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Chief

Disability Rights Section

Civil Rights Division

U.S. Department of Justice

150 M St. NE, 9th Floor

Washington, DC 20002

RE: RIN 1190–AA79/Docket ID No. 144

**[VIA ELECTRONIC SUBMISSION]**

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**National Coalition on Accessible Voting (NCAV) Comments Re: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities**

The undersigned members of the National Coalition on Accessible Voting (NCAV) appreciate the opportunity to comment on the U.S. Department of Justice (DOJ)’s proposed rule establishing specific requirements and technical standards for accessible websites and mobile apps. The proposed rule updates DOJ regulations on Title II of the Americans with Disabilities Act (ADA).[[1]](#footnote-1) The National Coalition on Accessible Voting works to maintain and expand voting access for people with disabilities. NCAV supports federal, state, and grassroots efforts to ensure accessibility in all methods and aspects of the voting process, from registration to casting a ballot.

The undersigned support the use of the World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG) as a standard for website and mobile app accessibility.[[2]](#footnote-2) The WCAG has long been the most widely used web accessibility standard. It is familiar to most web developers.

The undersigned’s comments address web and mobile app accessibility and voting. Voting is a fundamental right, and many people use the Internet or mobile apps to complete part of the voting process. Most states allow online voter registration;[[3]](#footnote-3) information on how and when to vote (and which issues and offices are on the ballot) is collected online,[[4]](#footnote-4) and most people get their absentee ballots by finding or filing request forms online.[[5]](#footnote-5) In some jurisdictions, voters with disabilities are able to access a blank digital ballot, mark that ballot, and return it through a mobile application or other digital mechanism. DOJ’s proposed rule has never been more important and timelier for ensuring full access to voting.

**Question 3: Are there technical standards or performance standards other than WCAG 2.1 that the Department should consider? For example, if WCAG 2.2 is finalized before the Department issues a final rule, should the Department consider adopting that standard? If so, what is a reasonable time frame for State and local compliance with WCAG 2.2 and why? Is there any other standard that the Department should consider, especially in light of the rapid pace at which technology changes?**

*We recommend that the Department adopt WCAG 2.2.*

The WCAG 2.2 standards were available in near final form as of July 20, 2023, and will likely become a full recommendation this fall.[[6]](#footnote-6) We expect some agencies to adopt the 2.2 standards within a few months,[[7]](#footnote-7) and most other web developers to be using 2.2 by the time of the final rule’s release. If 2.1 is used instead of 2.2, public entities will end up behind the technological curve rather than ahead of it.

We also recommend WCAG 2.2 because its new success criteria improve upon WCAG 2.1. For example, Success Criteria 3.3.8 and 3.3.9 eliminate, reduce, or mandate alternatives to authentication tests that require users to solve visual puzzles or remember one-time passwords before they can access their accounts.[[8]](#footnote-8) Authentication tests (such as CAPTCHA tests) are inaccessible to people with many different types of disabilities.[[9]](#footnote-9) Removing or reducing them would enhance accessibility.

If a higher WCAG standard than 2.2 becomes current or near finalized before the final rule is released, we recommend that the DOJ update the final rule to use that standard. We additionally recommend that the DOJ review this rule every two years to determine whether the WCAG standard has changed and, if so, whether the DOJ should revise the rule.

*Before finalizing its proposed rule, we recommend that the DOJ consult with the following groups: disability rights organizations, civil rights organizations, web content developers, and other federal agencies, such as the Election Assistance Commission (EAC).*

DOJ should determine from these consultations whether higher-level standards than WCAG Level AA are necessary for full accessibility. People with disabilities in particular are the best experts on their own needs and may identify content that would be inaccessible even if the final rule were implemented. DOJ could consider implementing a higher-level standard only for specific content. It is critically important that web and app content that provides access to a fundamental right, such as voting, is accessible to all.

**Question 12: 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?**

*We recommend that the Department limit the compliance date to two years regardless of population size.*

The proposed delay will deny people living in small townships access to vital services for an unreasonably long time. DOJ’s concerns that small entities may lack resources are not fully justified. The size of a town does not correspond to the amount of traffic on or quality of its websites and apps, nor to the number of people with disabilities who live there and use its website. Additionally, an entity that cannot comply can already apply the undue burden exception to Title II, rendering the delay unnecessary.

The proposed delay is particularly problematic for voting. Voting is time-sensitive, and most people retrieve their ballots and register to vote online. Delaying the compliance of small entities by a year could prevent a person with a disability from voting in a local election. The importance of voting also far outweighs the DOJ's concerns. Voting, even in towns with fewer than 50,000 people, can impact day-to-day life for years. For example, county sheriffs are usually elected officials with few checks on their power. They can arrest people, detain prisoners, and sometimes even function as coroners.[[10]](#footnote-10) Despite this 60 percent of sheriffs run unopposed and some have remained in power for decades.[[11]](#footnote-11) There is no justification for prolonging people with disabilities’ inability to vote in these elections. We therefore recommend that the DOJ not extend the compliance date.

*We recommend the Department significantly shorten or eliminate the compliance date for new content posted after the release of the final rule but before the end of the compliance period.*

The proposed rule itself is ambiguous, stating that public entities must ensure that their content is accessible by the proposed compliance date regardless of when it was posted. New content could be made accessible faster than older content, and therefore we recommend that it have a shorter compliance date.

**Question 23: Do public entities link to third-party web content to allow members of the public to participate in or benefit from the entities' services, programs, or activities? If so, to what extent does the third-party web content that public entities use for that purpose comply with WCAG 2.1 Level AA?**

The NCAV recommends that the DOJ, before implementing an exception for third-party content, consult with: Departments of State, state and local election officials, disability rights advocacy organizations, and others familiar with how websites and social media are used to support voting. Third-party content may be used by public entities to enhance their programs and services. That content should be accessible.

For example, public entities use social media to enhance many programs and services. Public entities that oversee voting occasionally link to third-party web content on their social media.[[12]](#footnote-12) Some of this content contains vital information on voter registration, eligibility, and outreach.[[13]](#footnote-13) For example, one Florida Department of State Twitter post links to a third-party interview with Florida’s Secretary of State, where the Secretary discusses new rules that directly impact the ability of Floridians to vote by mail.[[14]](#footnote-14) Linked third-party content does not always comply with WCAG 2.1 Level AA.[[15]](#footnote-15) .

**Question 24: What would the impact of this exception be on people with disabilities and how would foreseeable advances in technology affect the need for this exception?**

*The NCAV recommends that the DOJ clarify the extent to which public entities’ social media posts, when they contain links to third-party content, would be covered by the exception.*

DOJ proposes an exception for third-party web content shared by public entities, “unless the public entity uses the third-party web content to allow members of the public to participate in or benefit from the public entity's services, programs, or activities.”[[16]](#footnote-16) However, the extent to which third-party social media posts meet this standard is not always clear.

For example, the South Carolina State Election Commission shared a third-party article on its social media directing readers to a statewide voter engagement and registration campaign for voters with disabilities.[[17]](#footnote-17) It is not clear whether sharing information on this campaign is fulfilling the Election Commission’s obligation to “ensure every eligible citizen has the opportunity to register to vote and participate in fair and impartial elections.”[[18]](#footnote-18) An argument could be made that sharing information on a voter registration campaign helps ensure citizens with disabilities can vote. Without a clear standard for when these posts fall under the exception and when they do not, public entities will be forced to inefficiently examine each and every post. The NCAV recommends that the Department clarify how the exception applies.

**Question 25: What types of external mobile apps, if any, do public entities use to offer their services, programs, and activities to members of the public, and how accessible are these apps? While the Department has not proposed an exception to the requirements proposed in § 35.200 for public entities' use of external mobile apps, should the Department propose such an exception? If so, should this exception expire after a certain time, and how would this exception impact persons with disabilities?**

Because of the extensive level of security required for mobile voting applications, it is unclear if these would be covered as an “external mobile app” or not as they may be digitally deployed differently in different voting jurisdictions. Regardless of how/where such applications are housed, they are critically important for voters with disabilities and must be fully accessible and subject to these rules.

**We recommend that the DOJ provide strong technical assistance to public entities to support their implementation of the rule.**

While we do not recommend extending the two-year compliance period, we understand that many public entities may require technical assistance to understand their obligations. Lack of knowledge of ADA regulations and compliance obligations is a frequently cited reason for noncompliance, even though the ADA has been the law of the land for more than thirty years. Public entities and their contracted web developers and IT professionals would benefit from comprehensive access to guidance, training programs, and technical assistance on the WCAG and this proposed rule.

Outreach to professional organizations, prominent web developers, IT professionals, web vendors, State and local governments and their agencies, and others is also necessary. Public entities cannot ensure compliance if they and those who work for them have no idea that the rule exists. We believe all public entities, regardless of size, can comply if outreach has been performed and they have access to robust technical assistance and support.

**We recommend that the DOJ create guidance following the publication of its final rule addressing how public entities should update voting-related content. The guidance should include references and application examples on how these rules will apply to voting.**

Voting is managed differently from state to state and even from county to county. As a result, voting-related web content is not consistent between jurisdictions. In addition, commercially available voter registrations systems, e-poll books, and digital voting applications are purchased and deployed in various ways across voting jurisdictions. This diversity makes it more likely that state and local governments will misapply the final rule, or that they will not understand that these applications must be accessible. Detailed DOJ guidance could provide examples of compliant voting-related content to support State and local government revisions to their websites and apps. State and local governments would benefit from compliant examples of voter education materials, voter registration systems, e-poll books, voting apps and other voting-related technologies, and digital ballot delivery systems.

The NCAV appreciates the DOJ's commitment to enforcing Title II and to improving website accessibility. For more information on the NCAV and these comments please contact Kelly Israel, the NCAV’s Coordinator, at [kelly.israel\_contractor@ndrn.org](mailto:kelly.israel_contractor@ndrn.org).

Sincerely,

Undersigned Organizations:

American Association of People with Disabilities (AAPD)

American Council of the Blind (ACB)

Autistic Self Advocacy Network

Association of Assistive Technology Act Programs (ATAP)

Center for Living & Working, Inc

National Association of Councils on Developmental Disabilities

National Association of Statewide Independent Living Councils (NASILC)

National Council on Independent Living (NCIL)

National Disability Rights Network (NDRN)

Paralyzed Veterans of America

RespectAbility

Washington Lawyers' Committee for Civil Rights and Urban Affairs

Others:

Cliff Perez

1. Americans with Disabilities Act, 42 U.S.C. § 12132; 28 C.F.R. §§35.104, 35.200-209 (regulations). [↑](#footnote-ref-1)
2. W3C®, Web Content Accessibility Guidelines 2.1 (June 5, 2018), <https://www.w3.org/TR/WCAG21/>. [↑](#footnote-ref-2)
3. Am. Civ. Liberties Union, *States With Online Voter Registration,* <https://www.aclu.org/issues/voting-rights/promoting-access-ballot/states-online-voter-registration> (last updated Nov. 16, 2018). [↑](#footnote-ref-3)
4. USA.gov, *Voting and Elections,* <https://www.usa.gov/voting-and-elections> (last visited Aug. 21, 2023). [↑](#footnote-ref-4)
5. *See, e.g.,* Maryland State Board of Elections, *Mail-In Ballot Request Instructions* (Jul. 5, 2023), <https://elections.maryland.gov/voting/documents/Mail-in%20Ballot%20Application_English.pdf>; Vote.org, *Request Your Absentee Ballot,* <https://www.vote.org/absentee-ballot/> (last updated 2023); DOS Voting and Election Information, *Voting by mail-in or absentee ballot is safe, secure, and easy*, <https://www.vote.pa.gov/Voting-in-PA/pages/mail-and-absentee-ballot.aspx>. [↑](#footnote-ref-5)
6. W3C®, Web Content Accessibility Guidelines 2.2 (Jul. 20, 2023), <https://www.w3.org/TR/WCAG22/>. [↑](#footnote-ref-6)
7. The European Union adopted WCAG 2.1 in September 2018, only three months after WCAG 2.1’s release. Shadi Abou-Zahra, *WCAG 2.1 Adoption in Europe*, W3C® (Sept. 13, 2018), <https://www.w3.org/blog/2018/wcag-2-1-adoption-in-europe/>. [↑](#footnote-ref-7)
8. Web Content Accessibility Guidelines 2.2, <https://www.w3.org/TR/WCAG22/>; W3C®, *What’s New in WCAG 2.2.,* <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/> (last updated Aug. 29, 2023). [↑](#footnote-ref-8)
9. W3C®, Scott Hollier, Janina Sajka, Jason White, Michael Cooper and Matt May, *Inaccessibility of CAPTCHA Alternatives to Visual Turing Tests on the Web* (Dec. 16, 2021), <https://www.w3.org/TR/turingtest/> (describing accessibility issues with CAPTCHA content, listing difficulties presented to users with both physical and cognitive disabilities). [↑](#footnote-ref-9)
10. *See* Nat’l Sheriffs Assoc., Elected Office of the Sheriff: An Executive Summary 1-2, <https://www.sheriffs.org/sites/default/files/tb/The_Elected_Office_of_Sheriff_-_An_Executive_Summary.pdf> (last visited Aug. 24, 2023); Alan Neuhauser, *Running for a Badge: Why Does the U.S. Still Elect Sheriffs?* U.S. News and World Report (Nov. 4, 2016, 10:32AM), <https://www.usnews.com/news/politics/articles/2016-11-04/joe-arpaio-david-clarke-and-why-the-us-still-elect-sheriffs>; Jessica Pishko, *The Power of Sheriffs: Explained*, The Appeal (Jan. 4, 2019), <https://theappeal.org/the-power-of-sheriffs-an-explainer/>. [↑](#footnote-ref-10)
11. Michel Martin, All Things Considered: Do Sheriffs Have Outsize Power In the U.S.? NPR (Jul. 25, 2020, 5:16PM), <https://www.npr.org/2020/07/25/895423249/do-elected-sheriffs-have-outsized-power-in-the-u-s>; Jessica Pishko, The Power of Sheriffs: Explained, <https://theappeal.org/the-power-of-sheriffs-an-explainer/> . [↑](#footnote-ref-11)
12. *See, e.g.,* Baltimore County Board of Elections (@BaltCoElections), Twitter (Sept. 16, 8:01AM), <https://twitter.com/BaltCoElections/status/1703016148084646060>; SC State Election Commission

    (@scvotes), Twitter (Aug. 2, 2023, 5:58PM), <https://twitter.com/scvotes/status/1686859130835738624>.

    Florida Department of State(@FLSecofState), Twitter (Sept. 17, 2023, 7:11PM), <https://twitter.com/FLSecofState/status/1703547295877173500>. [↑](#footnote-ref-12)
13. *See, e.g.,* SC State Election Commission (@scvotes), <https://twitter.com/scvotes/status/1686859130835738624> (sharing information on a third-party voter initiative known as “Voting is My Right,” which promotes voter registration and engagement for people with disabilities). [↑](#footnote-ref-13)
14. Florida Department of State(@FLSecofState), <https://twitter.com/FLSecofState/status/1703547295877173500>. [↑](#footnote-ref-14)
15. Florida Department of State(@FLSecofState), <https://twitter.com/FLSecofState/status/1703547295877173500> (contains automatic, inaccurate captioning that makes it impossible for a Deaf or hard of hearing viewer to determine what is being said); W3C®, Web Content Accessibility Guidelines 2.1: 1.2.2, 1.2.4 (June 5, 2018), [https://www.w3.org/TR/WCAG21](https://www.w3.org/TR/WCAG21/); (requiring captions on all pre-recorded and live media at Level AA, where W3C in other materials defines the term “captions” as helping viewers “understand the media content”). [↑](#footnote-ref-15)
16. 88 Fed. Reg. at 51969. [↑](#footnote-ref-16)
17. SC State Election Commission (@scvotes), <https://twitter.com/scvotes/status/1686859130835738624>. [↑](#footnote-ref-17)
18. *About the SEC,* South Carolina State Election Commission, <https://scvotes.gov/about-the-sec/> (last visited Sept. 19, 2023). [↑](#footnote-ref-18)