

August 6, 2008

VIA ELECTRONIC SUBMISSION

The Honorable Grace C. Becker
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Office of the Assistant Attorney General, Main
Washington, D.C. 20530
Electronic address: www.regulations.gov (CRT Docket No. 106)

Re: *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; Notice of Proposed Rulemaking, 73 Fed. Reg. 34508 (June 17, 2008).*¹

Dear Assistant Attorney General Becker,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) submits these comments to the U.S. Department of Justice (DOJ) regarding its Notice of Proposed Rulemaking (NPRM), entitled *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, proposing to amend the regulations under Title III of the *Americans with Disabilities Act (ADA)* and adopt Parts I and III of the *2004 Architectural Barriers Act Accessibility Guidelines (2004 ADAAG)*. Advocacy is pleased that DOJ has taken the comments and concerns of small businesses into account during development of this NPRM; however, Advocacy is concerned that the proposed rule may still present significant costs to small entities unless further steps are taken to clarify the proposed rule. Advocacy provides the comments below to assist DOJ in developing final regulations that offer flexibility to small businesses while providing individuals with disabilities increased access to public accommodations and commercial facilities.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small

¹ *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; Notice of Proposed Rulemaking, 73 Fed. Reg. 34508 (June 17, 2008).*

² 5 U.S.C. § 601 et seq.

Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

On August 13, 2002, President Bush signed Executive Order 13272,⁴ which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

On June 17, 2008, DOJ published a Notice of Proposed Rulemaking (NPRM) revising the Department's regulations implementing Titles II and III of the Americans with Disabilities Act.⁵ The NPRM proposes substantial revisions to DOJ's ADA regulations (1991 regulations) in light of the 2004 ADAAG proposed by the U.S. Architectural and Transportation Barriers Compliance Board (Access Board).

When DOJ released its Advance Notice of Proposed Rulemaking (ANPRM) on this rule, it concluded that the 2004 ADAAG would likely impose a significant economic impact on a substantial number of small entities.⁶ Small business commented on the potential burden of the 2004 ADAAG on existing facilities, which required the removal of architectural barriers only when "readily achievable." Advocacy also provided comments on the ANPRM and published the report "*Evaluation of Barrier Removal Costs Associated with 2004 Americans with Disabilities Act (ADA) Accessibility Guidelines*," which concluded that higher barrier removal costs are associated with typical small firm buildings as compared to barrier removal costs for large firm buildings on both a per square foot and per employee basis.⁷

Comments from small business revealed that the "readily achievable" standard under the 1991 regulations is too vague to offer protection to small businesses. Without clearer guidance from DOJ on when barrier removal would be "readily achievable" for any given business, small businesses claim that they are often forced into settling frivolous lawsuits because the cost of defending against such claims is typically higher than the amount asked for in settlement.⁸ Additionally, small business and disability rights advocates alike have

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ *Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53461 (Aug. 16, 2002).

⁵ 73 *Fed. Reg.* 34508, June 17, 2008.

⁶ 69 *Fed. Reg.* 58768, September 30, 2004.

⁷ *Evaluation of Barrier Removal Costs Associated with 2004 Americans with Disabilities Act (ADA) Accessibility Guidelines*, E.H. Pechan & Associates, Inc., <http://www.sba.gov/advo/research/rs312tot.pdf>.

⁸ Comments from the National Federation of Independent Business (NFIB), at 5 (May 31, 2005) (referencing an article in *Fortune Small Business*, titled "*Why the Disabilities Act Exasperates Entrepreneurs*"). NFIB's comments also discussed the expensive legal advice small businesses must obtain

expressed concerns that applying the 2004 ADAAG to existing facilities would unfairly punish those small businesses that spent resources removing barriers in order to comply with the 1991 regulations, while rewarding non-compliant businesses. In light of those comments, Advocacy encouraged DOJ to adopt a safe harbor for elements within existing facilities that already comply with the 1991 standards.

The NPRM proposes a “general safe harbor” that would apply to elements in existing facilities covered by the rule regardless of size.⁹ Under the general safe harbor, elements that comply with the current (1991) ADA Standards would not need to be modified to meet the 2004 ADAAG. DOJ’s NPRM also proposes a “small business safe harbor” which provides that a qualified small business, as defined by SBA size standards, will be deemed to have met its barrier removal requirements for a given year if it spends the equivalent of one percent of the preceding year’s gross revenue on barrier removal.¹⁰ In effect, this safe harbor creates an affirmative defense for any qualified small business to assert against a claim that it has not done all that is readily achievable to remove accessibility barriers in its facilities.

Advocacy’s Comments on the Proposed Regulations

Advocacy has spoken with numerous individuals from trade and membership organizations who represent small businesses about the NPRM. Following the publication of the NPRM, Advocacy invited a large group of these individuals to attend a Small Business Roundtable where they shared their comments and concerns about the proposed regulations with DOJ officials and Advocacy. Many of the individuals Advocacy has spoken with regarding the NPRM appreciate DOJ’s effort to listen and respond to the comments of small businesses regarding this rulemaking; however, many of the same individuals have also expressed confusion and concerns regarding certain elements of the proposed rule.

In general, small businesses are supportive of the two safe harbors proposed by DOJ, but are unsure of how the safe harbors would operate in practice. In particular, several individuals have voiced concerns that, without more guidance from DOJ, the proposed small business safe harbor could unintentionally *increase* the burden on small businesses operating in existing facilities. Both the small business safe harbor and the general safe harbor will help small businesses operating in existing facilities comply with the proposed regulations and offer some protection to small business faced with possible litigation; however, many small businesses are urging DOJ to clarify and strengthen these provisions if they are to be effective at reducing the burden on small business, as intended by DOJ.

Additionally, several individuals have expressed concerns to Advocacy that DOJ’s Initial Regulatory Flexibility Analysis (IRFA) does not accurately quantify small business compliance costs. Because the IRFA does not include estimates of transaction costs associated with the revised regulations, such as the time and monetary resources expended to become familiar with the new regulations to determine the scope of their applicability,

in order to ascertain what would and would not be readily achievable in a given facility and how the case law does not present definitive answers to that inquiry.

⁹ *Supra* note 1 at 34555 (see “Removal of Barriers, *Safe Harbor*”).

¹⁰ *Id.* (see “Removal of Barriers, *Qualified Small Business*”).

small businesses believe that the IRFA significantly understates the economic impact on small businesses. Advocacy has spoken with several individuals who assert that the transaction costs for complying with the 1991 standards have been significant and particularly burdensome for small businesses that typically do not have in-house ADA specialists to assist them in developing a compliance strategy.

I. Small Business Support for the General Safe Harbor

The small business community has been supportive of the general safe harbor proposed in the NPRM that exempts elements in any existing facilities that meet the 1991 standards from the 2004 ADAAG. This safe harbor will provide savings for small business, and properly recognizes businesses for compliance with the 1991 standards. Without the general safe harbor, the proposed regulations would create a disincentive for businesses to comply with the ADAAG, that is, any businesses that have already spent significant resources in an effort to comply with the 1991 regulations would be at a disadvantage compared with those businesses that never took steps to comply with the 1991 standards. Advocacy believes that the general safe harbor provides the correct incentives for businesses to comply with any successive revisions to the ADAAG and will create substantially greater accessibility in the long run.

Advocacy also notes that DOJ has identified which of the standards under the 2004 ADAAG are “revisions” to the 1991 Standards and therefore qualify for safe harbor, and which elements are “supplemental” requirements that do qualify for safe harbor because they have no counterpart in the 1991 Standards.¹¹ Advocacy strongly encourages DOJ to include this technical assistance in a Small Business Compliance Guide, which DOJ is required to publish at the time it promulgates a final rule under Section 212 of the Small Business Regulatory Enforcement Fairness Act (SBREFA), as amended.¹²

II. Comments and Suggestions Regarding the Small Business Safe Harbor

The NPRM proposes a safe harbor which provides that a qualified small business that has spent the equivalent of one percent of the preceding year’s gross revenue on barrier removal has met its “readily achievable” barrier removal requirements for that given year.¹³ Advocacy could support this small business safe harbor if certain potential pitfalls are addressed.

This safe harbor would potentially provide a much needed affirmative defense for qualified small businesses to assert against claims that they have not met their barrier removal obligations under the regulations. Small business has indicated that they are uncertain how this safe harbor will work in practice.

¹¹ 73 *Fed. Reg.* 37009 at 37044 (June 30, 2008).

¹² *U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007*, Pub. L. No. 110-28, Amendment 103 (2007) (requiring the publication of SBREFA compliance guides simultaneously with a final rule, or as soon as possible after publication).

¹³ *Supra* note 8.

No Required Amount

The primary concern voiced by small businesses regarding the small business safe harbor is that the one percent figure will become the minimum a small business must spend every year on barrier removal to avoid legal liability. Advocacy urges DOJ to include strong language in the final rule indicating that a small business that has spent less than one percent of gross revenue on barrier removal can still successfully meet its barrier removal obligations under the regulations. Without language to that effect, courts may interpret the “safe harbor” provision as a spending floor, and small businesses operating without profits could be compelled to spend at least one percent of gross revenue on barrier removal even when they cannot afford to do so. Clarity on this issue is crucial in the effort to provide legal certainty regarding compliance with DOJ’s ADA regulations.

Additionally, there will likely become a point for many small businesses where they have substantially completed all but the most expensive of barrier removal projects for a given facility and therefore decide not to spend further revenue on barrier removal projects. Accordingly, DOJ should also include language in the final rule making it clear that qualified small businesses are never required to spend more than one percent of gross revenue on barrier removal in a given year. Adding this kind of language should make it clear to the public and the courts that the safe harbor is intended to provide a spending ceiling, and not a mandate to spend a certain dollar amount every year.

Small Business Compliance Guide

Small businesses have also expressed to Advocacy that they need clearer guidance regarding the kinds of records they would have to keep to successfully prove that they had spent the amount requisite to claim safe harbor. Advocacy has spoken with small businesses that have faced barrier removal litigation in the past and feel that, without clear guidance from DOJ on the kind of records small businesses should keep to track their barrier removal expenditures, the safe harbor will do little to protect small businesses from having to make the choice between spending significant resources defending a lawsuit or simply paying out a cash settlement.

To provide small businesses with an easy way to show that they qualify for the small business safe harbor, some small businesses have suggested that DOJ develop guidance describing a procedure for tracking barrier removal expenditures. Additionally, small businesses have expressed to Advocacy that they need clearer guidance from DOJ regarding what costs can be included when calculating barrier removal expenditures in order to avoid litigation over accounting methods. Advocacy encourages DOJ to develop such guidance and include it in the required Small Business Compliance Guide upon publication of a final rule. Such guidance could consist of a model barrier removal project and would describe the costs associated with the project that would be considered barrier removal expenditures, as well as the records that should be kept to document it.

Another concern that small businesses have brought to Advocacy's attention regarding the small business safe harbor is that, as written, it may unintentionally discourage small businesses from planning and completing large scale barrier removal projects. For instance, if a small business undertakes a costly barrier removal project with costs greatly exceeding one percent of gross revenue in one year, and then does not spend any revenue on barrier removal in the following year, the small business cannot claim safe harbor under the regulations.

To combat this unintended effect and provide for greater accessibility in small business facilities, small businesses have recommended that DOJ allow small businesses to "roll-over" barrier removal surplus from one year to the next, in effect spreading the cost of significant barrier removal projects over future years. Another variation on this idea would be to allow a qualified small business to claim safe harbor if it can show an average expenditure of one percent of average gross revenue per year over a specific period—perhaps from the effective date of final regulations forward.

Need for Both Safe Harbors

The small business safe harbor, in concert with the general safe harbor provision, could significantly reduce compliance costs for most small businesses. However, certain owners and operators of facilities like amusement parks, swimming pools, and miniature golf courses, will not be able to take advantage of the general safe harbor because their facilities will be subject to the new standards under the "supplemental" provisions of the 2004 ADAAG. Additionally, other small businesses may not be able to utilize the general safe harbor because they found complying with the 1991 standards to be prohibitively expensive, and not readily achievable in the past. Therefore, it is essential that DOJ retain the qualified small business safe harbor to provide some burden relief for these small scale owners and operators.

III. Comments regarding DOJ's Initial Regulatory Flexibility Analysis

DOJ's IRFA for the proposed rule does not include estimates for the costs that small firms face in hiring attorneys or other ADA consultants to carefully outline and document their compliance activities as well as obtain legal advice regarding possible decisions to refrain from undertaking barrier removal because of excessive cost. When DOJ published its ANPRM for this rule in 2004, small businesses urged DOJ to include these costs in their analysis.¹⁴ Presently, Advocacy has been contacted by several small business representatives who have expressed their dismay that DOJ's analysis does not accurately state the costs of compliance for small firms.

¹⁴ *Supra* note 5 at 10 (noting that the revised ADAAG presents new requirements that will require costly expertise to assess).

Advocacy reminds DOJ that OMB Circular A-4 directs agencies assessing economic impacts to use current statutory or regulatory requirements as a baseline for calculating incremental costs.¹⁵ Because the NPRM presents a departure from the current regulatory baseline, small businesses must spend time and money on internal staff costs and external professional costs to assess their compliance strategies. If the proposed rule becomes final, small businesses will have to hire an attorney and/or consultants with the expertise to determine which elements in their existing facilities meet the 1991 standards, and which elements will have to be brought into compliance with the 2004 ADAAG. Even though the NPRM proposes safe harbor provisions that will greatly reduce the burdens on small business, simply assessing the applicability of the two safe harbor provisions could be costly in itself. Such costs represent part of the marginal costs of the proposed regulations, and the RFA requires that DOJ quantify them in its IRFA.

Furthermore, Advocacy is concerned that DOJ's IRFA erroneously concludes that the proposed regulations will not have a significant economic impact on a substantial number of small entities. Advocacy recognizes that the general safe harbor proposed in the NPRM substantially reduces the burdens for many small businesses; however, as mentioned before, certain small businesses will not be able to take advantage of the general safe harbor because their facilities contain elements that were not previously subject to the ADAAG or they did not bring certain elements into compliance with the 1991 standards because it would have been prohibitively expensive. While the small business safe harbor may help to ameliorate some of the costs of complying with the 2004 ADAAG, the application of that safe harbor is so uncertain that, at the very least, DOJ's IRFA should include estimates of the average maximum expenditures per small business, in each regulated industry, assuming every business will spend one percent of gross revenue on barrier removal in a given year.

Conclusion

Advocacy is pleased with DOJ's effort to provide more flexibility for small businesses through the proposed general safe harbor and small business safe harbor. In tandem, these provisions have the potential to provide significant cost savings to small businesses. Advocacy urges DOJ to retain both safe harbors, while providing more guidance regarding what is required for small businesses to take advantage of the small business safe harbor. Additionally, Advocacy encourages DOJ to publish a Small Business Compliance Guide upon promulgation of a final rule, as required by Section 212 of the Small Business Regulatory Enforcement Fairness Act (SBREFA). Finally, Advocacy asks that DOJ include estimates of the maximum possible expenditures that would be required, per existing small business facility, in each of the regulated industries.

¹⁵ OMB Circular A-4 at 15 (September 17, 2003).

Advocacy is pleased to forward the comments and suggestions of small business and looks forward to continuing a dialogue with DOJ to develop final regulations that increase accessibility individuals with disabilities while providing necessary flexibility for small businesses. Please contact me or Janis Reyes at (202) 205-6533 (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//
Thomas M. Sullivan
Chief Counsel for Advocacy

//signed//
Janis C. Reyes
Assistant Chief Counsel

//signed//
Jamie Belcore
Regulatory Fellow

cc: The Honorable Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs