

# Client Alert

December 2017

## Virginia Credit Unions Sued Over Website's Inaccessibility to the Visually Impaired

A number of Virginia based credit unions have been sued on the basis that their websites do not comply with Title III of the Americans with Disabilities Act (the "ADA") because their websites are not accessible by the visually impaired. The lawsuit was filed by one of the firms that have either threatened a number of financial institutions with litigation over their websites or actually filed lawsuits. These lawsuits seek injunctive and equitable relief as well as attorneys' fees and costs. In addition to these lawsuits, more than 30 Virginia credit unions have received demand letters from plaintiffs' counsel. Similar letters have been sent to both banks and credit unions in a number of states, including California, Texas, Washington, and Virginia. Hunton & Williams is working with a number of clients as well as the Virginia Credit Union League to protect the interests of Virginia credit unions in connection with these demands and lawsuits.

In the most recent letters received by Virginia based credit unions, the plaintiffs' attorneys threaten legal action and seek damages and attorneys' fees. Plaintiffs allege that the websites do not comply with the Web Content Accessibility Guidelines ("WCAG"), which are published by the Web Accessibility Initiative of the World Wide Web Consortium. The lawsuits allege, among other things, that the websites do not contain embedded code that would allow a blind patron using screen reader software to vocalize a description of the graphics.

The ADA itself does not contain an express website accessibility requirement. To date, there have not been any guidelines issued regarding website compliance with the ADA. The United State Department of Justice (the "DOJ") is the agency that enforces the ADA. Notwithstanding the fact that the DOJ issued an Advance Notice of Proposed Rulemaking in 2010 in which it announced it was considering for the first time issuing regulations relating to the accessibility of internet sites to disabled users, and admitted that "clear guidance on what is required under the ADA does not exist," it has not issued any website accessibility regulations whatsoever. After a series of delays, in July 2017, all DOJ website accessibility rulemaking was placed on a list of "Inactive Actions."

The lack of any website accessibility rule, lawfully-enacted standard against which website accessibility can be assessed, method upon which compliance against any alleged requirement can be measured, and prospective date for compliance has not stopped aggressive plaintiffs' lawyers from filing lawsuits or threatening litigation based on alleged inaccessible websites. The DOJ, despite not having issued accessibility guidelines, has entered the fray and bolstered plaintiff-side lawsuits by requiring businesses in consent decrees to adopt WCAG guidelines and initiate programs that improve accessibility to their websites, and then issuing press releases to publicly endorse the WCAG as an alleged "industry standard." In some cases, the DOJ has intervened or made *amicus curiae* appearances in pending ADA website lawsuits to take the position that the websites are subject to the ADA's accessibility standards generally and WCAG guidelines specifically. To date, the DOJ's legal positions have not been tested in a federal court of appeals decision.

Until new laws are enacted or new regulations are issued, to reduce the risk of lawsuits, we recommend that credit unions take voluntary, affirmative action to improve website accessibility. The WCAG guidelines address website accessibility issues in minute detail, addressing issues such as (1) text alternatives for photographs and graphics to be changed into usable formats for the visually impaired, (2)

video accessibility via text and sequencing, (3) keyboard accessible content, (4) alternatives to time based media, (5) screen reading software, and other things.

## Best Practices

There are a number of actions that a credit union may take to help reduce the risk of a lawsuit that its website is not accessible under the ADA.

**Review The Web Content Accessibility Guidelines.** These guidelines (WCAG 2.0 AA is the current version) are not legal standards, but provide guidance for your website. They specify how to make content accessible, primarily for people with disabilities, including providing equivalent alternatives to auditory and visual content, ensuring direct accessibility of embedded user interfaces and using technologies and guidelines. Compliance with these guidelines by making any necessary changes likely would be a strong hedge against any claim that the website is not in conformity with the ADA.

**Provide Telephone Assistance.** While no court has yet ruled on what constitutes equivalent service through the use of a telephone number, providing a telephone number to provide assistance to blind customers 24 hours a day, 7 day a week (as those are the times that a person can access a website online) may be deemed effective alternative service. Importantly, a credit union would need to show that information on its website providing the telephone number is accessible with blind screen reader software.

**Insurance Coverage.** Credit unions should check their insurance policies to determine whether they cover claims based on website inaccessibility. Such coverage might exist under a cyber liability policy.

**Vendor Indemnification.** If you contract out your web design, hosting and /or on line services to a third party vendor, your agreement might indemnify you against claims based on the vendor's services. If there is no indemnification you should consider negotiating one – with express references to WCAG 2.0 AA compliance – when the contract is up for renewal.

## Potential Defenses

There are a variety of potential defenses to an ADA demand letter or lawsuit. These include arguments that: (1) there are currently no enforceable standards for websites as noted above (and thus the defendant's constitutional right to due process is violated), (2) the law firm's client may not have standing to bring a claim if he cannot show a concrete injury, (3) the plaintiff's firm may have run afoul of professional responsibility rules by representing an injured plaintiff and then offering services to the bank to correct the website deficiencies. Despite these potential defenses, however, a number of lawsuits have been proceeding, and the track record of successfully making one or more of these arguments is decidedly mixed.

## Pending Legislation

In January of this year legislation, known as the ADA Education and Reform Act of 2017 (H.R. 620), was introduced into the House of Representatives to help reign in civil lawsuits under the ADA. Recently the National Association of Federally Insured Credit Unions sent a letter to Rep. Ted Poe (R-TX), the bill's original sponsor, encouraging the expansion of the bill's protection to website lawsuits. The bill currently only covers architectural barriers and requires that before any lawsuit is filed that the person provides notice to the owner or operator of the place of public accommodation and be given an opportunity to remove the barrier. The bill currently has 92 co-sponsors. There is currently no Senate version.

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We believe that credit unions should take voluntary steps to protect themselves in light of potential litigation from private individuals and disabled persons advocacy groups. These efforts include reviewing the credit union's level of compliance with the noted WCAG guidelines, making necessary changes to the website, and having experienced defense counsel assist with advice to remediate problems and either preempt, or alternatively, respond to website accessibility demands and lawsuits quickly and efficiently. This compliance review should not be limited to the website as mobile banking, apps, and other technology products no doubt will be the next targets.

Hunton & Williams lawyers have worked with financial institutions, major retailers, restaurants, and other businesses in lawsuits involving alleged violations of the ADA, both in general and with regard to website accessibility. We have successfully resolved many of these claims and believe that our strategies for the defense and resolution of these prior suits will be of value to our clients in dealing with this latest attack on credit unions.

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