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Clarence E. Anthony

October 3, 2023

Disability Rights Section
Civil Rights Division
U.S. Department of Justice
150 M St. NE
9th Floor
Washington, DC 20002

Re: Comments on *Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities*, RIN 1190-AA79

On behalf of the more than 19,000 cities, towns and villages represented by the National League of Cities (NLC), thank you for the opportunity to comment on this important proceeding. Local leaders strive to make their government operations and services open and accessible to all residents, regardless of disability status. As the Department of Justice (Department) considers proposed regulation for the accessibility of local government websites, it is crucial that the Department acknowledge the efforts made by municipalities to meet residents' needs with a limited set of resources. Municipalities, particularly smaller cities, towns and villages, must balance the costs of meeting accessibility standards for digital resources with the value of providing digital access to government services and activities. NLC is pleased to provide feedback on the below questions raised in the Notice of Proposed Rulemaking (NPRM).

Question 4: What compliance costs and challenges might small public entities face in conforming with this rule? How accessible are small public entities' web content and mobile apps currently? Do small public entities have internal staff to modify their web content and mobile apps, or do they use outside consulting staff to modify and maintain their web content and mobile apps? If small public entities have recently (for example, in the past three years) modified their web content or mobile apps to make them accessible, what costs were associated with those changes?

Question 9: How will the proposed compliance date affect small public entities? Are there technical or budget constraints that small public entities would face in complying with this rule, such that a longer phase-in period is appropriate?

NLC's member municipalities have described a variety of anticipated costs and tasks associated with meeting the suggested WCAG 2.1 Level AA (WCAG 2.1) standards. The overwhelming majority of municipalities in the United States (more than 90%) are small and have populations of 50,000 people or less. Of those, the majority of small, incorporated municipalities have populations of 5,000 people or less. Very small municipalities tend to have limited staff support – often in the single digits - and frequently lack any in-house web development staff capacity. To the extent that smaller municipalities' staff directly update content on websites or mobile apps, these staff generally hold multiple roles for that municipality – for example, the same person may be responsible for reception at City Hall, managing accounts payable, handling incoming license requests, and more duties.

Therefore, it is reasonable to assume that the overwhelming majority of municipalities will rely on third-party vendors to bring their web content into compliance with WCAG 2.1. If existing vendors are capable of providing this service (both the one-time updates and ongoing changes in service to ensure accessibility going forward), cities anticipate an increased ongoing cost to current vendor contracts. If new vendors are required to provide these services, cities may be required to undertake a procurement process – which can add significant time to ultimately reach compliance. Most municipalities also work with multiple vendors to manage their digital content and services, from site design to bill payment processing. Because of the increased cost anticipated to meet compliance obligations, municipalities must adjust their budgets to account for this new expenditure. Some of NLC's member municipalities have expressed concern that these budgetary shifts could come at the expense of investment in cybersecurity efforts.

If the NPRM is finalized, all municipalities will need to be made aware of and understand the new compliance requirements. This education and outreach may occur directly from the Department, through professional and municipal associations, state governments, and vendors. After municipalities have been made aware, they will require sufficient time to scope out the work required to update existing web content and ensure accessibility in the future, communicate with all impacted vendors about their ability to make needed changes, budget for the work, and potentially undergo procurement for new contracts. For most municipalities, this could mean multiple vendor contracts will need to be updated or created. For this reason, **NLC encourages the Department to adopt its proposed alternate, longer time horizon for compliance of at least three years for large cities, and four years for cities, towns and villages with populations below 50,000.**

Question 6: How do public entities use social media platforms and how do members of the public use content made available by public entities on social media platforms? What kinds of barriers do people with disabilities encounter when attempting to access public entities' services via social media platforms?

Public entities increasingly rely on social media as a quick, effective way to disseminate time-sensitive information to residents. Social media has become a particularly valuable tool for emergency management, as public entities can dispel misinformation, share information about resources and guide residents to take steps to stay safe during emergencies. **NLC believes that social media posts should be excepted at this time from inclusion in the requirements of this rulemaking.** As noted by the Department, localities have no control over the accessibility of popular social media platforms, unlike content hosted on their own sites or content developed specifically for local government by a third party. Currently, the Department does not require accessibility generally from these platforms. NLC believes

that without an exception and until social media platforms are separately required to meet accessibility standards, local governments are likelier to reduce or cease use of social media out of concern for liability, removing use of this valuable tool for public safety.

Question 13: Should the Department consider a different compliance date for the captioning of live-audio content in synchronized media or exclude some public entities from the requirement? If so, when should compliance with this success criterion be required and why? Should there be a different compliance date for different types or sizes of public entities?

Question 14: What types of live-audio content do public entities and small public entities post? What has been the cost for providing live-audio captioning?

The most common form of live-audio content that NLC's members have reported posting is livestreamed public meetings, such as city council meetings or public commission meetings. In the wake of the COVID-19 public health emergency, many communities have benefited from *increased* accessibility to these public proceedings through livestreaming options. However, communities have expressed concern that the cost of a captioning requirement could become prohibitive or force that community to scale back on the type or number of proceedings that are available to view online. **Therefore, NLC suggests an exception be allowed for small entities' livestreaming of public meetings when accompanying documentation includes meeting minutes (not only agendas).**

Question 15: How do public entities currently manage content that is maintained for reference, research, or recordkeeping?

Question 17: Are there alternatives to this exception that the Department should consider, or additional limitations that should be placed on this exception? How would foreseeable advances in technology affect the need for this exception?

NLC appreciates the Department's inclusion of an exception for archived material. Many municipalities, either because of state record retention laws, liability prevention, or a general desire to make as much information available to the public as possible, have a substantial amount of content archived on websites. **NLC requests that the Department provide additional guidance on which types of content are covered by the exception.** For example, municipal governments may be required to retain multiple decades' worth of vendor contracts, meeting minutes, permits, and legislative documents. NLC believes this exception should include archived material that is digitized from a paper or other analog format for recordkeeping purposes, but was initially produced prior to the rule's effective date, such as documents scanned by a municipality to reduce the amount of paper archival documentation maintained by the city. NLC also believes this exception should apply to documents of a specified age, or that have passed their effective date (such as the end of a contract, or the end of a multi-year strategic plan).

Question 18: Where do public entities make conventional electronic documents available to the public? Do public entities post conventional electronic documents anywhere else on the web besides their own websites?

Question 19: Would this "preexisting conventional electronic documents" exception reach content that is not already excepted under the proposed archived web content exception? If so, what kinds of additional content would it reach?

NLC also appreciates the Department's exception for preexisting conventional electronic documents. As noted above, cities, towns and villages maintain many conventional electronic documents on their websites, such as meeting agendas, meeting minutes, meeting presentations, permit records, and more. We believe that this exception could potentially cover additional content beyond the archived content exception, depending on how the Department delineates archived content. **NLC encourages the Department to include in this exception conventional electronic documents generated by a municipality that are available on third-party websites, as municipalities cannot control those sites.** For example, third parties may aggregate municipal ordinances or host copies of municipal documents for educational, technical assistance, advocacy or professional development purposes. Cities should not be held liable for the content maintained by these third-party sites.

Question 23: Do public entities link to third-party web content to allow members of the public to participate in or benefit from the entities' services, programs, or activities? If so, to what extent does the third-party web content that public entities use for that purpose comply with WCAG 2.1 Level AA?

Question 25: What types of external mobile apps, if any, do public entities use to offer their services, programs, and activities to members of the public, and how accessible are these apps? While the Department has not proposed an exception to the requirements proposed in § 35.200 for public entities' use of external mobile apps, should the Department propose such an exception? If so, should this exception expire after a certain time, and how would this exception impact persons with disabilities?

As with web design services, most municipalities rely on a variety of third parties to provide web content and services to residents, either directly on a city's website or through links to a separate third party site or mobile app. As the Department has noted, these include everything from static business directories to bill pay and 311 assistance services. **NLC believes that the complexity of these vendor relationships further justifies extension of the compliance period to three years for large cities and four years for small cities. In addition, we request that the Department provide additional clarity more specifically delineating the types of excepted third party content.**

Question 57: What policies and practices for testing and remediating web and mobile app accessibility barriers are public entities or others currently using and what types of testing and remediation policies and practices are feasible (or infeasible)? What types of costs are associated with these testing and remediation policies?

NLC member cities report that, in addition to the state-run accessibility checker tools mentioned in the NPRM, third-party vendors often offer free or paid accessibility checking services. **NLC urges the federal government to provide a publicly available accessibility checking tool or validate which privately developed third party tools meet federal compliance criteria.** Cities, towns and villages have expressed concerns that paid tools may present excessive additional cost, and free vendor tools are perceived as "sales tools" that have an underlying profit motive and therefore cannot be completely relied upon.

Question 50: What should be considered sufficient evidence to support an allegation of noncompliance with a technical standard for purposes of enforcement action? For example, if web

content or a mobile app is noncompliant according to one testing methodology, or using one configuration of assistive technology, hardware, and software, is that sufficient?

Question 55: Should a public entity be considered in compliance with this part if the entity remediates web and mobile app accessibility errors within a certain period of time after the entity learns of nonconformance through accessibility testing or feedback? If so, what time frame for remediation is reasonable? How would allowing public entities a certain amount of time to remediate instances of nonconformance identified through testing or feedback impact people with disabilities?

Question 63: Should the Department consider limiting public entities' compliance obligations if nonconformance with a technical standard does not prevent a person with disabilities from accessing the services, programs, and activities that a public entity offers via the web or a mobile app? Should the Department consider limiting public entities' compliance obligations if nonconformance with a technical standard does not prevent a person with disabilities from accessing the same information, engaging in the same interactions, and enjoying the same programs, services, and activities as people without relevant disabilities, within similar time frames and with substantially equivalent ease of use? Should the Department consider limiting public entities' compliance obligations if members of the public with disabilities who are seeking information or services from a public entity have access to and use of information and services that is comparable to that provided to members of the public who are not individuals with disabilities? How would these limitations impact people with disabilities?

Question 66: How should the Department address isolated or temporary noncompliance with a technical standard and under what circumstances should noncompliance be considered isolated or temporary? How should the Department address noncompliance that is a result of technical difficulties, maintenance, updates, or repairs?

These questions get at the heart of the primary concern raised by NLC's members: how to ensure that cities, towns and villages making a good-faith effort to make information and services accessible to all users are not unfairly held liable for isolated instances of nonconformance that can be remedied or subject to abusive or serial litigation. This litigation could represent a serious cost burden to municipalities that ultimately serves no public benefit to city residents. **NLC urges the Department to create guardrails against abusive litigation** by: clarifying the terms under which a plaintiff has standing to claim harm from nonconforming web content, providing a reasonable period of time to make content accessible or available in an alternate accessible form after it has been identified, excepting temporary noncompliance due to maintenance or other technical difficulties, and creating a safe harbor of presumptive compliance for certain efforts, such as ensuring content is regularly assessed through automated accessibility testing tools. **NLC also requests the Department provide additional guidance on which circumstances might allow exception for a municipality due to "undue financial and administrative burdens."** Small communities in particular have a dramatically limited capacity to interpret regulation and may err on the side of removing content or services from their websites, rather than risk liability.

Again, NLC thanks the Department for its work to create regulations that are fair and reasonable for all communities. If you have any further questions, please contact Angelina Panettieri, Legislative Director, Information Technology and Communications for NLC at (202) 626-3196 or panettieri@nlc.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Clarence', followed by a long horizontal line.

Clarence Anthony
CEO and Executive Director
National League of Cities