agencies’ calls for action, and differing standards for determining website accessibility as factors underlying its proposal.

Among other issues addressed in its ANPRM, the DOJ asked for comments on which, if any, specific web accessibility standards should be adopted, citing the standards contained in the Rehabilitation Act and the Web Content Accessibility Guidelines (“WCAG”) developed by the independent Website Accessibility Initiative of the World Wide Web Consortium (“W3C”) as possible requirements. The comment period closed in January 2011.

In May 2013, the DOJ moved closer to adopting web accessibility standards by publishing its 2013 agenda, which included its intent to proceed with ADA regulations to include specific requirements to make public and private websites accessible to individuals with disabilities. The DOJ did not publish anything further in 2013. The DOJ’s next step will be publication of a proposed rule soliciting comments from stakeholders. Banks should carefully monitor the DOJ’s actions and consider responding to its proposed rule when published.

LITIGATION

Although the DOJ has not yet implemented regulations related to website accessibility, a number of lawsuits, starting as early as 2001, have been brought, including lawsuits against Target, Facebook, Southwest Airlines, and Netflix, asserting that these private websites and related services are not ADA compliant. In some cases, courts have decided that a “public accommodation” in the ADA is limited to physical structures and does not include websites. Courts in other cases have decided that public policy concerns and legislative intent support the determination that a website is a public accommodation subject to the ADA.

This split in cases creates uncertainty that can expose companies, including banks, to threats of lawsuits. Financial institutions such as Bank of America, Charles Schwab, Chase, First Union and Sovereign Bank have entered into agreements to improve website accessibility with litigants and individuals threatening litigation. Generally, these financial institutions have committed to upgrade their websites to comply with the WCAG of the W3C.

REGULATORY ENFORCEMENT

State and federal regulators have also entered into settlement agreements with financial institutions, such as HSBC and Wells Fargo, in which the banks agreed generally to provide improved website accessibility for individuals with disabilities.

WEB ACCESSIBILITY STANDARDS

The Rehabilitation Act standards were last updated in 2000 and do not reflect the significant advancements in technology since that date while the WCAG 2.0 was published in 2008. It is currently unknown which standards may be adopted by the DOJ in its proposed rule, however, we suggest that entities that wish to incorporate disability access in their website design review the WCAG principles since the WCAG standards have been the basis of numerous private sector settlements.

Those principles include the following modifications to address common disabilities:

- Provide text alternatives for any non-text content so it can be changed to other forms people need such as large print, Braille, speech, or simpler language.
- Provide captions or transcripts of audio content, and full text alternatives of interactive animations.
- Do not use color as the only visual means of conveying information or indicating what action is required (*e.g.*, “Items in red are mandatory”).
- Make the entire website accessible by keyboard.

- When choosing font and background colors, ensure there is sufficient contrast between the colors so that those with low vision can distinguish between the two.
- Program the site so that users can resize the text.
- Use actual text rather than pictures of text.
- Allow users enough time to read and use content. Allow the user to shut off or extend time limits for responses, or do not use time limits for responses.
- Provide ways to help users navigate, find content and determine where they are on the website. Give individual web pages, links and headings useful titles to describe topic or purpose (*e.g.*, “Frequently Asked Questions” instead of “click here”).
- Structure the site simply and logically, to reduce the likelihood that a user will get lost in a complicated hierarchy of pages.
- Make text readable and understandable. Use a version that does not require reading ability more advanced than the lower secondary education level. Provide a mechanism for identifying the meaning of unusual words and abbreviations.
- Help users avoid and correct mistakes. Give users an opportunity to check their responses before moving on.
- Ensure that the website is designed so that it is compatible with current adaptive technology and will not be difficult to change to become compatible with future adaptive technology.

CONCLUSION

Even though it is not possible at this time to determine what compliance standards will be adopted by the DOJ, or when those standards will apply, taking the WCAG principles into consideration now when designing or adding content to a bank’s website will increase website accessibility for the disabled and may even reduce the cost of compliance in the future. Improving website accessibility now will also increase customers and market share, and decrease regulatory risk, litigation risk and negative publicity.