



November 9, 2006

**BY ELECTRONIC MAIL**

James J. Raggio, General Counsel  
Office of the General Counsel  
U.S. Architectural and Transportation Barriers Compliance Board  
1331 F Street, NW, Suite 1000  
Washington, DC 20004-1111

**RE: Americans with Disabilities Act (ADA) Accessibility Guidelines for Large Passenger Vessels; Reopening of comment period**

Dear Mr. Raggio:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the Architectural and Transportation Barriers Compliance Board's (Access Board) draft revised *Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels (ADA Guidelines)*.<sup>1</sup>

**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),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> 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,<sup>4</sup> 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

<sup>1</sup> *Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels; Reopening of comment period*; 71 *Fed. Reg.* 53,630 (September 12, 2006).

<sup>2</sup> 5 U.S.C. § 601 et seq.

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

<sup>4</sup> *Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53461 (August 16, 2002).

Advocacy. Under E.O. 13272, 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.

The Access Board is placing the revised ADA Guidelines in the rulemaking docket in order to develop an accurate picture of the potential costs and benefits of this rulemaking for the passenger vessel industry. Advocacy recommends that the Access Board carefully assess the impact of the ADA Guidelines on small businesses and consider alternatives that would make the regulation less burdensome. Advocacy has spoken to small business representatives in the passenger vessel industry, and their comments and concerns are enumerated in this comment letter.

### **Background**

In 1998, the Access Board established the Passenger Vessel Access Advisory Committee (Advisory Committee) to develop recommendations on making passenger vessels accessible under the Americans with Disabilities Act. Based on the final report of the Advisory Committee in December 2000,<sup>5</sup> the Access Board released draft guidelines applicable to large passenger vessels in the *Federal Register* on November 26, 2004. That version defined large vessels as passenger vessels which are permitted to carry more than 150 passengers or more than 49 overnight passengers.<sup>6</sup> At the same time, the Access Board also published an advance notice of proposed rulemaking (ANPRM) on small passenger vessels. The ANPRM defined a small passenger vessel as one which carried 150 or fewer passengers, or 49 or fewer overnight passengers.<sup>7</sup>

The Access Board published and requested public comment on a revised draft of guidelines for large passenger vessels on July 7, 2006.<sup>8</sup> This rulemaking defined large vessels as passenger vessels which are permitted to carry more than 150 passengers or more than 49 overnight passengers. However, this version included all ferries regardless of size and passenger capacity, and certain tenders which carry more than 60 passengers. The Access Board reopened the comment period for an additional 60 days.<sup>9</sup>

### **Majority of U.S. Passenger Vessel Operators are Small Businesses.**

According to estimates by the Department of Transportation (DOT) and the Passenger Vessel Association (PVA), there would be more than 900 vessels affected by the Access Board's ADA Guidelines. This estimate includes the 677 ferry vessels of all sizes cited

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<sup>5</sup> Access Board, *Recommendations for Accessibility Guidelines for Passenger Vessels* (Dec. 2000), available at <http://www.access-board.gov/pvaac/commrept/index.htm>.

<sup>6</sup> *Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels; Large Vessels; Availability of Draft Guidelines; notice of hearing*; 69 *Fed. Reg.* 69,244 (Nov. 26, 2004).

<sup>7</sup> *Americans with Disabilities Act(ADA) Accessibility Guidelines for Passenger Vessels; Small Vessels; Advance Notice of proposed rulemaking; notice of hearing*; 69 *Fed. Reg.* 69,245 (Nov. 26, 2004).

<sup>8</sup> *Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels; Availability of Draft Guidelines*; 71 *Fed. Reg.* 38,563 (July 7, 2006).

<sup>9</sup> 71 *Fed. Reg.* 53,630 (Sept. 12, 2006).

in the DOT's National Ferry Database of 1999-2000.<sup>10</sup> The PVA also calculates that there are approximately 225 additional "large" passenger vessels that are permitted to carry more than 150 passengers included this rule.<sup>11</sup>

Using the Small Business Administration's size standard of 500 employees<sup>12</sup> and estimates from the PVA,<sup>13</sup> approximately 95 percent of these vessel owners are considered small businesses. Therefore, the Access Board's ADA Guidelines will affect small businesses almost entirely.

### **Small Entities' Concerns Regarding the ADA Guidelines.**

Advocacy has spoken to small business representatives regarding this rule, who raised a number of comments and concerns with the proposed ADA Guidelines; these concerns are reflected in the issues below<sup>14</sup>:

1. When the Access Board issued its first version of the draft ADA Guidelines in 2004, it stated that this regulation would apply only to "large" passenger vessels carrying more than 150 passengers or more than 49 overnight passengers.<sup>15</sup> Small entities support this demarcation between large and small vessels, because it follows the standard Coast Guard's regulations that require vessels authorized to carry more than 150 passengers to have a wide range of additional safety and manning standards.<sup>16</sup> Advocacy recommends that Access Board try to make the ADA Guidelines as consistent as possible with the Coast Guard's existing regulatory framework, rather than create a separate framework for accessibility.
2. Small businesses have also stressed the difficulty of applying a one-size-fits-all accessibility standard for all passenger vessels. There are simply too many differences between a cruise ship with a capacity of thousands of passengers and a water taxi with a capacity of a few dozen passengers to impose the same standards on each. Due to the size constraints of smaller vessels carrying 150 or fewer passengers, there are issues relating to safety, cost, competing regulations, and

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<sup>10</sup> *National Ferry Database Released*, San Francisco Bay Crossings Website, available at [http://www.baycrossings.com/Archives/2001/12\\_February/national\\_ferry\\_database\\_released.htm](http://www.baycrossings.com/Archives/2001/12_February/national_ferry_database_released.htm).

<sup>11</sup> Telephone interview with Edmund Welch, Legislative Director, Passenger Vessel Association (Nov. 7, 2006).

<sup>12</sup> Small Business Administration, Office of Advocacy, *Employer Firms & Employment by Employment Size of Firm by NAICS Codes 2004*, available at [http://www.sba.gov/advo/research/us04\\_n6.pdf](http://www.sba.gov/advo/research/us04_n6.pdf). According to the Small Business Size Standards, 95% of "water transportation" operators in the United States are considered to be small businesses.

<sup>13</sup> Letter from Edmund Welch, Legislative Director of the Passenger Vessel Association, to the Office of Advocacy, Small Business Administration (*PVA Letter*) (Oct. 31, 2006). The Passenger Vessel Association (PVA), a national trade association representing owners and operators of U.S.-flagged passenger vessels and ferries, estimates that 95% of their members are small businesses.<sup>13</sup>

<sup>14</sup> Advocacy spoke to the National Federation of Independent Business, the Passenger Vessel Association, the National Association of Charter Boat Operators, the Madeline Island Ferry Line, Water Taxi, Inc. and the National Marine Manufacturers Association.

<sup>15</sup> 69 *Fed. Reg.* 69,245 (Nov. 26, 2004).

<sup>16</sup> *PVA Letter*, Page 2.

overall structural feasibility.

3. Another concern for small entities is the inclusion of all ferries regardless of size in the 2006 version of the draft ADA Guidelines. The 2004 version of these draft ADA Guidelines would have only included ferries which are permitted to carry more than 150 passengers, or more than 49 overnight passengers.<sup>17</sup> According to the PVA, this 2006 version of the ADA Guidelines would include between 350-400 ferries which are permitted to carry less than 150 passengers.<sup>18</sup> This expanded scope frustrates the Coast Guard's framework, which allows less burdensome requirements for small vessels. Creating the required level of accessibility would also be difficult, expensive, and in some cases structurally impossible in these smaller vessels.
4. Small business representatives noted that the definition of "alteration" in the ADA Guidelines is critical for small entities operating existing passenger vessels. Typically, accessibility guidelines developed by the Access Board and implemented by agencies apply prospectively to new facilities and also when a pre-existing facility is altered. The PVA believes that it is essential for the Access Board to retain the same concepts of alterations for the passenger vessel industry as exist for other facilities and transportation entities; and not create a more stringent "alteration" duty for operators of passenger vessels.<sup>19</sup>
5. The Department of Transportation has been the only federal body to issue regulations making Access Board accessibility guidelines enforceable for other transportation modes. Small entities stressed that the Coast Guard, a new agency within the Department of Homeland Security, should be involved in this regulatory process, since this entity is the federal agency with regulatory oversight of the U.S. flagged passenger vessel industry.

### **Regulatory Flexibility Act Determinations**

The RFA requires federal agencies to analyze the impact of their regulations on small entities and to consider less burdensome alternatives. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, the agency must prepare an initial regulatory flexibility analysis (IRFA) and publish it in the *Federal Register* for public comment.<sup>20</sup> The Access Board has noted that the next step in its regulatory process is completing a regulatory assessment and soliciting a public comment on a Notice of Proposed Rulemaking on passenger vessel accessibility guidelines.<sup>21</sup> Advocacy looks forward to working with the Access Board and pertinent government

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<sup>17</sup> 69 *Fed. Reg.* 69,244 (Nov. 26, 2004).

<sup>18</sup> *PVA Letter*, at 3.

<sup>19</sup> *Id.* The PVA cited an Advance Notice of Proposed Rulemaking by the Department of Transportation on November 26, 2004 (69 *Fed. Reg.* 69,247), which requested comments on whether the alteration standard should be stricter for passenger vessels because these vessels remain in service longer.

<sup>20</sup> 5 U.S.C. § 603.

<sup>21</sup> 71 *Fed. Reg.* at 38,564 (July 7, 2006).

agencies to ensure that future rulemaking on the ADA Guidelines comply with the Regulatory Flexibility Act.

The Access Board should carefully assess the impact of adopting the ADA Guidelines as proposed, and consider the comments it receives in comment letters from small business on the potential cost to implement the ADA Guidelines. Advocacy also suggests that the Access Board include small businesses in its cost case studies, and analyze the costs of new construction and alterations required by the ADA Guidelines to these entities. Advocacy also recommends that the Access Board consider the less burdensome regulatory alternatives recommended by small businesses in the comment period. Advocacy would be pleased to assist the Access Board to determine how this rule would impact small business.

### **Conclusion**

Advocacy is pleased to forward the comments and concerns of small businesses in the passenger vessel industry. Please feel free to contact me or Janis Reyes at (202) 619-0312 (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

Thomas M. Sullivan  
Chief Counsel for Advocacy

Janis C. Reyes  
Assistant Chief Counsel for Advocacy

cc: The Honorable Wan J. Kim, Assistant Attorney General for Civil Rights, U.S.  
Department of Justice  
Steven D. Aitken, Acting Administrator, Office of Information and Regulatory Affairs  
Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, U.S.  
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