



January 24, 2011

VIA ELECTRONIC SUBMISSION

The Honorable Thomas E. Perez
Assistant Attorney General for Civil Rights
U.S. Department of Justice
Civil Rights Division
1425 New York Avenue, N.W.
Suite 4039
Washington, DC 20005

Re: *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations; 75 Fed. Reg. 43460 (July 26, 2010).*

Dear Mr. Perez:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration is pleased to submit these comments to the U.S. Department of Justice (DOJ) regarding its advance notice of proposed rulemaking (ANPRM) entitled, *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*.¹

Advocacy commends DOJ for seeking public input early in the regulatory process, and for specifically asking questions on the impact of this regulation on small entities. Advocacy believes that a rule requiring website accessibility for entities covered under Title II and Title III of the Americans with Disabilities Act (ADA) would have a significant economic impact on a substantial number of small entities. Advocacy recommends that DOJ complete an Initial Regulatory Flexibility Analysis (IRFA) following the ANPRM, as required by the Regulatory Flexibility Act (RFA). Advocacy is committed to helping DOJ reach out to small entities to analyze the economic impacts of this rulemaking and identify significant regulatory alternatives that may minimize the cost of this regulation for small businesses.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory

¹ DOJ, *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460 (July 26, 2010).

Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The recently passed Small Business Jobs Act of 2010 codifies Section 3(c) of Executive Order 13272, which requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Background

The Americans with Disabilities Act (ADA), signed into law in 1990, is a comprehensive civil rights law prohibiting discrimination on the basis of disability.⁶ Title II of the ADA prohibits discrimination on the basis of disability in services provided by state and local governments.⁷ Title III of the ADA prohibits discrimination in the activities of commercial facilities and public accommodations, and sets standards for making buildings accessible for people with disabilities.⁸ Public accommodations are businesses that are open to the public and affect commerce, and Title III lists 12 categories such as hotels, restaurants, theatres and retail establishments.⁹

DOJ is proposing to revise Title III of the ADA to require that websites operated by public accommodations are accessible to people with disabilities. DOJ is also proposing to revise Title II to require that websites operated by state and local governments also are ADA accessible.¹⁰ Although the ADA and DOJ's implementing regulations do not directly mention website accessibility for businesses and other entities covered by the ADA, the DOJ believes that the "statute's broad and expansive nondiscrimination mandate reaches goods and services provided by covered entities," such as websites.¹¹

DOJ's ANPRM discusses barriers to web accessibility faced by people with disabilities (such as visual impairments), and the use of assistive technology (such as screen readers) that enable them to navigate Web sites. DOJ's rule asks questions regarding various accessibility standards that might enable the use of assistive technology on websites,

² 5 U.S.C. § 601 *et seq.*

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 *et seq.*).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ *Id.*

⁶ Americans with Disabilities Act, 42 U.S.C. 12101 *et. seq.*

⁷ DOJ, *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 75 *Fed. Reg.* 56164 (Sept. 15, 2010). DOJ recently finalized a different rule updating Title II.

⁸ DOJ, *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 75 *Fed. Reg.* 56236 (Sept. 15, 2010). DOJ recently finalized a different rule updating Title III.

⁹ 42 U.S.C. 12181(7); 28 CFR 36.104.

¹⁰ 75 *Fed. Reg.* at 43463.

¹¹ *Id.*

coverage limitations, compliance issues, effective dates and the possible impacts on small entities.

Advocacy Recommends that DOJ Complete an IRFA for Proposed Rule

Under the Regulatory Flexibility Act (RFA), when an agency proposes a rule, it must perform an Initial Regulatory Flexibility Analysis (IRFA), unless the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities.¹² An IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities; (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.¹³

Advocacy recommends that DOJ complete an IRFA for a proposed rule following the ANPRM. Based on our conversations with the small business community, we believe that a rule requiring website accessibility would have a significant economic impact on a substantial number of small entities.

IRFA Must Define the Numbers of Small Businesses that May Be Affected by Rule

The Regulatory Flexibility Act (RFA) covers small businesses as set forth in SBA regulations, small organizations such as non-profits, and small governmental jurisdictions with a population of less than 50,000.¹⁴ There are millions of small entities that could be potentially covered under DOJ's proposed rule on web accessibility under Title II (small jurisdictions) and Title III of the ADA (small businesses and small organizations). When DOJ releases its proposed rule on ADA accessibility of websites, the agency must clarify what types of small entities and what types of website activity would be covered under this regulation so that the agency will get proper input from the small business community.

IRFA Must Analyze Small Business Compliance Costs from Rule

Section 603(b) of the RFA requires agencies to describe the projected reporting, recordkeeping and other compliance requirements of a proposed rule.¹⁵ This includes compliance requirements resulting from the proposed rule, such as the following: (a) capital costs for equipment needed; (b) costs of modifying existing processes and procedures; (c) lost sales and profits; (d) changes in market competition; and (e) hiring employees and other professionals dedicated to compliance with regulatory requirements.¹⁶

Small business representatives have told Advocacy that it was difficult to obtain compliance cost estimates because small entities were unfamiliar with the ANPRM and the

¹² 5 U.S.C. § 603, 605.

¹³ *Id.*

¹⁴ 5 U.S.C. § 601(3)-(5).

¹⁵ 5 U.S.C. § 603(b).

¹⁶ SBA Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 34 (June 2010), available at: <http://www.sba.gov/sites/default/files/rfaguide.pdf>.

concepts of ADA website accessibility. Before DOJ releases a proposed rule, Advocacy recommends that the agency do more outreach to the small business community to provide more information and obtain feedback regarding costs, data and the overall feasibility of this rule.

IRFA Must Consider Significant Alternatives for Small Entities

Section 603(c) of the RFA requires that agencies provide a description of significant alternatives to the proposed rule which accomplish the stated objectives and which minimize any significant economic impact of the proposed rule on small entities.¹⁷ Advocacy is pleased that DOJ's ANPRM solicits public comment on small business alternatives such as coverage limitations, different effective dates, safe harbors for existing sites and possible exemptions by employee size or amount of revenue. Advocacy will continue to do outreach to the small business community on other alternatives that may minimize the impact of this rule on small entities.

Conclusion

Advocacy believes that a rule requiring website accessibility for entities covered under Title II and Title III of the ADA would have a significant economic impact on a substantial number of small entities and we recommend the completion of an IRFA. Advocacy is committed to helping DOJ reach out to small entities to analyze the economic impacts of this rulemaking and identify significant regulatory alternatives that may minimize the cost of this regulation for small businesses. Advocacy will be happy to share further information which it obtains through its regular contacts with small business representatives. Please contact me or Janis Reyes at (202) 205-6533 or (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//
Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

//signed//
Janis C. Reyes
Assistant Chief Counsel

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs

¹⁷ 5 U.S.C. § 603(c).