



November 24, 2014

VIA ELECTRONIC SUBMISSION

Rebecca B. Bond
Chief, Disability Rights Section
Civil Rights Division
U.S. Department of Justice
1425 New York Avenue NW
Washington, DC 20005

Zita Johnson-Betts
Deputy Section Chief, Disability Rights Section
Civil Rights Division
U.S. Department of Justice
1425 New York Avenue NW
Washington, DC 20005

Re: Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description, 79 Fed. Reg. 44976 (Aug. 1, 2014).

Dear Ms. Bond and Ms. Johnson-Betts:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) submits the following comments to the Department of Justice (the Department) regarding this proposed rule, which would require movie theaters to exhibit 100 percent of showings with closed captioning and audio description whenever movies are produced with this capacity unless to do so would result in an undue burden or fundamental alteration. This rule, which amends regulations implementing Title III of the Americans with Disabilities Act (ADA), would require movie theaters to purchase hardware and a number of individual accessibility devices.¹

¹Americans with Disabilities Act of 1990, 42 U.S.C. 12182(b)(2)(A)(iii); 28 CFR 36.303(a)-(c) (2014). Title III of the ADA prohibits public accommodations from discriminating against individuals with disabilities; this includes steps to ensure that such individuals will not be denied services because of the absence of auxiliary aids and services (such as open captioning, closed captioning, and audio recordings).

Advocacy is pleased that the Department has taken the comments and concerns of small businesses into account during the development of its rulemaking. However, small businesses have told Advocacy that this rule will have a significant economic impact on small theater owners, particularly because it comes so soon after they have spent hundreds of thousands of dollars converting to digital cinema. Small theater owners are concerned that the Department has set an arbitrary and excessive number of required accessibility devices and that the timeframe in which theaters can purchase this equipment is too short. Advocacy believes that the Department has underestimated the compliance costs of this rule in the Initial Regulatory Flexibility Analysis (IRFA). Advocacy provides the comments and recommendations below to assist the Department in developing final regulations that offer flexibility to small businesses while improving the accessibility of movie theaters to individuals with disabilities.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal 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.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Background

Approximately 98 percent of movie theater firms are small businesses, and these firms manage approximately 53 percent of movie theater establishments.² Movie theaters can provide accessibility accommodations through personal captioning devices such as closed captioning text for individuals who are deaf or hard of hearing, or audio description for individuals who are blind or have low vision.

In 2010, the Department released an Advanced Notice of Proposed Rulemaking (ANPRM) on this issue, and sought feedback on a proposal to require 50 percent of movie screens to have captioning and audio description devices five years after the effective date of a final

² *Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description*, 79 Fed. Reg. 44976,45505 (Aug. 1, 2014). The Small Business Size Standard for Movie Theaters is less than \$38.5 million dollars in annual revenue. U.S. Small Business Administration, *Table of Small Business Size Standards*, available at: https://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.

regulation.³

In this Notice of Proposed Rulemaking (NPRM) released in August 2014, the Department is proposing a six month compliance deadline to require movie theaters with digital screens to purchase hardware and obtain a minimum number of individual closed captioning devices, approximately two percent of all seats in a movie theater.⁴ Additionally, a movie theater is required to provide at least one individual audio description listening device per screen (except single screen theaters, which are required to have two). For analog screens, the Department is seeking comment on whether it should adopt a four-year compliance date to comply with this rule, or should defer rulemaking on analog screens until a later date.

On September 15, 2014, Advocacy held a Small Business Roundtable on the proposed rule attended by small business representatives, small theater owners from 18 states and representatives from the Department of Justice. The following comments are reflective of the issues raised during these discussions and in subsequent site visits and conversations with small business representatives and small theater owners.

Comments regarding the Department's Initial Regulatory Flexibility Analysis (IRFA)

Advocacy believes that the Department's IRFA underestimates the economic impact of the proposed requirements on small theater owners. At the crux of the Department's cost analysis is an estimate of the number of seats in each theater, as the Department uses theater seat counts to determine variable costs such as the number of devices required to comply with the rule.

A survey from the National Association of Theater Owners (NATO) found that the Department's estimates for theater seat counts may be understated, and therefore these entities will have to purchase more captioning devices than the Department is assuming in its cost analysis. For example, for single screen theaters NATO's estimate of the average number of seats is over two and a half times greater than the Department's estimate; for miniplexes NATO's estimate is almost one and half times greater than the Department's.⁵ As a result, the actual cost for these smaller theaters will be substantively higher than the Department's estimates.⁶

The Department should acknowledge the range of costs for accessibility devices on the market; the rule only estimates the costs of less expensive devices that attach to seat cup holders at around \$430-479 each.⁷ Many theater owners purchase more expensive captioning glasses

³ *Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description*, 75 Fed. Reg. 43467 (July 26, 2010).

⁴ 79 Fed. Reg. 44976.

⁵ *Spring 2014 Accessibility Survey Results and Cost Estimates, Table 4: Actual Average Initial Costs*, National Association of Theater Owners (November 2014; to be released soon)(*NATO Survey*). The survey showed that the disparity between the Department's estimates and the NATO members estimates is the greatest for the smallest theater types: single screen theaters (175 seats vs. 462 seats) and miniplex theaters (600 seats vs. 876 seats).

⁶ *Id.* The NATO survey assessed the actual total initial cost per theater type as compared to the Department's figures; the differences ranged from \$4,421 to \$5,525 more than the Department's estimates.

⁷ 79 Fed. Reg. at 45008.

because they are often preferred by the audience, and these devices can cost over \$1,250 each.⁸

Small businesses are also concerned that the Department potentially understates the cost of operating, maintaining, and training that digital-screen theaters may incur from this rule. Small theater owners report high maintenance and operation costs to fix digital hardware or replace the flimsy individual devices that often break from regular customer wear and tear. The Department estimates that the annual operating and maintenance costs are \$100 for the smallest theater type and over \$1,000 for the largest theater type; this may not even cover the cost of the early replacement of a few broken devices given the price ranges cited earlier.⁹

Movie studios have recently announced that they will stop producing movies in analog or film versions in the next few years. In response to this industry transition, small theaters owners have had to spend a sizeable portion of their resources to convert to digital cinema; these entities estimate that the cost to convert ranged from \$75,000 to \$200,000 per screen. Small theater owners have reported financial difficulties trying to stay in business due to these costs; and are concerned that they do not have discretionary funds to comply with the additional costs of this new regulation. In many cases, theater owners have been forced to raise additional funds outside of revenue through debt financing or other fundraising efforts like the crowdfunding platform Kickstarter to be able to pay for digital conversions and theater maintenance. For example, Advocacy visited a small theater owner in Virginia who obtained a bank loan for \$600,000 for the digital conversion of his two theaters and an extra \$40,000 to purchase accessibility equipment; this theater owner will have to obtain another bank loan for \$20,000 to purchase the equipment necessary to meet the requirements of this rule.

Importantly, according to the Department's IRFA, a majority of small movie theaters fall in smaller revenue categories, with 51.7 percent of firms with annual revenues under \$500,000 and 86.8 percent of firms with annual revenues of less than \$2,500,000.¹⁰ In the IRFA, the agency compares the costs of this rule with the annual revenues of movie theaters over a large range of values. Advocacy believes that the Department should consider the financial situation of theaters when interpreting cost values relative to annual revenues as these figures do not directly represent funds available to comply with the rule. This consideration is critical for movie theaters, as almost half of their gross receipts may go directly to movie studios.

The financial situation is even more challenging for theaters that are very small businesses. Many roundtable participants are members of the Art House Convergence, a yearly meeting of community-based independent cinema exhibitors, a majority of which are non-profits. According to this group's 2014 survey, the mean total receipts of its members are a little more than \$1 million dollars per theater. However, total yearly mean expenses were a little over \$930,000.¹¹ Members reported that since only 49 percent of their revenues are from box office receipts, the rest of the revenue is not as reliable from year to year, because it is based on

⁸ *NATO survey*, at 5. Sony captioning glasses are estimated to cost \$950 each, and require a \$300 receiver.

⁹ 79 *Fed. Reg.* at 45010.

¹⁰ 79 *Fed. Reg.* at 45005, *Distribution of Movie Theater Firms, by Revenue, 2007*.

¹¹ *National Art House Theater Operations Survey 2014*, Art House Convergence in participation with Sundance Institute, conducted by the Bryn Mawr Film Institute (presented January 2014 utilizing 2012 data).

fundraising events, membership dues, concessions sales, and other sources.¹² These theater owners operate on thin margins and do not have extra discretionary funds to purchase unnecessarily large numbers of accessibility equipment.

Small Theater Owners Concerned About Scoping Requirements

Small businesses are concerned that the Department has set an arbitrary and excessive number of required individual captioning devices. Ideally, the Department would scope these requirements so that the number of devices required under the rule match up with how many people would actually use them. In other words, the requirements should relate to the demand for captioning devices because the Department otherwise would be imposing an unnecessary burden on small theater owners by requiring them to purchase expensive devices that no one will ultimately use.

The Department has based the scoping solely on the number of seats in a theater, or enough devices to cover approximately two percent of seats. Small theater owners have told Advocacy that the number of seats in a theater does not have a strong correlation with movie attendance or the number of accessibility devices a theater may need. For example, Advocacy heard from many small theater owners operating single screen and miniplex theaters in rural towns who reported very low attendance rates, regardless of the numbers of seats in a theater. A representative for the Art House Convergence commented that seat counts are even less indicative of demand for their members since these theaters are mission-driven and are mostly non-profits. For example, a non-profit theater in DC with two screens reported an average yearly attendance rate of 10-15 percent of seats, and therefore would not need the numbers of devices required under this rule.

Small theater owners at Advocacy's roundtable reported much lower demand and usage rates for closed captioning and audio description devices than what is required under this rule. Small theater owners are concerned that they will be required to purchase large numbers of expensive devices that will go unused. Small theater owners are also concerned that the Department is creating a one-size-fits-all standard for scoping, when there is variation in the demand for devices. Small theater owners have reported a few requests a week, a month or a year. For example, one small theater owner from a rural town of 7,000 in New York only reported one request a decade. Small theater owners recommend that the agency use more relevant factors such as device usage, demand and theater attendance in setting scoping requirements.

The Department believes that the demand for devices will be greater than one device per auditorium; however it requires relatively large numbers of devices without any justification or data.¹³ Although two percent of seats may not sound like a large number, based on the NATO survey, an average single screen theater would have to purchase 10 captioning devices and an average miniplex theater would have to purchase 16 captioning devices under this regulation.¹⁴ It

¹² *Id.* at 19, *Sources of Revenue in 2012*.

¹³ 79 *Fed. Reg.* at 44995. The Department "believes that the demand for individual captioning devices will be much greater than one device per auditorium once movies are regularly and uniformly exhibited with captioning and the availability of captioning becomes widely known."

¹⁴ *NATO survey*, at 5.

is unclear as to why the device requirements need to be so high to accomplish the Department's goals. Given the high cumulative costs of this equipment, the Department should determine the optimal number of devices sufficient to provide accessibility to the disability community while minimizing the burden on these small entities.

Small Business Alternatives:

When the Department released its ANPRM on this rule in 2010, the agency specifically asked for small business feedback on whether they should consider the establishment of different compliance requirements, timetables or exemptions for small theater owners or a subset of small theater owners.¹⁵ The following is a summary of alternatives recommended by roundtable participants.

Size of Business and Attendance

Advocacy recommends that the Department set the ratio of required accessibility devices at a lower amount than two percent of seats, or issue a deferral of this regulation to a subset of small businesses subject to further review. Some small theater owners recommended the same requirements for closed captioning devices as audio description devices, or one per screen; except for single screen theaters which are required to have two. The Art House Convergence recommended that the Department defer rulemaking for theaters that gross less than \$500,000 annually, subject to further review. The Art House Convergence also recommended that the number of individual devices be based on the average daily attendance per screening on weekends, which is the busiest time for theaters.

Screen Type and Demand

NATO and four organizations representing the deaf and hearing impaired recently released joint recommendations to the Department regarding this rule. For scoping, they recommended minimum closed captioning requirements for theaters by screen type at lower ratios than proposed by the Department.¹⁶ Additionally, they recommended that theaters track and record weekend consumer demand for closed captioning devices, evaluate the results every six months, and submit an annual report of its tracking to the Department.

¹⁵ 75 Fed. Reg. at 43476.

¹⁶ *Joint Recommendations to the Department of Justice*, from the Alexander Graham Bell Association, Association of Late-Deafened Adults, Hearing Loss Association of America, the National Association of the Deaf, and the National Association of Theater Owners (*Joint Recommendations*) (November 21, 2014), available at: <http://natoonline.org/wp-content/uploads/2013/07/Joint-NPRM-Filing-RIN-1190-AA63-and-Voluntary-Actions.pdf>. They recommended minimum closed captioning requirements are as follows: single screen (4 units), miniplex (6 units), multiplex (8 units) and megaplex (12 units).

Small Theater Owners Need Extended Time to Comply with Proposed Rule

Small theater owners at Advocacy's roundtable were concerned with the Department's short timeline of six months for digital theaters to comply with this proposed rule. Advocacy believes that this compressed timeline will have a disproportionate impact on small theater owners because large movie chains have more resources, allowing them to purchase accessibility equipment at a faster rate and lower cost.¹⁷

Small theater owners believe it will be difficult and burdensome to plan, raise funds, purchase and install the required hardware and equipment in such a short timeframe. Small theater owners are concerned that manufacturers may get flooded with requests for this equipment because of this rule, and these small theater owners will be unable to purchase and install this equipment within this timeframe.

Many roundtable participants requested 2 years of extra compliance time for small businesses to comply with this rulemaking. NATO and four organizations representing the deaf and hearing impaired recommended that the equipment must be installed and operational, and staff trained on the use of the systems, either within six months of system delivery or within two years of the final rule publication, whichever comes first.¹⁸ The Art House Convergence recommended phased compliance times for a subgroup of small businesses. Under this plan, cinemas that gross between \$500,000 and \$5 million dollars should have up to 4 years to comply with the proposed captioning rules. They recommended that the Department defer accessibility device requirements for cinemas that gross less than \$500,000, subject to future review.

Other Small Business Comments

Department Must Clarify Small Businesses Covered

Advocacy has heard from small entities that seek clarification on whether they are included in the definition of "Movie Theater." These include small theater owners that show movies utilizing a Blu-Ray/DVD player and film festivals that have ad-hoc temporary theaters, "pop-ups," and limited engagements in tents, libraries, convention centers and other venues.

Department Should Defer Rulemaking for Analog Theaters

For analog screens, the Department is seeking comment on whether it should adopt a four-year compliance date to comply with this rule, or should defer rulemaking on analog screens until a later date. Advocacy recommends that the Department defer rulemaking on analog screens until a later date because movie studios have stated that they will no longer produce analog films in

¹⁷79 Fed. Reg. at 44980. In 2013, a NATO representative testified that approximately 88 percent of all movie theater screens and nearly 35,000 screens had converted to digital cinema. The Department estimates that in 2015, there will still be 1,744 analog or film theaters and 4,888 screens; these remaining analog theaters are small businesses. According NATO's recent survey, only 34 percent of small companies had some closed captioning equipment and only 20 percent of small companies had some audio description equipment. In comparison, 100 percent of large companies had some closed captioning equipment and audio description equipment.

¹⁸ *Joint Recommendations*, at 5.

the next few years. Therefore, the Department should wait to regulate analog theaters until there is a more stable and clearly defined analog theater market.

Conclusion

Advocacy is pleased that the Department has taken the comments and concerns of small businesses into account during the development of its rulemaking. Small businesses are concerned that the compliance costs of this rule are greater than anticipated, and will have a significant economic impact on financially vulnerable small theater owners that have just spent hundreds of thousands of dollars converting to digital cinema. Small theater owners are concerned that the proposed rule has set arbitrary and excessive scoping requirements, without adequate data to justify this costly expenditure. Small theater owners believe that they cannot comply with the short timeline to purchase and install this equipment. Advocacy recommends that the Department adopt the regulatory alternatives discussed in this letter that provide flexibility to small theater owners while providing sufficient access to movie theaters for the disabled community. For additional information or assistance please contact me or Janis Reyes at (202) 205-6533 or Janis.Reyes@sba.gov.

Sincerely,



Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy



Janis C. Reyes
Assistant Chief Counsel



Jonathan Porat
Economist

Copy to: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget