# **ADA TITLE II REGULATIONS OUTLINE FOR cato**

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## The ADA Stance on Digital Accessibility

* The DOJ first asserted that the ADA applies to websites of covered entities in 1996.
* However, because there were no specific technical requirements for web content and mobile apps, there has been no specific direction on how to comply with the ADA’s general requirements of nondiscrimination and effective communication.
* The DOJ has modified the ADA to address the accessibility of web content and mobile apps by adopting accessibility standards.

## What does the Rule cover?

* The purpose of the rule is to revise the regulation implementing Title II of the ADA in order to ensure that the services, programs, and activities offered by State and local government entities to the public via web content and mobile apps are accessible to individuals with disabilities (p 34).
* The rule applies to all web content and mobile apps that a public entity provides or makes available either “directly or through contractual, licensing, or other arrangements.”

## Timelines

* 2 years for all public colleges and universities after the date of publication of the final rule in the federal registrar.
* A public entity, other than a special district government, with a total population of 50,000 or more shall begin complying with this rule two years after date of publication in the federal register.

## Adoption of New Standards

* The standards they have adopted by the DOJ are the **Web Content Accessibility Guidelines (WCAG) level 2.1AA.**
* WCAG is an internationally recognized set of standards established by the World Wide Web Consortium (W3C)
* For WCAG 2.1, Level A consists of 30 Success Criteria, Level AA consists of 20 Success Criteria. Therefore, **to fulfil the requirements of this rule, web content and mobile apps must conform to the 30 A and 20 AA Success Criteria**.

## Proactive vs. Reactive Accessibility

Quotes from the DOJ Ruling (from Doug’s document**, need page numbers**)

“…A core premise of the rule, which is that web content and mobile apps will generally be accessible by default. That is, people with disabilities typically will not need to make a request to gain access to services, programs, or activities offered online, nor will they typically need to receive information in a different format.”

“Under title II, individuals with disabilities cannot be, by reason of such disability, excluded by state and local government entities, including those offered via the web and mobile apps. One of the goals of the ADA also includes reducing segregation. Accordingly, it is important for individuals with disabilities to have access to the same platforms as their neighbors and friends at the same time…”

## Fundamental Alteration and Undue Burden

* **In determining whether an action would result in undue financial and administrative burdens, all a public entity’s resources available for use in the funding and operation of the service, program, or activity should be considered.** The burden of proving that compliance with the requirements of 35.200 would fundamentally alter the nature of a service, program, or activity, or would result in undue financial and administrative burdens, rests with the public entity (p 269).

## Equivalent Alteration

* It’s not good enough to provide a telephone line and phone number for people with disabilities to call instead of accessing content via the web!
* This provision is intended to clarify that public entities can use methods or techniques that provide equal or greater accessibility than this rule would require (p 266).

## Electronic Documents on the Web – What’s covered 1

* PDF, Word, PowerPoint, Excel documents, etc.
* Conventional electronic documents are defined to mean web content or content in mobile apps that is in a portable document format (PDF), word processor file format, presentation file format, or spreadsheet file format. This list is exhaustive, rather than open-ended (p 71).
* Database files are not included in the definition.
* In contrast to WCAG 2.1, the DOJ rule DOES include conventional electronic documents in the definition of “web content” (p 83).
* *For us in higher ed, this means any documents posted online that are publicly viewable or required to use/access as part of a program or service, such as meeting notices, class information, enrollment, etc.*

## Social Media – What’s covered 2

* This rule covers web content or content in a mobile app that a public entity makes available via a social media platform. The posts made to these platforms “must generally conform to WCAG 2.1 Level AA” (p 146).
* Public entities must use available accessibility features on social media platforms to ensure that their social media posts comply with this rule. However, where public entities do not provide social media platforms as part of their services, programs, or activities, they do not need to ensure the accessibility of the platform (p 149).
* Focus efforts on new social media posts moving forward.

## Captions and video – what’s covered 3

* WCAG 2.1 Level AA Success Criteria 1.2.4 requires captions for live-audio content in synchronized media (p 150).
* DOJ believes that the compliance dates set forth in this rule will give public entities sufficient time to locate captioning resources and implement or enhance processes to ensure they can get captioning services when needed (p 153).
* DOJ does not believe it is prudent to prescribe captioning requirements beyond the WCAG 2.1 Level AA requirements, whether by specifying a numerical accuracy standard, a method of captioning that public entities must use to satisfy this success criterion, or other measures.
* Rather than specify a particular accuracy level or method of satisfying Success Criterion 1.2.4 at this time, the final rule provides public entities with the flexibility to determine the best way to comply with this success criterion based on current technology (p 155).

## Course Content/LMS – What’s covered 4

* Under the final rule, **password-protected course content for public elementary, secondary, and postsecondary institutions will be treated like any other content and public educational institutions will generally need to ensure that content complies with WCAG 2.1 Level AA starting two or three years after the publication of this rule in final form (p 210).**
* Posts by third parties on course websites may be covered by the exception for content posted by a third party. However, that exception only applies where the third party is not posting due to contractual, licensing, or other arrangements with the public entity (p 234).
* *\*It is unclear whether students count as third parties in this case.*

## Digital Books, Textbooks, and Libraries – what’s covered 5

* The DOJ declines to make changes to the rule in response to or otherwise opine about public entities’ obligations with respect to intellectual property law.
* **Digital textbooks, including EPUBs, will be treated the same as all other educational course materials (p 237).**
* Under this rule, public libraries are treated the same as other public entities (p 240). Some material maintained in and by libraries may fall under the archived web content exception (p 241).
* The DOJ declines to adopt additional technical standards or guidance specifically related to EPUBs.

## Conforming Alternate Versions

* Under WCAG, a “conforming alternate version” is a separate web page that, among other things, is accessible, up to date, contains the same information and functionality as the inaccessible web page, and can be reached via a conforming page or an accessibility-supported mechanism. (p 257).
* Under this rule, the DOJ specifies that the use of conforming alternate versions is permitted only in limited, defined circumstances, which represents a slight departure from WCAG 2.1. A public entity may use conforming alternate versions of web content ONLY where it is not possible to make web content directly accessible due to technical or legal limitations (p 257).
* *What would be examples in higher education?* Perhaps super complex diagrams, charts, or images, then linking to a separate page that provides the data in a simplified and accessible table, or provides more extensive alternative text description for the image.

## Exemptions

Some types of content do not have to comply with the technical standard in certain situations (p 157). These are:

1. **Archived web content.**

Archived web content is defined as content that:

* 1. Was created before the date the public entity is required to comply with this rule, reproduces paper documents created before the date the public entity is required to comply with this rule, or reproduces the contents of other physical media created before the date the public entity is required to comply with this rule.
  2. Is retained exclusively for reference, research, or recordkeeping.
  3. Is not altered or updated after the date of archiving; and
  4. Is organized and stored in a dedicated area or areas clearly identified as being archived.
  + Archived web content must meet all four parts of the archived web content definition in order to qualify for the exception (p 167).
  + Under this exception, public entities may not circumvent their accessibility obligations by merely labeling their web content as “archived” or by refusing to make accessible any content that is old.

1. **Preexisting conventional electronic documents, unless they are currently used to apply for, gain access to, or participate in the public entity’s services, programs, or activities.**
   * Conventional electronic documents that are available as part of a public entity’s web content or mobile apps before the date the public entity is required to comply with this rule do not have to comply with WCAG 2.1 Level AA unless such documents are currently used to apply for, gain access to, or participate in a public entity’s services, programs, or activities (p 174).
   * DOJ believes that public entities should generally focus their resources on developing new conventional electronic documents that are accessible and remediating existing conventional electronic documents that are currently used to access the public entity’s services, programs, or activities (p 175).
2. **Content posted by a third party.**
   * Web content and mobile apps that are created or posted on behalf of a public entity fall within the scope of this rule (p 188). Where a public entity links to third-party content but the third-party content is truly unaffiliated with the public entityand not provided on behalf of the publicentity due to contractual, licensing, or other arrangements, the linked content falls outside the scope of this rule.
   * This exception does not apply to the tools or platforms the public uses to post third-party content on a public entity’s web content or content in mobile apps, such as message boards (p 190).
   * Sometimes a public entity itself chooses to post content created by a third party on its website. The exception does not apply to content posted by the public entity itself or posted on behalf of the public entity due to contractual, licensing, or other arrangements, even if the content was originally created by a third party. For example, many public entities post third-party content on their websites, such as calendars, scheduling tools, maps, reservation systems, and payment systems that were developed by an outside technology company. Sometimes a third party might even build a public entity’s website template on the public entity’s behalf. To the extent a public entity chooses to rely on third-party content on its website in these ways, it must select third-party content that meets the requirements of this rule. This is because a public entity may not delegate away its obligations under the ADA (p 192).
   * Authoring tools, embedded content, and other similar functions provided by the public entity that facilitate third-party posting are not covered by this exception and must be made accessible in accordance with the rule (p 194).
   * **Does not apply to third party content and applications where the public entity is within contractual, licensing, or other arrangements. (p. 200).**
     + *What would be an example of a third-party application that is NOT exempt? Canvas, ctcLink, Okta*
3. **Individualized, password-protected or otherwise secured conventional electronic documents.**
   * There is an exemption for conventional electronic documents that are (1) about a specific individual, their property, or their account; and (2) password-protected or otherwise secured (p 241).
   * Some examples are bills, healthcare documents, financial statements, receipts.
   * Public entities are still bound under Title II to make these documents accessible for persons with disabilities upon request.
   * This exception does not apply to individualized information made available in formats other than a conventional electronic document (p 243).
4. **Preexisting social media posts**
   * The final rule includes an exception for preexisting social media posts that were posted before the date the public entity is required to comply with the rule (p 253).

## External Mobile Apps

* Under the rule, external mobile apps are subject to the rule in the same way as mobile apps that are developed, owned, and operated by a public entity.
* This approach of applying ADA requirements to services, programs, or activities that a public entity provides through a contractual, licensing, or other arrangement with a third party is consistent with the existing framework in Title II of the ADA. Under this framework, public entities have obligations in other Title II contexts where they choose to contract, license, or otherwise arrange with third parties to provide services, programs, or activities (p 210).

## Measuring Compliance

* The DOJ believes that a tailored approach is needed for measuring compliance with a technical standard in a digital space (p 288).
* The DOJ believes that it is likely to be more difficult for State and local government entities to maintain perfect conformance to the technical standard set forth in this rule than it is to comply with the ADA Standards (p 290).
* The DOJ believes that measuring compliance as strictly 100 percent conformance to WCAG 2.1 Level AA would not be the most prudent approach, and that an entity’s compliance obligations can be limited under some narrow circumstances without undermining the rule’s objective of ensuring equal access to web content and mobile apps (p 291).
* The goal of this rule is to provide access to people with disabilities that is functionally equivalent to the access experienced by people without disabilities (p 293).

## Where to start

* Provide notice to the public on how an individual who cannot access preexisting electronic documents, web content, or mobile apps because of a disability can request other means of other effective communication or reasonable modification.
* Provide an accessibility statement that tells the public how to bring web content or mobile app accessibility problems to the entities’ attention and develop a procedure for reviewing and addressing issues raised.