

Cooperative Credit Union Association, Inc.
Website Accessibility Under the Americans with Disabilities Act

Issue Summary

Currently, there is no federal law or regulation that expressly covers website accessibility, which contributes to the uncertainty and legal vulnerability that covered entities such as credit unions are facing.

The Department of Justice, the federal agency charged by Congress to implement the ADA, has not promulgated any rules or standards to guide businesses on what is needed to make websites ADA compliant. The DOJ has rulemaking authority, but regarding website access has relied on guidance known as WCAG 2.0, which was developed by the Worldwide Web Consortium.

The Act, including Title III, was amended in 2008, and the rules were revised in 2010 and twice in 2016. Neither Congress nor the DOJ used those opportunities to regulate website accessibility for public accommodations. In 2010, DOJ did issue an advanced notice of proposed rulemaking on website accessibility and in 2016 sought further comments on website accessibility for state and local governments under Title II of the ADA. However, the DOJ notices regarding website accessibility under Titles II and III were withdrawn December 26, 2017 (82 FR 60932).

Issue Impact

Credit unions have taken costly steps to review their websites in the wake of the news of predatory litigation by certain plaintiffs' law firms seeking to profit from ambiguities in the requirements for website accessibility under the ADA. The litigation asserts that individuals are being denied equal access not to credit unions' locations, but to credit unions' websites, which are asserted to be a violation of Title III of the ADA.

While the ADA is important and necessary for the well-being of those protected by it, plaintiffs' lawyers have been exploiting compliance ambiguities to the detriment of all credit union members. The most common factor in pending cases filed against credit unions is that the plaintiff is not even a credit union member.

Path Forward

Credit unions recognize the extreme sensitivities surrounding the Americans with Disabilities Act ("ADA") and are committed to ensuring access to all products and services to all members.

A final rule from the DOJ on website accessibility could clarify the agency's expectations for website accessibility and a renewed rulemaking process would allow stakeholders an opportunity to provide their views and concerns that would inform the development of the rule. In addition, the Association is of the position that the final rule must provide that a plaintiff wishing to sue a credit union under the regulation's provisions must be a member of that credit union, in addition to meeting other requirements for standing.

Alternative Approaches

The Association is sensitive not only to raising the ADA but also to the frustration experienced by lack of response and guidance from the DOJ. An alternative approach could be to engage in a regional delegation effort to raise the visibility of this issue with DOJ. More specifically, the Association believes that the DOJ is authorized to file a Statement of Interest ("Statement") in pending cases under the ADA. The goal is to encourage the DOJ to file a Statement in at least one case that is pending in each federal district where cases are filed. Such a Statement would

clarify to the court that an individual does not have standing to sue a credit union in federal court under Title III of the ADA regarding website accessibility unless the plaintiff is a member of that credit union or eligible to join the credit union. If an individual is not a member or in the field of membership of a credit union, then the plaintiff is not able to show requisite harm to support standing since the individual is not entitled to use that credit union's services. Such a Statement could provide a very important clarification that would not limit legitimate claims but would help mitigate the number of frivolous challenges against credit unions.

Association Letter to Senator Whitehouse

The Association is working closely with Rhode Island Senator Whitehouse for his assistance with ADA predatory demand letters. Senator Whitehouse presently serves as a member of the Senate Judiciary Committee. As a lawyer, former United States Attorney General and Attorney General of Rhode Island, he is in the unique position of understanding the detrimental impact of frivolous lawsuits on credit unions as local financial cooperatives.

The Association's request to Senator Whitehouse has been sent following briefings with his staff. Although staff has acknowledged that opposing the ADA is an uphill challenge, his staff has expressed a willingness to review the topic on his behalf as well as with the Senate Judiciary Committee.

A request to DOJ from him is suggested by posing sample questions such as:

- Why did the DOJ halt the rulemaking process in 2010 on website accessibility?
- If the DOJ does not take the view that a rule is needed, then what steps could the DOJ take to bring clarity to the rights and responsibilities of stakeholders on website accessibility?
- Whether in the rule or through interpretation, does the DOJ agree that standing to sue a credit union regarding its website under Title III of the ADA requires, among other factors, that the plaintiff be a member of the credit union against which a complaint is filed?

Additional Association Engagement with Lawmakers

Recently, Congressmen Ted Budd (R-NC) and Lou Correa (D-CA) authored a Dear Colleague letter to DOJ urging support to seek guidance from the DOJ on the issue. Members of the Association's congressional delegations were encouraged to sign on to the letter, which increases the visibility and importance of this issue. House members from the Association's member state delegations who signed onto the Dear Colleague letter include Congressman Bill Pascrell (D-NJ), Congressman Leonard Lance (R-NJ), Congressman Tom MacArthur (R-NJ), and Congressman Frank Lobiondo (R-NJ).

In ongoing conversations with Congressional offices, Congressman James McGovern (D-MA) has expressed a willingness to review the topic and work with his regional counterparts in the House and Senate on a local letter. These discussions continue.

In addition, although it does not directly address website accessibility issues, Congress has proposed H.R. 620, the *ADA Education and Reform Act of 2017*, which would be an important step forward in addressing litigation threats under the ADA. This legislation requires the DOJ to

develop a program to educate stakeholders on strategies for promoting access to public accommodations for persons with a disability. In addition, it prohibits civil actions based on the failure to remove a barrier to access into a public accommodation unless notice is given and improvement descriptions are not provided by owner or operator. The bill would also require the creation of a model program to promote alternative dispute resolution mechanisms to resolve ADA claims.

Association Resources

The Association continues to monitor the issue closely, and is collaborating with all parties to ensure that as much compliance and strategic guidance is available to credit unions on this important and emerging topic. To help members navigate this complex issue, an ADA Compliance Toolkit was compiled by the Association to provide tips, resources, and options to navigate the landscape.