rules? What are the costs and benefits, both quantitatively and qualitatively, of providing individuals with disabilities an equal opportunity to access health care, recreational facilities, exercise equipment, furniture in hotels, nursing homes, and hospitals, and electronic information and transactions? The Department seeks specific cost information, including information on the costs and benefits, as well as anecdotal evidence of the costs and benefits of accessible equipment and furniture.

A. Impact on Small Entities

Consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. See 5 U.S.C. 603–04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002). The Department will make an initial determination as to whether any rule it proposes is likely to have a significant economic impact on a substantial number of small entities, and if so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small entities and regulatory alternatives that reduce the regulatory burden on small entities while achieving the goals of the regulation. In response to this ANPRM, the Department encourages small entities to provide cost data on the potential economic impact of adopting a specific requirement for Web site accessibility and recommendations on less burdensome alternatives, with cost information.

Question 23. The Department seeks input regarding the impact the measures being contemplated by the Department with regard to accessible equipment and furniture will have on small entities if adopted by the Department. The Department encourages you to include any cost data on the potential economic impact on small entities with your response.

Question 24. Are there alternatives that the Department can adopt, which were not previously discussed, that will alleviate the burden on small entities? Should there be different compliance requirements or timetables for small entities that take into account the resources available to small entities or should the Department adopt an exemption for certain or all small entities from coverage of the rule, in whole or in part. Please provide as much detail as possible in your response.

Dated: July 21, 2010.

Thomas E. Perez,

Assistant Attorney General, Civil Rights Division.

[FR Doc. 2010–18331 Filed 7–22–10; 4:15 pm]

BILLING CODE 4410–13–P

DEPARTMENT OF JUSTICE

28 CFR Parts 35 and 36

[CRT Docket No. 110]

RIN 1190–AA61

Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Department of Justice (Department) is considering revising the regulations implementing title III of the Americans with Disabilities Act (ADA or Act) in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web), accessible to individuals with disabilities. The Department is also considering revising the ADA's title II regulation to establish requirements for making the services, programs, or activities offered by State and local governments to the public via the Web accessible. The Department is issuing this advance notice of proposed rulemaking (ANPRM) in order to solicit public comment on various issues relating to the potential application of such requirements and to obtain background information for the regulatory assessment the Department must prepare if it were to adopt requirements that are economically significant according to Executive Order 12866.

DATES: The Department invites written comments from members of the public. Written comments must be postmarked and electronic comments must be submitted on or before January 24, 2011. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by RIN 1190–AA61 (or Docket ID No. 110), by any one of the following methods:

- *Federal eRulemaking Web site: www.regulations.gov.* Follow the Web site's instructions for submitting comments.
- *Regular U.S. mail:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031–0885.
- *Overnight, courier, or hand delivery:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Christina Galindo-Walsh, Attorney, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY). This is not a toll free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

You may obtain copies of this ANPRM in large print, audiotape, Braille, or computer disk by calling the ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY). This ANPRM is also available on the ADA Home Page at *http://www.ada.gov.*

SUPPLEMENTARY INFORMATION:

I. Electronic Submission of Comments and Posting of Public Comments

You may submit electronic comments to *www.regulations.gov.* When submitting comments electronically, you must include CRT Docket No. 110 in the subject box, and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and made available for public inspection online at *www.regulations.gov.* Submission postings will include any personal identifying information (such as your name, address, etc.) included in the text of your comment. If you include personal identifying information (such as your name, address, etc.) in the text of your comment but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also include all the personal identifying information you want redacted along with this phrase. Similarly, if you submit confidential business information as part of your comment but do not want it posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first

paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.*

Comments on this ANPRM will also be made available for public viewing by appointment at the Disability Rights Section, located at 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005, during normal business hours. To arrange an appointment to review the comments, please contact the ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

The reason that the Civil Rights Division is requesting electronic comments before Midnight Eastern Time on the day the comment period closes is because the inter-agency Regulations.gov/Federal Docket Management System (FDMS), which receives electronic comments terminates the public's ability to submit comments at Midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov/FDMS system do not apply to U.S. postal comments, which will be considered as timely filed if they are postmarked before Midnight on the day the comment period closes.

II. Public Hearing

The Department will hold a hearing to solicit comments on the issues presented in this notice. The Department plans to hold the public hearing during the 180-day public comment period. The date, time, and location of the public hearing will be announced to the public in the **Federal Register**.

III. Background

A. Statutory and Rulemaking History

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability. The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires newly designed and constructed or altered State and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Section 204 (a) of title II and section 306(b) of title III direct the Attorney General to promulgate regulations to carry out the provisions of titles II and III, other than certain provisions dealing specifically with transportation. 42 U.S.C. 12134; 42 U.S.C. 12186(b).

Title II applies to State and local government entities, and, in Subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (section 504), to all activities of State and local governments regardless of whether these entities receive Federal financial assistance. 42 U.S.C. 12131–65.

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation (private entities whose operations affect commerce and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreational facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181–89.

On July 26, 1991, the Department issued its final rules implementing title II and title III, which are codified at 28 CFR part 35 (Title II) and part 36 (Title III). Appendix A of the title III regulation, at 28 CFR part 36, app. A, contains the ADA Standards for Accessible Design. On September 30, 2004, the Department published an advance notice of proposed rulemaking (2004 ANPRM) to begin the process of updating the 1991 regulations to adopt revised ADA Standards based on the relevant parts of the 2004 ADA/ABA Guidelines. 69 FR 58768. On June 17, 2008, the Department issued a notice of proposed rulemaking (NPRM) to adopt the revised 2004 ADA Standards and revise the title II and title III regulations. 73 FR 34466. The NPRM addressed the issues raised in the public's comments to the ANPRM and sought additional comment. Although the Department did not propose to include Web accessibility provisions in the 2004 ANPRM or the 2008 NPRM, the Department received numerous comments urging the Department to issue Web accessibility regulations under the ADA. Based on these comments and the reasons detailed below, the Department has decided to begin the process of soliciting comments and suggestions with respect to what an NPRM regarding Web access should contain.

B. Legal Foundation for Web Accessibility

When the ADA was enacted in 1990, the Internet as we know it today—the ubiquitous infrastructure for information and commerce—did not exist. Today the Internet, most notably the sites of the Web, plays a critical role in the daily personal, professional, civic, and business life of Americans. Increasingly, private entities are providing goods and services to the public through Web sites that operate as places of public accommodation under title III of the ADA. Similarly, many public entities under title II are using Web sites to provide the public access to their programs, services, and activities. Many Web sites of public accommodations and governmental entities, however, render use by individuals with disabilities difficult or impossible due to barriers posed by Web sites designed without accessible features.

Being unable to access Web sites puts individuals at a great disadvantage in today's society, which is driven by a dynamic electronic marketplace and unprecedented access to information. On the economic front, electronic commerce, or "e-commerce," often offers consumers a wider selection and lower prices than traditional, "brick-and-mortar" storefronts, with the added convenience of not having to leave one's home to obtain goods and services. For individuals with disabilities who experience barriers to their ability to travel or to leave their homes, the Internet may be their only way to access certain goods and services.

Beyond goods and services, information available on the Internet has become a gateway to education. Schools at all levels are increasingly offering programs and classroom instruction through Web sites. Many colleges and universities offer degree programs online; some universities exist exclusively on the Internet. Even if they do not offer degree programs online, most colleges and universities today rely on Web sites and other Internet-related technologies in the application process for prospective students, for housing eligibility and on-campus living assignments, course registration, assignments and discussion groups, and for a wide variety of administrative and logistical functions in which students

and staff must participate. Similarly, in the elementary- and secondary-school settings, communications via the Internet are increasingly becoming the way teachers and administrators communicate grades, assignments, and administrative matters to parents and students.

The Internet is also dramatically changing the way that governmental entities serve the public. Public entities are increasingly providing their constituents access to government services and programs through their Web sites. Through government Web sites, the public can obtain information or correspond with local officials without having to wait in line or be placed on hold. They can also pay fines, apply for benefits, renew State-issued identification, register to vote, file taxes, request copies of vital records, and complete numerous other everyday tasks. The availability of these services and information online not only makes life easier for the public, but also enables governmental entities to operate more efficiently and at a lower cost.

The Internet also is changing the way individuals socialize and seek entertainment. Social networks and other online meeting places provide a unique way for individuals to meet and fraternize. These networks allow individuals to meet others with similar interests and connect with friends, business colleagues, elected officials, and businesses. They also provide an effective networking opportunity for entrepreneurs, artists, and others seeking to put their skills and talents to use. Web sites also bring a myriad of entertainment and information options for Internet users—from games and music to news and videos. With the Internet, individuals can find countless ways to entertain themselves without ever leaving home.

More and more, individuals are also turning to the Internet to obtain healthcare information. Individuals use the Internet to research diagnoses they have received or symptoms that they are experiencing. There are a myriad of Web sites that provide information about causes, risk factors, complications, tests, and diagnoses, treatment and drugs, prevention, and alternative therapies for just about any disease or illness. Moreover, healthcare and insurance providers are increasingly offering patients the ability to access their healthcare records electronically via Web sites. As use of the Internet to provide and obtain healthcare information increases, the inability of individuals with disabilities to also access this information can potentially have a significant adverse effect on their health.

The ADA's promise to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life will be achieved in today's technologically advanced society only if it is clear to State and local governments, businesses, educators, and other public accommodations that their Web sites must be accessible. Consequently, the Department is considering amending its title II and title III regulations to require public entities and public accommodations that provide products or services to the public through Web sites on the Internet to make their sites accessible to and usable by individuals with disabilities under the legal framework established by the ADA.

i. Barriers to Web Accessibility

Millions of individuals in the United States have disabilities that affect their use of the Web. Many of these individuals use assistive technology to enable them to navigate Web sites or access information contained on those sites. For example, individuals who do not have use of their hands may use speech recognition software to navigate a Web site, while individuals who are blind may rely on a screen reader to convert the visual information on a Web site into speech. Many Web sites fail to incorporate or activate features that enable users with disabilities to access all the site's information or elements. For instance, individuals who are deaf are unable to access information in Web videos and other multimedia presentations that do not have captions. Individuals with low vision may be unable to read Web sites that do not allow the font size or the color contrast of the site's page to be modified. Individuals with limited manual dexterity who may use assistive technology that enables them to interact with Web sites cannot access sites that do not support keyboard alternatives for mouse commands. These same individuals, along with individuals with intellectual and vision disabilities, often encounter difficulty using portions of Web sites that require timed responses from users but do not give users the ability to indicate that they need more time to respond.

Individuals who are blind or have low vision often confront significant barriers to Web access. This is because many Web sites provide information visually without features that allow screen readers or other assistive technology to retrieve information on the site so it can be presented in an accessible manner. The most common barrier to Web site accessibility is an image or photograph without corresponding text describing the image. A screen reader or similar assistive technology cannot "read" an image, leaving individuals who are blind with no way of independently knowing what information the image conveys (*e.g.,* a simple graphic or a link to another page). Similarly, complex Web sites often lack navigational headings or links that would facilitate navigation using a screen reader or may contain tables with header and row identifiers that display data, but fail to provide associated cells for each header and row so that the table information can be interpreted by a screen reader.

Online forms, which are an essential part of accessing goods and services on many Web sites, are often inaccessible to individuals with disabilities. For example, field elements on forms—the empty boxes that hold specific pieces of information, such as a last name or telephone number—that lack clear labels, and visual CAPTCHAs ("Completely Automated Public Turing Test To Tell Computers and Humans Apart")—distorted text that must be inputted by a Web site user to verify that a Web submission is being completed by a human rather than a computer—make it difficult for persons using screen readers to make purchases, submit donations, and otherwise interact with a Web site. These barriers greatly impede the ability of individuals with disabilities to fully enjoy the goods, services, and programs offered by covered entities on the Web.

In most instances, removing these and other Web site barriers is neither difficult nor especially costly, and in most cases providing accessibility will not result in changes to the format or appearance of a site. The addition of invisible attributes known as alt (alternate) text or tags to an image will help keep an individual using a screen reader oriented and allow him or her to gain access to the information on the Web site. Associating form labels to form input fields and locating form labels adjacent to form input fields will allow an individual using a screen reader to access the information and form elements necessary to complete and submit a form on the Web site. Moreover, Web designers can easily add headings, which facilitate page navigation using a screen reader, to their Web pages. They can also add cues to ensure the proper functioning of keyboard commands and set up their programs to respond to assistive technology, such as voice recognition technology.

ii. Web Accessibility Under the ADA

The Internet as it is known today did not exist when Congress enacted the ADA and, therefore, neither the ADA nor the regulations the Department promulgated under the ADA specifically address access to Web sites. But the statute's broad and expansive nondiscrimination mandate reaches goods and services provided by covered entities on Web sites over the Internet. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a). Title III of the ADA and its corresponding regulations define a "place of public accommodation" as a facility whose operations affect commerce and that falls within at least one of the following 12 categories:

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used for specified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. 12181(7); 28 CFR 36.104. Congress contemplated that the Department would apply the statute in a manner that evolved over time, and it delegated authority to the Attorney General to promulgate regulations to carry out the Act's broad mandate. *See* H.R. Rep. No. 101–485(II), 101st Cong., 2d Sess. 108 (1990); 42 U.S.C. 12186(b). Consistent with this approach, the Department stated in the preamble to the original 1991 ADA regulations that the regulations should be interpreted to keep pace with developing technologies. 28 CFR part 36, app. B.

Section 12182 of title III provides that no person "who owns, leases (or leases to), or operates a place of public accommodation" may discriminate "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations *of* any place of public accommodation." 42 U.S.C. 12182(a) (emphasis added). Similarly, title II provides that qualified individuals with disabilities shall not be excluded from "participation in or be denied the benefits of the services, programs, or activities *of* a public entity." 42 U.S.C. 12132 (emphasis added). The plain language of these statutory provisions applies to discrimination in offering the goods and services "of" a place of public accommodation or the services, programs, and activities "of" a public entity, rather than being limited to those goods and services provided "at" or "in" a place of public accommodation or facility of a public entity. *See National Federation of the Blind* v. *Target Corp.,* 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (finding in a Web site-access case that "[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute"); *Rendon* v. *Valleycrest Productions, Ltd.,* 294 F.3d 1279 (11th Cir. 2002) (finding that discrimination did not have to occur on-site in order to violate the ADA); *see also Carparts Distribution Ctr.,* 37 F.3d 12 (concluding that title III is not limited to provision of goods and services provided in physical structures, but also covers access to goods and services offered by a place of public accommodation through other mediums, such as telephone or mail). *But see Access Now, Inc.* v. *Southwest Airlines, Co.,* 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (finding a Web site is only covered if it affects access to a physical place of public accommodation); *See Weyer* v. *Twentieth Century Fox Film Corp.,* 198 F.3d 1104, 1114–16 (9th Cir. 2000) (requiring some connection between the goods or services complained of and an actual physical place); *Ford* v. *Schering-Plough Corp.,* 145 F.3d 601, 612–13 (3d Cir. 1998) (finding no nexus between challenged insurance policy and services offered to the public from insurance office). Instead, the ADA mandate for "full and equal enjoyment" requires nondiscrimination by a place of public accommodation in the offering of *all* its goods and services, including those offered via Web sites.

iii. Need for Department Action

The Internet has been governed by a variety of voluntary standards or structures developed through nonprofit organizations using multinational collaborative efforts. For example, domain names are issued and administered through the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet Society (ISOC) publishes computer security policies and procedures for sites, and the World Wide Web Consortium (W3C®) develops a variety of technical standards and guidelines ranging from issues related to mobile devices and privacy to internationalization of technology. In the area of accessibility, the Web Accessibility Initiative (WAI) of the W3C® has created the Web Content Accessibility Guidelines (WCAG).

It has been the policy of the United States to encourage self-regulation with regard to the Internet wherever possible and to regulate only where self-regulation is insufficient and government involvement may be necessary. *See Memorandum on Electronic Commerce,* 33 WCPD 1006, 1006–1010 (July 1, 1997), available at *http://www.gpo.gov/fdsys/pkg/WCPD-1997-07-07/html/WCPD-1997-07-07-Pg1006-2.htm* (last visited June 29, 2010); *A Framework for Global Electronic Commerce, http://clinton4.nara.gov/WH/New/Commerce* (last visited June 29, 2010).

Voluntary standards have generally proved to be sufficient where obvious business incentives align with discretionary governing standards as, for example, with respect to privacy and security standards designed to increase consumer confidence in e-commerce. There has not, however, been equal success in the area of accessibility. The WAI leadership has recognized this challenge and has stated that in order to improve and accelerate Web accessibility it is important to "communicat[e] the applicability of the ADA to the Web more clearly, with updated guidance * * * ." *Achieving the Promise of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, H. Comm. On*

the Judiciary, 111th Cong. (Apr. 22, 2010) (statement of Judy Brewer, Director, Web Accessibility Initiative at the W3C®). It is clear that the system of voluntary compliance has proved inadequate in providing Web site accessibility to individuals with disabilities. *See, e.g.,* National Council on Disability, *The Need for Federal Legislation and Regulation Prohibiting Telecommunications and Information Services Discrimination* (Dec. 19, 2006), available at *www.ncd.gov/newsroom/publications/2006/discrimination.htm* (last visited June 29, 2010) (discussing how competitive market forces have not proven sufficient to provide individual with disabilities access to telecommunications and information services.)

There is no doubt that the Web sites of state and local government entities are covered by title II of the ADA. *See* 28 CFR 35.102 (providing that the title II regulation "applies to all services, programs, and activities provided or made available by public entities"). Similarly, there seems to be little debate that the Web sites of recipients of federal financial assistance are covered by section 504 of the Rehabilitation Act. The Department has affirmed the application of these statutes to Web sites in a technical assistance publication, *Accessibility of State and Local Government Web sites to People with Disabilities* (available at *www.usdoj.gov/crt/ada/Web sites2.htm*), and in numerous agreements with State and local governments and recipients of Federal financial assistance.

The Department has also repeatedly affirmed the application of title III to Web sites of public accommodations. The Department first made this position public in a 1996 letter from Assistant Attorney General Deval Patrick responding to an inquiry by Senator Tom Harkin regarding the accessibility of Web sites to individuals with visual disabilities. *See* Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), available at *www.justice.gov/crt/foia/tal712.txt.* The letter has been widely cited as a statement of the Department's position. The letter does not, however, state whether entities doing business exclusively on the Internet are covered by the ADA.

In 2000, the Department filed an amicus brief in the Fifth Circuit in *Hooks* v. *OKbridge, Inc.,* which involved a Web-only business. The Department's brief explained that a business providing services solely over the Internet is subject to the ADA's prohibitions on discrimination on the basis of disability. *See* Brief of the United States as Amicus Curiae in Support of Appellant, 232 F.3d 208 (5th Cir. 2000) (No. 99–50891), 1999 WL 33806215, available at *http://www.justice.gov/crt/briefs/hooks.htm.* In a 2002 amicus brief in the Eleventh Circuit in *Rendon* v. *Valleycrest Productions, Inc.,* the Department argued against a requirement, imposed outside of the Internet context by some Federal courts of appeals, that there be a nexus between a challenged activity and a private entity's "brick-and-mortar" facility to obtain coverage under title III. *See* Brief for the United States as Amicus Curiae in Support of Appellant, 294 F.3d 1279 (11th Cir. 2002) (No. 01–11197), 2001 WL 34094038, available at *http://www.justice.gov/crt/briefs/rendon.htm.* Although *Rendon* did not involve Web site access, the Department's brief argued that title III applies to any activity or service offered by a public accommodation, on or off the premises.

For years, businesses and individuals with disabilities alike have urged the Department to provide guidance on the accessibility of Web sites of entities covered by the ADA. While some actions have been brought regarding access to Web sites under the ADA that have resulted in courts finding liability or in the parties agreeing to a settlement to make the subject Web sites accessible, a clear requirement that provides the disability community consistent access to Web sites and covered entities clear guidance on what is required under the ADA does not exist. *See generally, Target,* 452 F. Supp. 2d 946; *Amazon.com and National Federation of the Blind Join Forces to Develop and Promote Web Accessibility* (Mar. 28, 2007), *http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=174* (last visited June 29, 2010); *Spitzer Agreement to Make Web Sites Accessible to the Blind and Visually Impaired* (Aug. 2004), *http://www.ag.ny.gov/media_center/2004/aug/aug19a_04.html* (last visited June 29, 2010). Two independent Federal agencies have also formally called on the Department to revise its regulations to make clear that the Web sites of entities covered under title III are subject to the ADA. *See* Federal Communications Commission, *Recommendation 9.10, National Broadband Plan* (Mar. 16, 2010), available at *http://www.broadband.gov/plan* (last visited June 29, 2010) ("The DOJ should amend its regulations to clarify the obligations of commercial establishments under title III of the Americans with Disabilities Act with respect to commercial Web sites"); National Council on Disability, *The Need for Federal Legislation and Regulation Prohibiting Telecommunications and Information Services Discrimination* (Dec. 19, 2006), available at *http://www.ncd.gov/newsroom/publications/2006/discrimination.htm* (last visited June 29, 2010) (urging the Department to clarify the ADA's coverage of Web sites of title III entities).

Although the Department has been clear that the ADA applies to Web sites of private entities that meet the definition of "public accommodations," inconsistent court decisions, differing standards for determining Web accessibility, and repeated calls for Department action indicate remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III. For these reasons, the Department is exploring what regulatory guidance it can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible. Despite the need for action, the Department appreciates the need to move forward deliberatively. Any regulations the Department adopts must provide specific guidance to help ensure Web access for individuals with disabilities without hampering innovation and technological advancement on the Web.

IV. Request for Public Comments

Before the Department seeks comment on specific regulatory text, the Department is seeking input from the public. In addition to seeking comments in response to the specific questions raised in this ANPRM, the Department is particularly interested in receiving comments from all of those who have a stake in ensuring that the Web sites of public accommodations and public entities are accessible to people with disabilities or would otherwise be affected by regulations requiring Web site access. The Department appreciates the complexity and potential impact of this initiative and therefore also seeks input from experts in the field of computer science, programming, networking, assistive technology, and other related fields whose feedback and expertise will be critical in developing a workable framework for Web site access that respects the unique characteristics of the Internet and its transformative impact on everyday life. In your comments, please refer to each question by number. Please provide additional information not addressed by the proposed questions if you believe it would be helpful in understanding the implications of imposing ADA

regulatory requirements on the Web sites of public accommodations and State and local government entities.

A. Accessibility standards to apply to Web sites of covered titles II and III entities

As previously mentioned, the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C®) has created recognized voluntary international guidelines for Web accessibility. These guidelines, set out in the Web Content Accessibility Guidelines (WCAG), detail how to make Web content accessible to individuals with disabilities. The most recent and updated version of the WCAG, the WCAG 2.0, was published in December 2008 and is available at *http://www.w3.org/TR/WCAG20/* (last visited June 29, 2010). According to the WAI, the WCAG 2.0 "applies broadly to more advanced technologies; is easier to use and understand; and is more precisely testable with automated testing and human evaluation." *See* WAI, *Web Content Accessibility Guidelines (WCAG) Overview,* available at *http://www.w3.org/WAI/intro/wcag.php* (last visited June 29, 2010).

The WCAG 2.0 contains 12 guidelines addressing Web accessibility. Each guideline contains testable criteria for objectively determining if Web content satisfies the guideline. In order for a Web page to conform to the WCAG 2.0, the Web page must satisfy the criteria for all 12 guidelines under one of three conformance levels: A, AA, or AAA. The three levels of conformance indicate a measure of accessibility and feasibility. Level A, which is the minimum level of conformance for access, contains criteria that provide basic Web accessibility and that are the most feasible for Web content developers. Level AA, which is the intermediate level for access, contains enhanced criteria that provide more comprehensive Web accessibility and yet are still feasible for Web content developers. Level AAA, which is the maximum level of access, contains criteria that may be less feasible for Web content developers. In fact, WAI does not recommend that Level AAA conformance be required as a general policy for entire Web sites because it is not possible to satisfy all Level AAA criteria for some content. *See* W3C®, *Understanding WCAG 2.0: Understanding Conformance* (Dec. 2008), *http://www.w3.org/TR/UNDERSTANDING–WCAG20/conformance.html* (last visited June 29, 2010).

Standards for Web site accessibility also exist for Federal government agencies, which are required to make their Web sites accessible under section 508 of the Rehabilitation Act of 1973, 29 U.S.C. 794(d) (section 508). Specifically, the Web sites of Federal government agencies must comply with the Electronic and Information Technology Accessibility Standards (section 508 standards) published by the U.S. Access Board, 36 CFR 1194, available at *http://www.access-board.gov/sec508/standards.htm* (last visited June 29, 2010). The Access Board is currently revising the section 508 standards, in part to harmonize the standards with model guidelines, such as the WCAG.

Question 1. Should the Department adopt the WCAG 2.0's "Level AA Success Criteria" as its standard for Web site accessibility for entities covered by titles II and III of the ADA? Is there any reason why the Department should consider adopting another success criteria level of the WCAG 2.0? Please explain your answer.

Question 2. Should the Department adopt the section 508 standards instead of the WCAG guidelines as its standard for Web site accessibility under titles II and III of the ADA? Is there a difference in compliance burdens and costs between the two standards? Please explain your answer.

Question 3. How should the Department address the ongoing changes to WCAG and section 508 standards? Should covered entities be given the option to comply with the latest requirements?

Question 4. Given the ever-changing nature of many Web sites, should the Department adopt performance standards instead of any set of specific technical standards for Web site accessibility? Please explain your support for or opposition to this option. If you support performance standards, please provide specific information on how such performance standards should be framed.

B. Coverage limitations

It is the Department's intention to regulate only governmental entities and public accommodations covered by the ADA that provide goods, services, programs, or activities to the public via Web sites on the Internet. Although some litigants have asserted that "the Internet" itself should be considered a place of public accommodation, the Department does not address this issue here. The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of "public accommodations," as defined by the statute and regulations. Because the Department is focused on the goods and services of public accommodations that operate exclusively or through some type of presence on the Web—whether hosting their own Web site or participating in a host's Web site—the Department wishes to make clear the limited scope of its regulations. For example, the Department is considering proposing explicit regulatory language that makes clear that Web content created or posted by Web site users for personal, noncommercial use is not covered, even if that content is posted on the Web site of a public accommodation or a public entity. This would include individual participation in popular online communities, forums, or networks in which people upload personal videos or photos or engage in exchanges with other users. The Department could also make clear that public accommodations and public entities are not liable for inaccessible content posted to their sites by individuals not under their control as long as they provide their Web site users the ability to make their posts accessible.

In addition, the Department does not intend to propose regulatory text that reaches the informal or occasional trading, selling, or bartering of goods or services by private individuals in the context of an online marketplace. The Department could distinguish such occasional trading activity by individuals acting in a private capacity from legally established business entities, ranging from sole proprietorships to limited liability companies and corporations. As long as these business entities offer the goods or services of a public accommodation online, they would be responsible for making such offerings accessible to individuals with disabilities. Lastly, a public accommodation or public entity would not be required to ensure the accessibility of Web sites that are linked to its site, but that it does not operate or control. However, to the extent an entity requires users of its Web site to utilize another Web site in order to take part in its goods and services (e.g., payment for items on one Web site must be processed through another Web site), the entity may be liable for the accessibility of other sites it requires its patrons to use even if it does not operate or control the site.

Question 5. The Department seeks specific feedback on the limitations for coverage that it is considering. Should the Department adopt any specific parameters regarding its proposed coverage limitations? How should the Department distinguish, in the context of an online marketplace, between informal or occasional trading, selling,

or bartering of goods or services by private individuals and activities that are formal and more than occasional? Are there other areas or matters regarding which the Department should consider adopting additional coverage limitations? Please provide as much detail as possible in your response.

C. Compliance Issues

Question 6. What resources and services are available to public accommodations and public entities to make their Web sites accessible? What is the ability of covered entities to make their Web sites accessible with in-house staff? What technical assistance should the Department make available to public entities and public accommodations to assist them with complying with this rule?

Question 7. Are there distinct or specialized features used on Web sites that render compliance with accessibility requirements difficult or impossible?

The Department has taken the position that covered entities with inaccessible Web sites may comply with the ADA's requirement for access by providing an accessible alternative, such as a staffed telephone line, for individuals to access the information, goods, and services of their Web site. *See Accessibility of State and Local Government Web sites to People with Disabilities,* available at *http://www.ada.gov/Web sites2.htm.* In order for an entity to meet its legal obligation under the ADA, an entity's alternative must provide an equal degree of access in terms of hours of operations and range of information, options, and services available. For example, a department store that has an inaccessible Web site that allows customers to access their credit accounts 24 hours a day, 7 days a week in order to review their statements and make payments would need to provide access to the same information and provide the same payment options in its accessible alternative.

Question 8. Given that most Web sites today provide significant amounts of services and information in a dynamic, evolving setting that would be difficult, if not impossible, to replicate through alternative, accessible means, to what extent can accessible alternatives still be provided? Might viable accessible alternatives still exist for simple, non-dynamic Web sites?

D. Effective Date

Following the publication of a final rule, the Department must set an effective date for the application of any new title II or title III regulations requiring the Web sites of entities covered by the ADA to be accessible. When the ADA was enacted, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Under the 1991 regulations, new construction under title II and alterations under either title II or title III had to comply with the design standards of the Department's new regulations by January 26, 1992, six months after the regulations were published. *See* 28 CFR 35.151(a)–(b); 28 CFR 36.402(a). For new construction under title III, the ADA requirements applied to facilities of public accommodations designed and constructed for first occupancy after January 26, 1993——eighteen months after the ADA Standards were published by the Department. *See* 28 CFR 36.401(a).

The Department is considering an effective date of six months after the publication of the final rule for newly created Web sites or pages, *i.e.,* those that have been placed online for the first time six months after the publication of the final rule. Under such a proposal, newly created or completely redesigned Web sites will have to come into total compliance with any Web access requirements adopted by the Department. New pages on existing Web sites would need to comply with the Web access requirements to the maximum extent feasible. The Department is considering this provision for new pages on existing Web sites because the Department recognizes that certain features on existing Web sites—such as navigation components or use of integrated Web technology with limited capacity for accessibility—cannot be completely altered or replaced without a complete redesign of the entire site. For this reason, the Department is considering requiring new pages on existing Web sites to comply with the accessibility requirements to the maximum extent feasible. The Department recognizes, however, that in some cases this may result in incomplete accessibility of new pages. For existing Web sites or pages, the Department is considering having the Web site access requirement apply two years after the date of publication of the final rule. The Department is considering this period of time for existing Web sites because it recognizes that many Web sites have hundreds (and some thousands) of pages that will need to be made accessible.

Question 9. The Department seeks comment on the proposed time frames for compliance. Are the proposed effective dates for the regulations reasonable or should the Department adopt shorter or longer periods for compliance? Please provide as much detail as possible in support of your view.

Question 10. The Department seeks comment regarding whether such a requirement would cause some businesses to remove older material rather than change the content into an accessible format. Should the Department adopt a safe harbor for such content so long as it is not updated or modified?

Question 11. Should the Department take an incremental approach in adopting accessibility regulations applicable to Web sites and adopt a different effective date for covered entities based on certain criteria? For instance, should the Department's regulation initially apply to entities of a certain size (*e.g.,* entities with 15 or more employees or earning a certain amount of revenue) or certain categories of entities (e.g., retail Web sites)? Please provide as much detail and information as possible in support of your view.

E. Cost and Benefits of Web Site Regulations

Executive Order 12866 requires Federal agencies to submit "significant regulatory action" to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) for review and approval prior to publication in the **Federal Register**. See E.O. 12866, 58 FR 51735 (Sept. 30, 1993), as amended; OMB Budget Circular A 4, *http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf* (Sept. 17, 2003) (last visited June 29, 2010). A proposed regulatory action is deemed to be "economically significant" under section 3(f)(1) of Executive Order 12866 if it has an annual effect on the economy of $100 million or more. *Id.* Regulatory actions that are deemed to be economically significant must include a formal regulatory analysis—a report analyzing the economic costs and benefits of the regulatory action. A formal cost-benefit analysis must include both qualitative and quantitative measurements of the benefits and costs of the proposed rule as well as a discussion of each potentially effective and reasonably feasible alternative. Since this is an ANPRM, the Department is not required to conduct certain economic analyses or written assessments that otherwise may be required for other more formal types of agency regulatory actions (e.g., notices of proposed rulemaking or final rules). If any proposed rule the Department issues regarding Web access is likely to have an economically

significant impact on the economy, the Department will prepare a formal regulatory analysis.

Question 12. What data source do you recommend to assist the Department in estimating the number of public accommodations (i.e., entities whose operations affect commerce and that fall within at least one of the 12 categories of public accommodations listed above) and State and local governments to be covered by any Web site accessibility regulations adopted by the Department under the ADA? Please include any data or information regarding entities the Department might consider limiting coverage of, as discussed in the "coverage limitations" section above.

Question 13. What are the annual costs generally associated with creating, maintaining, operating, and updating a Web site? What additional costs are associated with creating and maintaining an accessible Web site? Please include estimates of specific compliance and maintenance costs (software, hardware, contracting, employee time, etc.). What, if any, unquantifiable costs can be anticipated from amendments to the ADA regulations regarding Web site access?

Question 14. What are the benefits that can be anticipated from action by the Department to amend the ADA regulations to address Web site accessibility? Please include anticipated benefits for individuals with disabilities, businesses, and other affected parties, including benefits that cannot be fully monetized or otherwise quantified.

Question 15. What, if any, are the likely or potential unintended consequences (positive or negative) of Web site accessibility requirements? For example, would the costs of a requirement to provide captioning to videos cause covered entities to provide fewer videos on their Web sites?

Question 16. Are there any other effective and reasonably feasible alternatives to making the Web sites of public accommodations accessible that the Department should consider? If so, please provide as much detail about these alternatives, including information regarding their costs and effectiveness in your answer.

F. Impact on Small Entities

Consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. *See* 5 U.S.C. 603–04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002). The Department will make an initial determination as to whether any rule it proposes is likely to have a significant economic impact on a substantial number of small entities, and if so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small entities and regulatory alternatives that reduce the regulatory burden on small entities while achieving the goals of the regulation. In response to this ANPRM, the Department encourages small entities to provide cost data on the potential economic impact of adopting a specific requirement for Web site accessibility and recommendations on less burdensome alternatives, with cost information.

Question 17. The Department seeks input regarding the impact the measures being contemplated by the Department with regard to Web accessibility will have on small entities if adopted by the Department. The Department encourages you to include any cost data on the potential economic impact on small entities with your response. Please provide information on capital costs for equipment, such as hardware and software needed to meet the regulatory requirements; costs of modifying existing processes and procedures; any affects to sales and profits, including increases in business due to tapping markets not previously reached; changes in market competition as a result of the rule; and cost for hiring web professionals for to assistance in making existing Web sites accessible.

Question 18. Are there alternatives that the Department can adopt, which were not previously discussed in response to *Questions 11* or *16,* that will alleviate the burden on small entities? Should there be different compliance requirements or timetables for small entities that take into account the resources available to small entities or should the Department adopt an exemption for certain or all small entities from coverage of the rule, in whole or in part. Please provide as much detail as possible in your response.

G. Other Issues

Question 19. The Department is interested in gathering other information or data relating to the Department's objective to provide requirements for Web accessibility under titles II and III of the ADA.

Are there additional issues or information not addressed by the Department's questions that are important for the Department to consider? Please provide as much detail as possible in your response.

Dated: July 21, 2010.

Thomas E. Perez,

Assistant Attorney General, Civil Rights Division.

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DEPARTMENT OF JUSTICE

28 CFR Part 36

[CRT Docket No. 112]

RIN 1190–AA63

Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description

AGENCY: Civil Rights Division, Justice.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Department of Justice (Department) is considering revising its regulation implementing title III of the Americans with Disabilities Act (ADA) in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by movie theater owners or operators at movie theaters accessible to individuals who are deaf or hard of hearing or who are blind or have low vision by screening movies with closed captioning or video description. The Department is issuing this Advance Notice of Proposed Rulemaking (ANPRM) in order to solicit public comment on various issues relating to the potential application of such requirements and to obtain background information for the regulatory assessment the Department may need to prepare in adopting any such requirements.

DATES: The Department invites written comments from members of the public. Written comments must be postmarked and electronic comments must be submitted on or before January 24, 2011.

ADDRESSES: You may submit comments, identified by RIN 1190–AA63 (or Docket ID No. 112), by any one of the following methods:

- *Federal eRulemaking Web site: www.regulations.gov.* Follow the Web site's instructions for submitting comments. The Regulations.gov Docket ID is DOJ–CRT–0112.
- *Regular U.S. mail:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031–0885.
- *Overnight, courier, or hand delivery:* Disability Rights Section, Civil Rights Division, U.S. Department of