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ASSOCIATION of
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December 13, 2018

The Honorable Linda McMahon
Administrator
U.S. Small Business Administration
409 3rd Street, SW
Washington, DC 20416

Matthew G. Whitaker
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Administrator McMahon and Acting Attorney General Whitaker:

On behalf of the 1.3 million members of the National Association of REALTORS® (NAR), I thank the Small Business Administration (SBA) Office of Advocacy and the Department of Justice (DOJ) Disability Rights Section for hosting the December 4th Roundtable on the Americans with Disabilities Act (ADA). NAR strongly supports the ADA and programs that encourage compliance with the ADA.

As you know, NAR members are frustrated with the absence of regulations related to the application of Title III of the ADA to website accessibility. Without such direction, business owners are unclear about what qualifies as an “accessible” website, how to achieve accessibility, and what level of accessibility would provide sufficient protection against demand letters and lawsuits.

As you heard from many participants at the December 4th Roundtable, a growing cottage industry of law firms have sent thousands of demand letters and have filed lawsuits to extract sizeable sums from businesses that allegedly violated the ADA due to “inaccessible” websites despite the lack of firm guidelines as to what is or is not accessible. For small businesses, this is particularly detrimental as they are faced with fighting unfounded claims in lengthy, expensive court battles or paying large settlements in an effort to minimize impact and keep focus on sustaining consumer services.

NAR appreciates the DOJ’s recent statement in a September 2018 letter to Congressman Ted Budd that says, “absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.” Unfortunately, plaintiffs’ attorneys are taking



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advantage of this “flexibility” in compliance, which is evidenced in the 30 percent increase in website accessibility lawsuits filed from 2017 to 2018.¹

NAR is eager to continue working with the DOJ and other industry partners to develop a clear and reliable technical standard for website accessibility. This will allow NAR members and other business owners to provide individuals with disabilities access to the information, benefits, and services available on their respective websites. To further these efforts, NAR responded to the May 2016 Supplemental Advance Notice of Proposed Rulemaking under Title II of the ADA concerning the accessibility of Web information and services of state and local government entities. The attached recommendations explain important considerations for any future rulemakings, with necessary transition timelines to reduce unnecessary burdens on small businesses.

In addition to our efforts on website accessibility, NAR is committed to working with Congress to add a critical “notice-and-cure” provision to the ADA to give business owners the opportunity to rectify a violation within a reasonable period before they are threatened with a costly lawsuit or a demand letter. Currently, business owners are given no opportunity to fix accessibility issues before a costly legal process begins. This effort will strengthen and improve the ADA by ensuring businesses spend their resources fixing alleged violations instead of on lengthy legal processes.

NAR looks forward to continuing this conversation and working with the DOJ to ensure that regulations are keeping pace with the technological advances in the real estate industry and other business sectors. If you have any questions or concerns, please contact me, or our Director of Real Estate Services and Policy Oversight, Sarah Young, at SCYoung@REALTORS.org or 202-383-1233.

Sincerely,



John Smaby
2019 President, National Association of REALTORS®

cc: Janis C. Reyes, Assistant Chief Counsel, SBA Office of Advocacy
Savannah Weston, Attorney Advisor, DOJ Disability Rights Section
Mary Adams, Architect, DOJ Disability Rights Section

Attachment

¹ <https://www.adatitleiii.com/2018/07/website-access-and-other-ada-title-iii-lawsuits-hit-record-numbers/>

October 7, 2016

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Ms. Vanita Gupta
Principal Deputy Assistant Attorney General
U.S. Department of Justice Civil Rights Division
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Office of the Assistant Attorney General, Main
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Re: RIN 1190-AA65 or Docket ID No. 128 (submitted electronically)

Dear Principal Deputy Assistant Attorney Gupta:

I write on behalf of more than 1.1 million members of the National Association of REALTORS® (NAR) in response to the Department of Justice's (the Department) May 9, 2016, Supplemental Advance Notice of Proposed Rulemaking (SANPRM) under Title II of the *Americans with Disabilities Act* (ADA) concerning the accessibility of Web information and services of state and local government entities.

Although this rulemaking will result in regulations that only apply to state and local governments covered by Title II of the ADA, the Department noted that: "[a] Title II Web accessibility rule is likely to facilitate the creation of an infrastructure for Web accessibility that will be very important in the Department's preparation of the Title III Notice of Proposed Rulemaking on Web site accessibility of public accommodations." While NAR's members support the adoption of clear website accessibility standards and requirements, some of the positions taken by the Department in this rulemaking ignore the practical challenges entities face in creating and maintaining websites. It is for these reasons that NAR is submitting comments to the SANPRM, as many of the issues raised will be addressed by the Department in any proposed regulations for the accessibility of Web information of places of public accommodations under Title III of the ADA.

The real estate market is a major contributor to the national economy and any alterations affecting this industry must be thoroughly vetted. To that end, there are a number of the Department's preliminary positions in the SANPRM that cause NAR and its members serious distress, discussed in more detail below. With these considerations in mind, NAR urges the Department to streamline and expedite the Title III rulemaking process.

Practical Challenges Exist with Conformance Requirements

The proposal to require websites to conform to Website Content Accessibility Guidelines 2.0 AA (WCAG 2.0 AA), which are published by the Web Accessibility Initiative of the World Wide Web Consortium, the main international standards organization for the Internet, are inherently problematic. *Neither the Department nor any other federal agency has adopted WCAG 2.0 AA for their own websites*, yet the Department is proposing to adopt this standard in this rulemaking. Some of the greatest challenges NAR's members foresee are as follows:

- The subjectivity involved with implementing certain aspects of WCAG 2.0 AA;
- The sheer amount of work and resources associated with complying with certain aspects of WCAG 2.0 AA (e.g. Manually creating alternative text for hundreds of thousands of images of homes and audio descriptions and closed captioning for videos);
- The inability to control or have knowledge of the accessibility of third party websites that are linked from a member's website;
- Third-party content and service vendors who are unwilling to conform to WCAG 2.0 AA;
- Scarcity of qualified digital accessibility consultants who truly understand how to implement WCAG 2.0 AA and the lack of qualified website developers who know



- how to then implement WCAG 2.0 AA (because the consultants do not actually implement the code changes);
- Cost of retaining qualified consultants to evaluate, and developers to implement required changes, the length of time such changes will take to implement, and the extreme burden this places on a small entity's resources, including independent contractors;
- The lack of official guidance from the Department or agreement among experts on: (1) how to demonstrate conformance with WCAG 2.0 AA; (2) website testing protocols; and (3) the elements of an appropriate compliance program;
- The absence of a safe harbor for covered entities that are committed to and working to make their websites accessible, but may still be exposed to expensive and often unwarranted ADA Title III lawsuits.

The task of making one's own website conform to the WCAG 2.0 Level A or Level AA is formidable and expensive enough and NAR's members are further concerned about the possible expansion of regulation from the websites of covered entities to their "web content." This possible change in scope has unimaginable and detrimental consequences given the continuous amount of content that real estate professionals push out to the web and that appear on third party websites not under the web content creator's control.

The Department should not impose additional burdens for which compliance is virtually impossible. Covered entities and the vendors that support them need time to learn and implement the accessibility techniques that are essential to making and keeping a website conforming to the standard that the Department ultimately adopts.

Lack of Government Regulations Contributes to Growing Number of Lawsuits

The absence of clear regulations related to Title III of the ADA's application to Web information has contributed to the growing cottage industry of law firms sending demand letters and filing lawsuits in order to extract sizeable sums from companies that allegedly violated the ADA due to an "inaccessible" website.

At least six plaintiff's law firms¹ have already taken advantage of the Department's delay in providing clear guidance on the ADA's requirements for website accessibility, and have extracted sizeable settlements from hundreds of companies. In the absence of a clear website accessibility standard, such as one similar to the ADA 2010 Standard for physical accessibility, businesses are very confused about what qualifies as an "accessible" website, how to achieve accessibility, and what level of accessibility would provide sufficient protection from receiving demand letters and lawsuits.

Without interim guidance, companies are reluctant to make costly changes to their websites that may not comply with the Department's final rule. It is therefore imperative that the Department implement protections during this rulemaking process for covered entities working to provide accessibility to ensure immunity from liability under the ADA and are not engaging in unlawful discrimination.

NAR is Uniquely Positioned to Comment on the SANPRM

NAR is uniquely positioned to comment on the SANPRM because it is the United States' largest trade association, representing over 1.1 million real estate professionals. NAR's members are involved in all aspects of the residential and commercial real estate industries, and belong to one or more of the approximately 1,200 local REALTOR® associations or boards, and 54 state and territorial REALTOR® associations. The real estate industry alone accounts for at least 15 percent of the U.S. economy, comprising of over \$2 trillion in residential and commercial real estate transactions, and creating millions of jobs.

NAR members, who identify themselves as REALTORS®,² are individuals who make their livelihood as real sales professionals and recognize how technology innovations impact the delivery of real estate information and the future of their businesses. According to the 2016 NAR Member Profile, 69 percent of REALTORS® reported having a website of their own, and 54 percent have had a website for at least five years.³ REALTORS® recognize that consumers have become increasingly digital, and that they rely on brokers' and third party real estate listing websites to conduct property searches, and watch property listing videos.

¹ These firms are distinct from the Department's own enforcement actions and disability rights advocacy groups and their dedicated attorneys who have a long history of advocating for businesses and the law to adopt and incorporate more accessible technologies through structured negotiations and less adversarial actions.

² REALTOR® is a federally registered collective membership mark, which identifies a real estate professional who is a member of the National Association of REALTORS®. NAR is the exclusive owner of the REALTOR®, REALTORS®, REALTOR ASSOCIATE®, AND REALTOR® Logo trademarks.

³ National Association of REALTORS® Research Division, *2016 National Association of Realtors Member Profile*, (May 2016). [Hereinafter 2016 NAR Member Profile].

In fact, 90 percent of homebuyers rely on the internet as their primary research tool during their home buying process, and 52 percent turn to the Web as their first step.⁴ Real estate-related searches on Google.com have grown 22 percent year-over-year.⁵ NAR's members' and other real estate professionals' ability to effectively advertise and promote their real estate services online is therefore paramount to business sustainability and remaining competitive in today's real estate industry.

NAR members also recognize the importance of providing access to the real estate information and services they provide to all individuals, including individuals with disabilities. Since its enactment, NAR's members have been deeply committed to complying with the ADA, and have strived to provide individuals with disabilities with access to the same information, benefits, and services available on their websites; however, the extent to which certain technologies can be made accessible is sometimes limited.

Real estate professionals have used, when necessary, alternative means, such as by telephone and in-person communications, to communicate with individuals with disabilities. NAR urges the Department to state that telephonic and in-person service can be just as, if not more, effective as having a website that conforms to WCAG 2.0 AA. For example, real estate professionals commonly provide verbal descriptions of properties to potential buyers, or show the properties to the buyers in person.⁶ In the real estate context, this service is commonplace, and is arguably even more effective and reasonable than a vision-impaired person reading about a property's attributes online. Any future rulemaking should continue to allow for these types of alternative means of delivering information.

In light of the many challenges that covered entities will face in achieving and maintaining conformance with WCAG 2.0 AA, should the Department decide to adopt this standard, the Department should allow covered entities that have strived to create an accessible website to utilize the availability of phone or in-person access as a defense to any lawsuit where the failure of a website to conform to the Department's adopted accessibility standard is an unexpected or isolated issue. NAR strongly advocates for a final rule that provides for alternatives, safe harbors, and carve-outs for technology accessibility requirements in order to ensure its members, both large and small, can continue to provide their online services.

For these reasons and more, NAR submits the attached detailed comment on the SANPRM proposal in the following addendum.

Conclusion

As the real estate sales industry continues to grow, the use of websites to transact real estate business will continue to be essential to participation in the industry. Regulations must keep pace with technology developments in this field, and avoid overly onerous or costly requirements, as well as take into consideration the significant positive impact the real estate industry has on the economy. NAR appreciates the opportunity to comment on this SANPRM, and thanks the Department for considering its comments. If you have any questions or concerns, please contact me or our regulatory policy representative, Christie DeSanctis, at CDeSanctis@REALTORS.org or 202-383-1102.

Sincerely,



Tom Salomone

2016 President, National Association of REALTORS®

⁴ The Digital House Hunt: Consumer and Market Trends in Real Estate, A Joint Study from The National Association of REALTORS® and Google.

⁵ *Id.*

⁶ Ninety-one percent of NAR members surveyed preferred using the telephone for communications with current clients, which nearly tied with email communication. *See* 2016 NAR Member Profile.

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I. The Scope of Regulation Should Be Limited to Websites – Not “Web Content”

In its Advance Notice of Proposed Rulemaking dated July 26, 2010, the Department proposed issuing regulations for “websites” of state and local governments and places of public accommodations. In the SANPRM, the Department focuses instead on the “web content” of covered entities. This new focus suggests that the Department may require web content to be accessible *even when it appears on a site other than the covered entity’s own website* – an alarming expansion of the rulemaking would have very serious consequences.¹ For the reasons discussed below, *we urge the Department to limit its rule to the websites – not “web content” – of covered entities.*

NAR has no objection to a rule that would set clear standards and requirements for websites that are owned and operated by covered entities, as such websites are ultimately under the covered entity’s control. However, requiring a covered entity to ensure that the web content it provides to third parties – the use and distribution of which the third parties then control – is nearly *impossible*. Such a requirement would impose an immeasurable economic and administrative burden on covered entities, and create a goldmine for opportunistic plaintiffs’ attorneys.

Real estate professionals and firms routinely provide third parties with a massive amount of content for dissemination on the web. For example, real estate listings that appear on the multiple listing service (MLS) are sent to third-party aggregation websites, such as REALTOR.com. In addition, many brokers participate in the Internet Data Exchange (IDX) program, which automatically feeds the real estate listing information brokers provide into the

¹ The Department proposes to define “Web content” as “[i]nformation 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.”

MLS to other brokers' websites for display. A broker's website is therefore very likely to include listings from the IDX feed, which originated from other MLS participants and over which the broker has no control. And, a broker's own MLS listings may wind up on thousands of other websites belonging to other brokers or third-party aggregation sites, over which that broker has no control.

Real estate sales professionals do not always know where their web content is displayed. They have no control over the manner in which such content is accessed on third party sites, since those sites take the information and display it using their own user interfaces. For instance, images that originally had alternative text may not be uploaded with such alternative text by a third party. Accessible text provided by a real estate professional may appear on web pages that do not have proper headers to allow for navigation, or which may not be keyboard accessible. Advertising banners that were accessible when provided by the real estate professional may animate too quickly on a third party site. Policing these third party sites is impossible given the number of sites on which the web content can appear. Real estate professionals have little control over the third party websites that display their content and little to no leverage to require them to be accessible. Even if the third party site is willing to represent that its site is accessible, real estate brokers and agents would have no way of knowing whether the representation is truthful without performing independent audits. Simply put, it is not reasonable to make content providers liable for any content appearing on websites they do not control.

Moreover, making a covered entity liable for the web content that it places into the web stream of commerce through third parties would create another way to line the pockets of plaintiff's lawyers and subject covered entities to increased defense litigation costs. The Department must take such expenses – especially troubling for smaller entities, including

individuals – into account. Consider the following example: A serial plaintiff finds the web content of a broker on a third party real estate site and the web content is not accessible. The plaintiff sues the broker for not providing accessible content. The broker will have to hire attorneys, at substantial cost, to defend during litigation, which will also take the brokers' time and attention away from his or her business. To prove that it did not violate the ADA, at a minimum the broker would have had to maintain a file of what it sent to the third party, and will have to hire a technology expert in the litigation to testify that the content was accessible when provided to the third party. But even this might be insufficient to resolve the issue, which is further complicated by the IDX and significant amount of scraping and unauthorized sublicensing that exists online, causing real estate professionals to have very little knowledge about which third parties are displaying their web content. As such, it is often impossible for the broker to trace how the unauthorized third party obtained its web content and at what point the Web content became inaccessible. Needless to say, by the time this happens, the broker has already spent at least tens of thousands of dollars to defend itself, which means that paying the plaintiff and their attorney some lesser amount to settle the litigation is economically more sensible, even if the Web content that the broker provided was accessible. To make matters worse, real estate professionals push out hundreds of thousands of property listings and other forms of web content each year, which could each be the subject of a costly lawsuit.

For the foregoing reasons, the Department should limit its regulation to the website(s) that a covered entity owns and/or controls. Expanding any proposed rule to include “web content” will impose astronomical costs and create compliance burdens that are inherently unreasonable and cannot be implemented.

II. NAR Supports Adoption of WCAG 2.0 as the Accessibility Standard

NAR supports having a clear technical standard for accessible websites and believes the WCAG 2.0 can be the basis for such a standard. However, Level AA should not be that immediate basis. Private entities that have attempted to comply with both Level A and AA criteria have encountered difficulties. Even federal agencies that are required to meet the Electronic and Information Technology Accessibility Standards (section 508 standards), which are comparable WCAG 2.0 Level A, have not adopted Level AA conformance for its websites – *including the Department*. Before a Level AA standard is adopted, the Department should conduct a cost benefit analysis, examining the practical challenges of meeting the Level AA success criteria.

As discussed below, there are only a handful of consultants who understand how to evaluate a website for conformance to WCAG 2.0, and just as few vendors and in-house web developers who know how to design, or to make the required changes to websites, to conform to WCAG 2.0. With such a small pool of consultants and experts to work with, real estate professionals and small businesses alike will have great difficulty achieving compliance. Given the dearth of practical experience with both Level A and AA conformance, the Department should adopt a phased approach in which conformance to Level A is required within three years and conformance with AA (with certain exceptions) is required within five years from the Effective Date of a final rule.

Adopting WCAG 2.0 Level A and, ultimately, Level AA, as the legal technical standard is not enough, however. The Department must also provide clear guidance on how to comply with certain subjective criteria, how testing is to be conducted, what evidence is needed to support a conclusion that a website is in conformance with the applicable standard, and most importantly, what types of non-conformance would amount to a violation of the ADA. In

addition, the Department should adopt methods for entities to cure any violations before enforcement actions and lawsuits are permitted, or penalties are assessed, for any violations. For example, on a website with more than 100,000 images, it is likely that some will be missing an alternative text or have an inaccurate alternative text at any given time, especially given that images are often uploaded on a daily or weekly basis. A *de minimis* exception where a single or even a few instances of non-conformance should be adopted so as not to allow nominal exceptions to accessibility to be the basis of a lawsuit or a finding of unlawful discrimination under the ADA. This is all the more true given the highly dynamic nature of websites.

NAR also submits that the Department must consider and address certain aspects of the WCAG 2.0 Level A or Level AA that are especially difficult for the real estate industry to implement. Some examples are discussed below.

Alternative Text for Images. Success Criteria 1.1.1 (Level A) requires that “all images, form image buttons, and image map hot spots have appropriate alternative text.” Implementing this requirement is an entirely manual and subjective process that requires a person with judgment and training to make a number of important decisions for every single image on a site. First, the person must decide if the image is informational or simply decorative. Second, if the image is merely decorative, the person must assign the image an “Alt=” attribute so that the screen reader knows that it is merely a decorative image. If this image has no Alt attribute, an automated scan of the site will identify the lack of alternative text as an error. If the image is informative, the person must draft an accurate description of the image. *This manual and subjective process must be repeated for every single image or photograph on a website.*

Real estate professionals display hundreds of thousands of images on their websites each year as new home listings are continually added. If a brokerage company uploads 100,000

images per year and it takes 10 minutes to implement the process described above for each image, it would take 16,667 hours or *8 people working full time for a year* to just to add alternative text for all such images.² To further complicate matters, images on websites are often changed and many people and departments within a real estate organization or brokerage may have the ability to upload images and photographs. Given this wildly onerous burden, NAR urges the Department to devise an exception to the alternative text requirement for photographs on sites that are photo-intensive.

Audio Description for Videos: Videos are often used for promotional and other purposes on NAR member websites, including showing rooms and properties. Success Criteria 1.2.5 (Level AA) requires that all videos have an audio description of the visual content that is not discernable from the dialogue that can be heard by a blind user. In other words, “[d]uring existing pauses in dialogue, audio description provides information about actions, characters, scene changes, and on-screen text that are important and are not described or spoken in the main sound track.” Providing audio descriptions for every video on a real estate website would be extremely burdensome and likely discourage real estate professionals from including them on their sites, despite their effectiveness in marketing real estate and increasing consumer satisfaction.

Color Contrast: The more stringent color contrast requirements of Level AA (as opposed to Level A) will also limit the ability of real estate professionals to maintain their website’s brand identity by forcing them to use colors that are not associated with their brand. NAR urges the

² It is important to note that most content on real estate professionals’ websites is “third party content,” specifically, the listing database from the MLS. The broker has no ability to alter the MLS listing database content, not even to add accessibility tags. The only information a broker can alter or control is his or her own listings, which is usually a very small percentage of the content appearing on the broker’s own website. But, as this example illustrates, that small percentage is not insubstantial when considering the amount of work that would be required for each brokerage to implement the “Alt tag” process for every image associated with every one of the brokerage’s own home listings.

Department to consider the consequences such a requirement would have on individual businesses owners invested in their unique brands and *not* adopt this AA color contrast requirement.

III. The Department Should Impose a Minimum Compliance Period of Three Years to Level A and Five Years to Level AA for Large Entities

The Department's proposed two-year compliance period is much too short. NAR maintains that covered entities need a minimum of three years to achieve compliance with WCAG 2.0 Level A, and another two years to achieve WCAG 2.0 Level AA conformance. Small entities need even more time, as discussed in Section IV.

Covered entities can only achieve compliance on this timeline if they can focus on those activities without fear of or distraction by lawsuits. It is therefore essential that the Department immediately implement protections for covered entities that are working toward conformance with the access standard, and make clear that entities working to achieve conformance, even before the compliance dates, are immune from liability under the ADA and are not engaging in unlawful discrimination. Without this clear statement, covered entities will have to divert funds and manpower away from the task of making their websites accessible to defend lawsuits and respond to demand letters.

There are many reasons for the NAR's proposed 3-year minimum compliance period. As discussed in Section II, it will take eight people working full time for a year to create alternative text for a website with 100,000 images, and that is just one requirement of dozens, many of which are even more technically difficult to implement. As detailed further below and in Section X, there are a number of other difficulties surrounding hiring qualified consultants that bar a more expedited compliance timeframe. The Department must consider how retaining assistance

of a reputable digital accessibility consultant is both time consuming and costly for small and large entities alike.

Most accessibility consultants are unwilling to make the required coding and programming changes to bring a website into conformance. These consultants typically perform audits of a covered entity's website and provide a report that identifies the issues requiring remediation accompanied by generic guidance on how to address them, but do not themselves provide the repairs. Thus, the covered entity must expend further time and money for its internal IT team or outsource to a vendor to implement necessary changes, which includes an initial training period for the remediation work. If not paying an external website developer, real estate firms sometimes have the consultant train their in-house website development teams to perform the remediation, which can be challenging and lengthy because their web development personnel have little knowledge or experience in implementing these accessibility changes.

Making matters worse, there are very few companies even available to provide the digital accessibility consulting services and that have a meaningful track record (*i.e.*, fewer than ten) with the development and implementation of WCAG 2.0 AA. This shortage of consultants is a serious problem considering the number of entities that need their services. In the past year, there has been a surge in the demand for such consultants and a corresponding increase in pricing and reduction of their availability. An audit of a website can cost anywhere from \$15,000 to \$75,000 or more, depending on the size and complexity of the site, amongst other factors. Guidance during the remediation process can cost \$100 to \$250 per hour a la carte. Re-audits of websites after accessibility changes are made, and issuance of a certificate or letter of conformance to WCAG 2.0 AA as proposed by the SANPRM, can cost an entity at least another \$15,000 to \$50,000.

For larger entities, conformance also requires extensive organizational process changes to ensure that all content loaded onto a website by the many people in various departments conforms to the standard. The cost of making a website conform with WCAG 2.0 AA (ranging from hundreds of thousands to millions of dollars for a large website, to a less expensive yet equally impactful sum for a small entity's smaller website) is also a major expense that must be budgeted *at least a year in advance*.

In short, the engagement of a qualified consultant is a burdensome and expensive proposition, which is more daunting for those brokers and agents who have no in-house website development expertise. NAR suggests that the Department canvas the field of such consultants and determine for itself the number of consulting companies that are qualified, including costs for services, to consider when establishing compliance periods. Such evidence will prove that a longer timeframe than what the Department has proposed for Level A and AA compliance is necessary.

IV. Small Entities Must Have a Longer Compliance Timetable

It is crucial for smaller entities – such as independent contractors engaged in the business of real estate – to have a different compliance timetable, or be subject to a less demanding access standard. Of these options, NAR supports a longer compliance timetable, such as four years for small entities to conform to WCAG 2.0 Level A and six years to conform to Level AA.

As discussed in detail above, the process of compliance demands expending extensive resources for all entities; and small entities require more time to bear the costs and labor required in this process – if they are able to bear it at all. The compliance timeframe begins for many entities with first becoming aware of the issue and requirements. Second, the entity learns who the qualified consultants are in the area and how few there are to choose from to aid with compliance. Third, the entity issues RFPs then vets those proposals and interviews consultants.

Fourth, the entity negotiates the terms of the engagement. Fifth, the entity schedules a time for the consultant to perform an audit. Sixth, the entity budgets the time, qualified personnel and budget – not to mention scheduling remediation work to fit into already-scheduled updates – for the entity to make all necessary changes identified in the consultant’s audit report. Each of these hurdles is more challenging for small entities and individuals, which have far fewer resources to dedicate to this issue, and are unlikely to have the technical experience to manage this process. Small entities will require the assistance of outside consultants, and vendors to help with remediation. In this environment, there is simply no way that small entities, including independent agents, can meet the Department’s proposed two-year compliance deadline.

Smaller entities are also not in a position to compete with larger companies for the services made available by only handful of consultants and often cannot implement any accessibility changes themselves due to insufficient personnel or expertise. Those entities will therefore be more vulnerable to continued private demand letters and lawsuits, and Department enforcement actions. In the face of these challenges, smaller brokerages and agents would have no other choice but to take down their own websites, which would essentially force them out of business, reducing choices for consumers participating in the market. Displaying property information online is so essential to the real estate industry today that it is not possible for a broker to compete without a website. This makes the Department’s adoption of less demanding requirements in the form of a longer timeframe for small entities imperative.

If the Department adopts a longer timetable for small entities, it will also need to define the characteristics of a “small” entity. For the real estate industry, this definition could be based on some combination of revenue and headcount. A smaller entity in the real estate industry could

have significant revenues, but few workers, which would result in scarcer resources to dedicate to this issue.

V. All Content Posted before the New Rule’s Effective Date and Not Updated or Materially Altered Thereafter Should Be Exempt

The Department’s proposal to exempt “archived web content” is a step in the right direction, but the way it proposes to define “archived web content” is not practical, not realistic, and would create undue burdens for the industry. The Department should instead exempt content that was placed on the website prior to the Effective Date of the regulation and not updated or otherwise materially altered after the Effective Date.

The Department is considering defining “archived web content” as content that is: (1) maintained exclusively for reference, research, or recordkeeping; (2) not altered or updated after the date of archiving; and (3) organized and stored in a dedicated area or areas clearly identified as being archived. To take advantage of this exception, real estate professionals would have to identify all material to be archived and move it to the dedicated archival area. This identification process alone is a significant undertaking. Moreover, most agents and brokerages would not likely have an archive area on their websites – in part because all content – even years’-old property information may need to be accessed as reference material at any time. To alleviate this burden and encourage covered entities to maintain old information that may be beneficial to the public, the Department should instead exempt content that was placed on the website prior to the Effective Date of the regulation and not updated or otherwise materially altered after the Effective Date.

The types of old web content falling within this exemption would likely include videos, photos, old property information, newsletters, contracts, PowerPoints or informational videos, disclosure statements, marketing materials, and other transactional or brokerage data. This would

include, and NAR therefore supports the Department’s proposed exemption for, conventional electronic files such as pdfs, Word documents, Excel spreadsheets, and PowerPoint presentations that existed on a website before the compliance date of any proposed rule.

VI. All Third-Party Web Content Should Be Exempt from Any Access Standard

A. Content the Covered Entity Provides to a Third Party

The Department states that it is considering exempting third-party web content that is linked from a covered entity’s website from conformance with any accessibility standard, except where the covered entity uses the third-party website or web content to allow members of the public to participate in or benefit from the covered entity’s services, programs, or activities.

NAR strongly supports an exemption for third-party web content, but disagrees that there should be any limitation on this exemption.

The real estate industry perfectly illustrates why the proposed limitation on the exemption is meaningless. For example, as explained in Section I, brokers feed their own content, their property listings, to the MLS. Other brokers pull that content from MLS and put it on their own websites. The inclusion of the “feeding brokers” content on the third party “pulling brokers” websites allows the public access to the services of the “feeding broker” – the property seller’s representative – and the “pulling broker” – who would most likely represent the property buyer. But once the “feeding broker” submits the property listing to MLS, it has no control over how that information is displayed on the “pulling brokers” websites or on any third party website that may receive that property information in a feed from the MLS. Accordingly, the Department’s proposed exemption, as limited, would make a real estate professional who provides content, such as a property listing to a third party site such as REALTOR.com whether directly or through the MLS process, liable under the ADA if the third party’s website does not conform to the access standard the Department adopts through this rulemaking. This limitation to the

exemption is unworkable and renders the entire exemption meaningless. Countless other entities would likely face similar situations.

A covered entity has no control over a website that it does not own or operate and has no ability or authority to require a third party to make changes to its website. Because it is only one of thousands of other entities that do business with any given third party website, the covered entity has no leverage to get the third party to make its website conform to the access standard; nor does the covered entity have the resources or ability to determine the level of conformance of the third party's website in the first place. The covered entity's only option would be to *not* to allow its content to be linked to the third party's site, which, as discussed above, is often not possible and is not economically viable. Real estate professionals rely on the broad dissemination of their listings as a vital part of their business model. In fact, consumers attempting to sell their homes also rely heavily on the broad dissemination to attract buyers at the highest price, and consumers looking to purchase a home rely on the broad dissemination to gain knowledge about their available options. Thus, limiting such dissemination would injure real estate professionals and consumers alike. This exemption, without any limitation, is essential to real estate professionals' ability to do business and provide their valuable services to home buyers and sellers.

B. Third Party Content Posted on the Covered Entity's Website

The Department is proposing an exemption from the access standard it adopts through this rulemaking for content that is posted on a covered entity's website by third parties, unless the website owner has *chosen* to include the third party content on the Web site. NAR supports a rule that does not impose liability on a website owner for non-conforming third party content on the covered entity's website. However, NAR strenuously objects to the carve-out which would

impose liability on a website owner for inaccessible third party content that the owner has *chosen* to include on its site.

There are hundreds of thousands of brokerage websites that provide property listing information, including photographs, provided by other MLS participants for display. Each of these real estate professionals needs to be able to display other professionals' content, and have displayed their own content on MLS and other brokerages' websites, without fear of liability for nonconforming content they use nor for their own content others post in a nonconforming way. The inability to continue to do so would be a fundamental departure from the way real estate professionals operate their businesses and provide services to their clients. As such, the most reasonable solution to the third party content issue is to *exempt all third party content from application of the access standard, and to make entities responsible only for their own web content on their own websites provided that they make third party content on their site available to the public in an alternative format upon request (i.e. in person communication).*

This framework is akin to the safe harbor under the *Digital Millennium Copyright Act* ("DMCA") for third party content appearing on a website. *See* 17 U.S.C. § 512(c). Similar to the DMCA, Section 230 of the *Communications Decency Act of 1996* also recognizes that a website owner cannot be held responsible for the compliance with certain laws of content posted by third parties on its website. *See* 47 U.S.C. § 230 ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.") As such, exempting all third party content from compliance with the access standard would also be consistent with recognized principles of existing federal law.

As the lawmakers recognized in enacting these laws, requiring a website owner to police all third party content on its site – here, to ensure it conforms to the access standard – is

mandating the impossible. For example, as discussed in Section I, through the IDX program, brokers' property listings are fed to third party brokers' websites for display. Brokers cannot police whether the tens of thousands of images that come from these feeds have proper alternative text. Even if they could, the only action they could take is to stop participating in the program, which would effectively preclude them from competing in the real estate industry. The Department must exempt this type of third party content from coverage under the access standard because there is simply no reasonable way to screen it out. This issue is likely to harm small entities the most because they tend to rely on vendors to provide them with the software/content needed to run their businesses and have the least amount of resources to devote to such impractical compliance requirements. Because it would be extremely difficult for the Department to write a rule that distinguishes this type of third party content from any other type of third party content, all third party content should be exempt.

There is also the issue of inaccessible third party content that is essential to an entity's business and the sole source of that content. For example, many firms use Google Maps on their websites. Google Maps is not accessible to blind users. We are aware of no similar application that is accessible.³ While we believe a blanket exemption for third party content is the most practical solution to this issue, at a minimum, covered entities should not be precluded from including inaccessible third party content on their sites if a limited, reasonable, search reveals that there is no other accessible alternative that meets their needs. In this situation, denying the covered entity the ability to use the inaccessible third party content would fundamentally alter the goods and services the entity offers the public. The Department must recognize this practical challenge and provide guidance as to the required level of diligence necessary to discharge the

³ Federal courts use Google Maps as well and their websites are required to be accessible by Section 508 of the Rehabilitation Act. See <http://www.dcd.uscourts.gov/court-location>.

obligation to conduct a reasonable search for vendors providing accessible third party content, as well as the necessary documentation to prove that obligation was satisfied.

In the event that an exemption for all third party content is not adopted, there should be at a minimum, a safe harbor from liability for all non-conforming content on its website provided the covered entity: (1) has made their website conform to the access standard by the compliance date stated in any final rule; (2) has a program in place to review the accessibility of their website on a regular basis; (3) has available alternative means to accessing information and services available on its website(s); and (4) has a process in place for receiving complaints about the website's accessibility and takes down, provides in an alternative format, or brings into conformance with the access standard the complained-of inaccessible content within a reasonable amount of time.

VII. Content Appearing On Social Media Platforms Should Be Exempt

NAR objects to the Department's proposal to require information provided by covered entities on social media platforms, such as Facebook, Youtube, Twitter, and LinkedIn, be available in some alternative way if the platforms are not accessible. Social media occurs in real time. Many real estate professionals have a presence on Twitter, Facebook, and other social media sites where they not only post more static information but also communicate with the public in real time. In fact, 70 percent of REALTORS® are using social media and an additional eight percent plan to engage in social media in the future.⁴ This is an increase of five percent from 2015, and will only increase as more professionals enter the business.⁵ The use of social networking sites is more prominent among those aged 49 or under, where eight in ten

⁴ 2016 NAR Member Profile.

⁵ *Id.*

REALTORS® are using social media to promote their business.⁶ If a covered entity tweets out a comment on Twitter and Twitter is not accessible, where else is the covered entity supposed to post tweets? The same practical challenge would exist for posts, comments, and replies to comments on Facebook.

Requiring covered entities to provide the information they post on inaccessible social media websites in some alternative location would be extremely difficult, suppress communications with the public, provide another opportunity to enhance the plaintiffs' bar with opportunistic litigation, and most importantly, limit a covered entity's ability to address issues raised by the public or promote the interests of their clients on these social media sites.

VIII. Conforming Alternate Versions of Web Pages and Web Content Should Be Permitted

NAR supports the adoption of a rule permitting the use of conforming alternate versions of a webpage and/or web content both: (1) when it is not possible to make the web content directly accessible due to technical or legal limitations; and (2) when used to provide access to conventional electronic documents. However, these conforming alternate versions must still be subject to undue burden and fundamental alteration principles, discussed further in Section IX, especially with respect to cost of creating the conforming alternate version.

IX. Undue Burden, Fundamental Alteration, and Technical Infeasibility Defenses Should Be Available

The Department is considering allowing the use of these defenses as grounds to not make Web content conform to the access standard the Department adopts, subject to the following requirements: (1) the burden of proving these defense would remain on the public entity; (2) 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

⁶ *Id.*

funding and operation of the service, program, or activity; and (3) the decision must be documented with a written statement of the reasons for reaching that conclusion. In addition, the public entity would still have to provide access in some alternative fashion unless doing so would result in a fundamental alteration in the nature of the service, program, or activity offered by the covered entity or undue financial and administrative burdens.

NAR agrees that the undue burden and fundamental alteration defenses should be available for entities to rely upon as grounds for not making Web content conform to the access standard the Department adopts. However, technical infeasibility should be an additional defense, or be considered a form of undue burden. The defense of technical infeasibility is already in the statute and applies to physical access barriers. This concept is equally applicable in the website context where our members have encountered situations where web content cannot be made accessible.

For the undue burden and fundamental alteration defenses to be meaningful, the Department must establish guidelines about when such defenses may be invoked. A continual source of frustration for covered entities is the lack of clarity about the situations when these defenses would apply with regard to other requirements of the ADA.

The requirement that the head of an entity provide a written determination whenever these defenses are invoked is excessive and creates an undue administrative burden. A written determination as to why conformance is an undue burden or results in a fundamental alteration should be documented, but the process should not be onerous or result in substantially more work.

The final rule should also recognize and take into account the fact that not being able to use a unique technology or product that is available only from one vendor constitutes a

fundamental alteration. For example, Google has a product called Business View that allows a business to show off to consumers the attractive and inviting interior atmosphere of that business. For real estate professionals, this is especially appealing because it displays properties in an enhanced fashion and attracts clients by providing a more complete picture of the space, which is then enriched with personal communication occurring throughout a transaction. No other vendor offers a similar product. Not being able to use Business View would constitute a fundamental alteration because an important feature of the website would be eliminated.

The Department could build into its final rule a requirement that entities in such situations make a written request to the vendor to provide the technology in a manner that complies with WCAG 2.0 AA. If the vendor refuses, fails to respond, or indicates the technology is incapable of conformance to WCAG 2.0 AA, the covered entity would be in a safe harbor and be able to use the technology.

The Department should make clear that in determining whether a covered entity has established that making certain web content accessible is an undue burden, a court should take into account the very large number of website requirements with which entities must comply, and the significant undertaking required to budget, prioritize, staff, and manage all necessary actions to achieve compliance with those requirements. Entities are also constantly changing and updating websites to provide current, accurate, bug-free content, and to comply with all legal requirements. Many entities have website update schedules, created according to carefully-set priorities, with new updates and content roll-outs scheduled months in advance, and some requiring months to years of planning and work. The final rule should take into account these realities, and not require an entity to drop everything, or to abandon and disrupt all these long-planned activities. Accessibility improvements must likewise be well-planned and scheduled in

conjunction with the business operations to ensure effective, accurate, and lasting implementation.

X. The Department Must Issue Detailed Guidance on How to Measure Compliance with WCAG 2.0 AA

The Department seeks comment on how compliance with WCAG 2.0 Level AA should be assessed or measured, and has asked whether: (1) the measurement be based on the percentage of web content that is accessible, or some minimum threshold of compliance; and (2) there are circumstances where web accessibility errors may not be significant barriers to accessing the information or functions of a website.

The question of how to measure a website’s compliance with WCAG 2.0 is a very difficult one that requires detailed guidance from the Department. There is currently no consensus about how testing of a website is to be conducted, let alone when the website can be declared conforming with the WCAG 2.0. This question of when a website “substantially conforms” with WCAG 2.0 Level AA such that it is considered accessible perplexes and frustrates businesses – which must rely upon a limited number of reputable consultants to make that declaration – and contributes to the ambiguity on which plaintiff’s attorneys have capitalized. Although most reputable consultants believe that both automated and manual testing are essential, at least one very well-known and reputable consultant only performs manual testing. Some consultants only use automated tools even though such tools only pick up about 25-30 percent of accessibility errors on a site and cannot discern a number of errors, such as incorrect alternative text or inappropriately labeled forms. Automated tools are also notorious for uncovering “false positives” and not uncovering the accessibility bugs that most impact usability of the website. Most consultants agree that it is not necessary to test every page of a website to do an audit or issue a statement that a website conforms to WCAG 2.0 AA, but others are

reluctant to issue such statements without a review of every page, which can be wildly burdensome and problematic given the significant amount of updates that occur throughout the normal course of business.

In light of all this, a final rule setting a WCAG 2.0 AA conformance standard by which ADA compliance is measured must contain the following elements:

- A. Website testing protocols (*e.g.*, what percentage of pages must be tested; methods of testing [automated vs. User testing]; software and browsers to be used for testing);
- B. The specific objective and subjective criteria that will be applied to determine whether compliance has been achieved and who is qualified to make this determination;
- C. A recognition that errors that do not prevent access are not violations of the ADA; and
- D. A safe harbor is made available for covered entities encountering instances of non-conformance with the access standard if the covered entity: (1) has made their website conform to the access standard by the compliance date stated in any final rule; (2) has a program in place to review the accessibility of their website on a regular basis; (3) has available alternative means to accessing information and services available on its website(s); and (4) has a process in place for receiving complaints about the website's accessibility and takes down, provides in an alternative format, or brings into conformance with the access standard the complained-of inaccessible content within a reasonable amount of time.

The bottom line is that covered entities want to comply, but the Department must give them clear and specific rules on how to do so, in addition to reasonable defenses available for unforeseen circumstances. Simply adopting the WCAG 2.0 AA as a standard is not enough.

XI. It Is Premature to Make Rules Regarding Mobile App Accessibility

NAR strongly believes it is premature for the Department to adopt a standard for mobile apps at this time because there is currently no generally-accepted standard for mobile application accessibility; and in light of the already significant burden that will be faced in learning and implementing any website standard the Department adopts; the Department should not include mobile app accessibility in the final rule. After the present rulemaking, entities will invest time and resources learning how to apply accessibility techniques on their websites, which they can

then apply to their mobile apps. The accessibility of mobile applications will therefore likely improve as a result of the present rulemaking; without imposition of a rule to mobile applications that may be based on a disputed standard, imposed as an add-on to the present rulemaking rather than through the proper rulemaking process specific to mobile applications.

XII. Covered Entities Will Incur Significant Direct and Indirect Costs in Complying with Web Access Regulations, But Benefit from a Certain Standard

As demonstrated throughout the foregoing discussion, requiring covered entities to make their websites conform to an access standard the Department adopts, such as WCAG 2.0 Level AA, and maintain conformance is very expensive. That cost will have a far greater impact on smaller entities, especially the self-employed and/or independent contractor. Examples of activities that would impose significant initial and ongoing costs on entities small and large include:

Initial Activities

- Initial audit of website
- Website remediation
- Elimination of content from websites due to expense/difficulty associated with making website conform to the access standard
- Training of employees on how to remediate
- Re-audit(s) of website
- Certification of conformance with the access standard
- Development of policies and procedures to achieve and maintain website accessibility

Ongoing Activities

- Training of all employees who have the ability to impact a website's accessibility on accessibility techniques
- Annual audits of website
- Automated scans of websites
- Licensing of automatic scanning software
- Monitoring and responding to customer complaints about website access issues
- Creating alternative text for images
- Creating audio descriptions and closed captions for videos
- Development of accessible upgrades to website
- Litigation defense

- Exclusion of content from websites due to expense/difficulty associated with making website conform to the access standard.

NAR is hopeful that adoption of a specific access standard, with a safe harbor framework like that outlined above, will benefit all covered entities in providing much-needed clarity in what is legally required, and quell the demand letters and lawsuits diverting their attention and financial resources from compliance to litigation and settlements.

XIII. Password-Protected Web Content Should Be Exempt

The Department sought comments on password-protected educational websites and courses. While this topic was specific to education, the concept of including within the scope of this rule content that is not provided to the general public, but is only provided behind a password-protected, invitee-only “locked door” is applicable to a much wider group of industries, and an area of particular concern to real estate professionals.

NAR members and other real estate professionals regularly use the MLS, which is a password-protected site not available to the general public. In addition, NAR members use the password-protected portions of the NAR websites, as well as their state or local association websites. Any final rule should make clear that these password-protected sites, or portions of the sites which are not made available to the general public, are exempt from any accessibility obligations under the rule.