

March 21, 2025

BY ELECTRONIC MAIL (oit_rules@state.co.us)

OIT Rulemaking Administrator
Governor's Office of Information Technology
1575 Sherman Street
Denver, CO 80203

Re: OIT March 17, 2025 Proposed Amendments
Technology Accessibility Rules, 8 CCR 1501-11

Dear OIT Rulemaking Administrator,

These comments are submitted by Converge Accessibility LLC, an accessibility-focused consulting firm, that has been working with several Colorado public entities (including the City of Centennial, Arapahoe County, and Rio Blanco County). Specifically, these comments reflect the input of Ken Nakata, a former trial attorney with the Disability Rights Section of the U.S. Department of Justice and the same section that issued the new ADA Title II web accessibility rule. These comments also reflect the input of Laura Ruby, a former Director of Accessibility Policy and Standards for Microsoft. In her role at Microsoft, Laura worked with the World Economic Forum and G20 to fold accessibility into model procurement policies for governments worldwide. Laura also led the IT industry's effort to develop the Voluntary Product Accessibility Template (VPAT) when she chaired the Information Technology Industry Council's Accessibility Committee and worked alongside her colleagues at the U.S. General Services (GSA).

We commend the Governor's Office of Information Technology (OIT) for its leadership in promoting digital accessibility and for opening opportunities for people with disabilities in Colorado. At Converge, we work with governments across the country and around the world to implement digital accessibility. Time and again, OIT's accessibility rule has been a model for other governments to follow.

The new proposed rule includes a number of valuable improvements. It includes several exceptions in [Section 35.201 of the new ADA Title II web regulation](#). This will prevent Colorado public entities from producing content that would otherwise violate Colorado law while being exempted from federal law. The new proposed rule also adds additional factors into its section for "undue burden" that align it more closely with existing ADA requirements.

PROPOSED REVISIONS TO SECTIONS 11.5 AND 11.7 CREATE PROBLEMS

OIT's proposed amendment to Section 11.5 and its elimination of the compliance elements in Section 11.7, however, introduce numerous problems and significant challenges for public entities striving to comply with accessibility standards.

- First, the original "best meets" exception from Section 11.7 ensured that public entities could make the most accessible choices available when procuring technology, even when fully compliant options were not yet available. Eliminating it is

a mistake. After Congress created Section 508, the U.S. Access Board and the U.S. General Services Administration agreed that “best meets” approach in the Section 508 standards and the Federal Acquisition Regulations (FAR), respectively, was the ideal way to encourage federal agencies to create an accessible digital infrastructure. This goal was impossible under existing laws, like Section 504 of the Rehabilitation Act. The “best meets” model has been promoted and adopted by governments around the world as a best practice. It forms the basis of important tools like the Voluntary Product Accessibility Template (VPAT) and Accessibility Conformance Report (ACR). While the ADA Title II web regulation does not explicitly include a best meets requirement, this was a missed opportunity by the DOJ. Following the best meets process in the OIT rule ensures that public entities did everything possible to get the most accessible product short of imposing an undue burden or violating procurement laws. Retaining “best meets” in OIT’s accessibility rule is not inconsistent with DOJ’s rule; instead, retaining it only makes compliance more likely. OIT should not abandon this proven model.

- A second related concern is that the proposed revision to Section 11.10 removes the requirement that “conformance is required to the extent that it does not result in a fundamental alteration, undue burden, or direct threat.” This language is important because it requires compliance to the extent possible. For instance, some GIS systems may not be capable of being made fully accessible to a screen reader, but this should not eliminate the obligation to ensure proper color contrast or keyboard navigation. This obligation to make ICT accessible to the extent feasible is also included in the [regulatory analysis accompanying ADA Section 35.204](#). Removing both this clause and the best meets requirement would mean that public entities would not have to take any steps to ensure IT products are accessible if no fully compliant products are commercially available.
- Third, accessibility compliance is a complex, ongoing process that requires planning across dozens or even hundreds of web applications; making good faith progress on such plans is essential for achieving digital accessibility. Public entities in Colorado have relied on this provision for the last year. It would be unfair to remove it immediately before the enforcement deadline and it would set up Colorado public entities to immediate litigation. Allowing compliance through a “plan” wasn’t included in the ADA Title II web accessibility rule. This was another missed opportunity by the DOJ. An accessibility plan establishes a framework for what is achievable by a state or local government in making their ICT accessible over time. Where a litigant demands that a public entity go beyond that plan, a thoughtful accessibility plan can help the public entity show how these demands impose an undue burden. Like the “best meets” requirement, retaining the “plan option” is not inconsistent with the DOJ rule and only makes compliance with both rules more likely.
- Fourth, the original Section 11.7 provided a clear compliance checklist—substantially revising it will make implementation and compliance with the rule far more difficult for Colorado public entities to achieve.
- Lastly, the proposed rule creates ambiguity around when conforming alternate versions are permitted under WCAG. This should be clarified to ensure appropriate application.

To address these issues, we propose that OIT retains its original Section 11.7. The original Section 11.7 was clear, succinct, and flexible.

Alternatively, we propose revising Section 11.5 to include the key elements that were removed in the current draft as follows.

Section 11.5 Technical Requirements

- A. *Each public entity shall make their ICT that is in active use accessible by meeting the Technical Standards or through equivalent facilitation. Where a public entity cannot meet this requirement, it shall use a conforming alternative version in accordance with Section 11.8.*
- B. *A public entity will also be deemed to be in compliance if it provides equal access to its programs, services, and activities for persons with disabilities through reasonable modifications or accommodations upon request and meets one of the following conditions:*
 - 1. *The public entity procured ICT that best meets the Technical Standards and its business needs (e.g., audience needs, capacity, reliability, interoperability, organizational needs, privacy, and security).*
 - 2. *The public entity has a written plan to remove barriers across its ICT inventory and can demonstrate good faith progress in meeting or exceeding this plan beginning no later than July 1, 2025.*
 - 3. *Where making or obtaining ICT that fully meets this rule would impose an undue burden, the public entity can demonstrate that it met this rule in all other requirements that would not impose an undue burden.*
 - 4. *An exception applies under this rule.*
- C. *In no event can a public entity require an individual with a disability to pay to cover the cost of measures, such as providing auxiliary aids or barrier removal, that are required to provide that individual with non-discriminatory treatment.*

ADDITIONAL COMMENTS ON THE PROPOSED RULE

1. Section 11.2(C) Clarification

As written, the placement of the phrase *"the public entity provides or makes available directly or through contractual, licensing, or other arrangements"* could be misinterpreted as applying only to internal-facing ICT rather than both public-facing and internal-facing ICT.

To clarify that it also applies to public-facing ICT, we suggest revising to:

"The rules apply to all information and communication technology (ICT) in active use (either public-facing or internal-facing) that the public entity provides or makes available directly or through contractual, licensing, or other arrangements."

This ensures both categories of ICT are explicitly covered.

Also, the last sentence, “ICT includes digital content, self-contained closed systems, and hardware as defined in section 11.4.” can be redacted because it appears to narrow the definition of ICT already provided in section 11.4

2. Section 11.3 – Impact on Digitization of Records

The last sentence, "The rules also apply when a non-active version of the ICT is requested by an individual with a disability," is unclear and may discourage local entities from digitizing records because it could be read to require accessibility for old handwritten or paper documents.

[Section 35.201 of the new ADA web accessibility rule](#) exempts “archived web content” for this reason. To align with federal standards and avoid unintended barriers to digitization, we recommend either

- Deleting this sentence (less preferable), or
- Adding "archived content" and "archivist materials" to the exceptions in Section 11.7 (more preferable).

This ensures that historical records can be preserved and digitized without imposing excessive accessibility burdens. Adding archived content and archivist materials to the exceptions in Section 11.7 would also more closely align OIT’s rule more closely with the new ADA rule and avoid imposing inconsistent duties on Colorado public entities

3. Section 11.4 – Definition of "Active Use"

The addition of the phrase, "as a primary means" for public-facing ICT is vague and may unintentionally exclude ICT that people with disabilities rely on. At the same time, we recognize that local governments may provide different or “non-primary” ICT pathways as limited workarounds or accommodations—and it would be unfair to require that these workarounds fully meet WCAG.

To balance these concerns, we recommend either

- Deleting or clarifying the phrase “as a primary means,” and
- Adding the sentence, "The term, 'active use' does not include electronic content that is provided to a specific individual with a disability as an accommodation."

This promotes clarity while preserving flexibility for accessibility accommodations.

4. Section 11.4 – Definition of "Applicable and Achievable"

The term "*applicable and achievable*" is vague and is only used within the definition of "*technical standards*." To improve clarity, we recommend modifying the last clause.

Change:

"which are assessable and/or whose elements, artifacts, or functionality are present in an ICT asset."

To:

"which are assessable against the elements, artifacts, or functionality present in an ICT asset."

5. **Section 11.4 – Definition of "Conforming Alternate Version"**

The proposed definition is inconsistent with how the ADA, WCAG, and Section 508 define a *conforming alternate version*. A conforming alternate should be an alternative, not a replacement, for ICT that cannot be made accessible.

To align with established standards while addressing OIT's interest in equivalent facilitation, we recommend replacing:

"3. Meet the requirements established by Section 508 Standard E101.2 (Equivalent Facilitation) and Section 508 Standard 302 (Functional Performance). Standards E101.2 and 302 of the Information and Communication Technology (ICT) Standards and Guidelines under Section 508 of the Rehabilitation Act."

With:

*"3. Be as up-to-date as the non-conforming version.
4. Be as readily available as the non-conforming version.
5. Fully conform to the OIT standards or meet the requirements through equivalent facilitation."*

This change ensures that **conforming** alternate versions remain current, accessible, and available while maintaining flexibility for equivalent facilitation.

6. **Section 11.4 – Definition of "Section 508"**

The reference to Section 255 in the definition of "Section 508" should be removed. Section 255 of the Telecommunications Act applies to telecommunications manufacturers and service providers, whereas Section 508 applies to technologies used by federal agencies and incorporates elements of Section 255 where relevant.

To ensure accuracy, we recommend revising the definition as follows:

"Section 508 or Section 508 of the Rehabilitation Act: Unless a specific citation is provided, Section 508 refers to the ICT Standards and Guidelines (also known as 'Standards and Guidelines'), issued and corrected by the U.S. Access Board on January 17, 2018, and not including any later amendments or versions."

This revision correctly reflects the scope of Section 508 while eliminating unnecessary references to Section 255.

7. **Section 11.4 – Definition of Technical Standards for Self-Contained Closed Systems and Installed Software**

The current definition is inconsistent because self-contained closed systems, by definition, do not allow user installation of assistive technology.

To correct this, we recommend revising Subsection B to:

"B. For Self-Contained Closed Systems and installed software, such products must provide documentation on accessibility features, provide user control over accessibility features, and conform with all applicable and achievable success criteria of the W3C WCAG 2.1 conformance levels A and AA."

This ensures the definition aligns with practical accessibility requirements for closed systems.

8. Section 11.7 – Clarification and Restructuring of Exceptions

The amended Section 11.7 is confusing and should be limited to the five exceptions outlined in Section 35.201 of the ADA Title II web accessibility rule. The additional exceptions currently included in Section 11.7 are not true exceptions but rather applications of OIT's rules to specific technologies.

To improve clarity, we recommend:

- Limiting Section 11.7 to only the five ADA Title II exceptions, ensuring alignment with federal accessibility standards. As noted earlier, we recommend adding "archived content" to the list of exceptions
- Moving the other exceptions into separate paragraphs, where they can be more clearly defined as specific applications of OIT's rules rather than broad exceptions.

This revision will make Section 11.7 more precise, ensuring that exceptions remain narrowly tailored while still addressing specific technologies appropriately elsewhere in the rule.

While current subparagraphs (E),(G), and (H) to separate paragraphs is fine, two subparagraphs have additional problems.

- Subparagraph (A) should include an additional sentence, "Public entities must nonetheless meet all of these standards to the extent that doing so would not impose and undue hardship, undue burden, fundamental alteration, or pose a direct threat."
- Subparagraph (H) is confusing and should be rewritten for clarity. We recommend simplifying it to:

"Self-contained, closed products. Self-contained, closed products will be deemed to be in compliance if they meet the Closed Functionality hardware requirements in Section 402 of the Section 508 regulations."

This revision ensures clarity and alignment with Section 508 while maintaining a straightforward compliance standard.

- Before carving out exceptions or creating new requirements for non-web information and documents (11.7 G and H), OIT should consider the [Guidance on Applying WCAG 2 to Non-Web Information and Communications Technologies \(WCAG2ICT\)](#). This guidance provides a comprehensive framework for applying the WCAG to non-web ICT, including documents and software. By leveraging WCAG2ICT, OIT can ensure that accessibility standards are harmonized across both web and non-web platforms, promoting a consistent and inclusive user experience for all individuals, including those with disabilities. Additionally, WCAG2ICT offers informative guidance that is not normative, meaning it provides valuable insights without imposing rigid requirements. This approach allows OIT to make informed decisions based on established best practices, reducing the risk of creating fragmented or inconsistent accessibility policies. Embracing WCAG2ICT can help OIT maintain alignment with international accessibility standards, fostering greater accessibility and usability across all information and communication technologies.

This guidance will likely be referenced in future updates of the European accessibility standards (EN 301 549) and the U.S. Section 508 requirements.

While we understand that public entities may want additional guidance on defenses like undue burden, fundamental alteration, or direct threat, we encourage OIT to provide this information through technical assistance and examples on its website. Creating definitions for these terms that vary from the language used in the federal standards will likely put Colorado public entities into a confusing and potentially conflicting position meeting both HB 21-1110 and ADA Title II.

9. Section 11.8 Conforming Alternate Version

The term “conforming alternate version” is generally understood to refer to web content; using this term in other contexts is confusing. Instead, equivalent facilitation is generally understood to include all technologies, both digital and non-digital.

We recommended eliminating this section and relying on the recommended definition of conforming alternate version. The examples of digital content, self-contained, closed products, and installed software in amended Section 11.8 would be better placed as examples of equivalent facilitation under section 11.9.

10. Section 11.10 – Need to Restore Reasonable Accommodations and Modifications

The revised Section 11.10 more closely aligns undue burden and fundamental alteration with existing ADA requirements, particularly by requiring approval from the head of the public entity. However, this revision also omitted the phrase, “a public entity may not provide services or benefits to individuals with disabilities through programs that are separate or different, unless the separate programs are necessary to ensure that services are equally effective.” We suggest restoring this anti-segregation requirement in the discussion of reasonable modifications of policies and reasonable accommodations.

CONCLUSION

OIT is an important leader in worldwide digital accessibility. We are proud to have participated in this rulemaking by offering our comments—and we look forward to continuing help shape OIT’s accessibility rule in any way possible.

Respectfully submitted,



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Principal



Laura Ruby
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