

If this change becomes law, retailers and their employees will be in a better position to meaningfully assist a customer who needs to find financing to purchase a home. These changes would also provide lenders with additional assurances that loan originator compensation, including prohibited loan originator compensation, is not being paid in connection with the origination of their loans.

Even with these changes, retailers and their employees are not free from restrictions when assisting consumers with finding financing. Notably, S. 2155 expressly prohibits the direct negotiation of loan terms. In addition, S. 2155 does not exempt retailers and their employees from licensing under state law, including mortgage loan originator licensing, which means retailer employees will need to still refrain from engaging in licensable activity, such as taking applications or offering or negotiating loan terms.

### Conclusion

After the SAFE Act and the CFPB's changes to the LO Comp Rule, the manner in which a retailer employee can provide assistance to a customer in finding an appropriate financing source is heavily restricted. While pending legislation, including S. 2155, would remove some of these restrictions, it would not remove all of them.

A lender that makes loans secured by manufactured homes should continue to be cognizant of the restrictions that are in place, now or in the future, to make sure retailer employees' conduct does not expose the lender to regulatory risk.

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## Does Your Bank's Website Invite ADA Lawsuits?

by [Brian J. Malcom](#)

Does your bank have a website? Unless your bank uses an abacus to tally deposits, the answer is probably yes. If so, do you know if your bank's website complies with the Americans with Disabilities Act ("ADA")? Did you even know that your website might be subject to scrutiny under the ADA? Let's discuss.

The ADA entitles individuals with a disability to "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). There is some debate over whether a website is "a place of public accommodation" within the meaning of the ADA, but there is enough disagreement to enable the plaintiffs' bar to latch on to these claims.

Litigation against banks relating to the ADA is not a new thing. In the past, plaintiff's attorneys brought suits against banks alleging lack of physical accessibility in branches and, more recently, challenged the accessibility of ATM machines. Now, plaintiff's attorneys are targeting banks and other financial institutions with ADA lawsuits alleging that the target's website lacks accessibility for their disabled clients.

In 2000, Bank of America settled a web-accessibility suit. Charles Schwab also settled an ADA suit a short time later. In 2008, Target paid a total of nearly \$10 million to settle a class-action suit brought by the National Federation for the Blind. By the middle of 2017, more than 240 businesses had faced a lawsuit in federal court relating to website accessibility.

Also in 2008, a consortium of private companies created the Web Content Accessibility Guidelines in an effort to offer guidance on the vagaries of the ADA when it comes to websites. Those guidelines state that banks, and similar consumer-seeking companies like stores, hotels, and restaurants should ensure

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that deaf, blind and visually-impaired consumers can access the content on their websites, make purchases, and communicate with the company. These guidelines are not law, but this is not preventing the plaintiffs' bar from using the guidelines to coerce lucrative settlements from financial institutions.

The Obama Administration, through the Department of Justice, indicated that specific rules relating to website compliance with the ADA would take effect sometime in 2018 or 2019, but the Trump Administration has put that on hold for now. While this may seem like good news for banks, it leaves banks and credit unions without specific rules it can point to when it receives a demand letter from an ADA plaintiff. Sometimes, vagaries and ambiguities in the law actually assist the plaintiffs' bar in extracting settlements from businesses.

For instance, in June 2017, a plaintiff won a trial verdict against Winn-Dixie in a Florida federal district court. That same month, a California federal judge allowed an ADA website accessibility case against Hobby Lobby to proceed to discovery. Shortly thereafter, two federal judges in New York refused to dismiss ADA website accessibility suits against a restaurant and a retailer and held, in part, that courts do not need agency regulations setting a standard for website accessibility to determine that a website violates the ADA.

Smaller banks and credit unions make attractive targets for a plaintiff's attorney looking to threaten an ADA lawsuit because of their limited litigation budgets. In December 2017, plaintiff's attorneys filed at least 30 new ADA lawsuits against credit unions alone alleging violations of the ADA by their respective websites. So, how does it work? A plaintiff's attorney may send a demand letter or even file suit against a community bank or credit union alleging that the bank's website does not comply with the ADA and that the bank is exposed to significant liability under the ADA. Then, the plaintiff's attorney may offer to resolve the dispute so long as the bank agrees to pay the plaintiff's attorney an inflated "consulting fee." Make no mistake, this consulting fee is a settlement payment and only resolves the claim mentioned in

the demand letter or complaint. So, if the plaintiff's attorney can find another client to bring the same type claim, the bank remains exposed to additional similar claims.

### Next steps:

1. **Perform an audit to determine whether your website complies with the ADA and the Web Content Accessibility Guidelines.** If your website does not comply with the ADA or guidelines, bring the website into compliance.
2. **Review your insurance coverage and vendor contracts to see whether a potential ADA claim relating to your website is covered.** The insurance coverage portion is self-explanatory, but a bank should also check its contract(s) with its web vendors to determine if the contract contains any indemnification language that may insulate the bank.
3. **Talk to a lawyer about your website. An ounce of prevention goes a long way.** Talk to a lawyer about whether your website exposes you to claims under the ADA and the relevant guideline to try to avoid a demand letter or suit. If you have already received a demand letter or have been sued, consult with a lawyer about your options before making a decision that may not be in the best interest of your bank.

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