



REPRESENTING THE RESTAURANT INDUSTRY

The Cornerstone of the Economy, Career Opportunities and Community Involvement

May 31, 2005

The Honorable Alexander Acosta
Assistant Attorney General
Department of Justice
Civil Rights Division
ANPRM
P. O. Box 1032
Merrifield, VA 22116-1032

Re: CRT Docket No. 2004-DRS01; AG Order No. 2736-2004

Dear Assistant Attorney General Acosta:

The National Restaurant Association, on behalf of more than 60,000 member companies, and over 300,000 individual foodservice establishments, hereby submit comments in response to the Department of Justice Advance Notice of Proposed Rulemaking (ANPRM) for the ADA-ABA Access Guidelines as recommended by the U.S. Access Board (CRT Docket No. 2004-DRS01).

We appreciate the opportunity to comment on this proposed revision to the Americans with Disabilities Act Accessibility Guidelines (ADAAG) and are encouraged that the agency will consider the special challenges our industry would face under the revisions. Our comments reflect not only our concerns for our members and their employees, but are, in some instances, in direct response to the agency's request for information concerning key provisions of the revised guidelines.

As a leading member of the hospitality industry, restaurants have a long-standing commitment to offer a warm welcome to all customers with or without special needs. As such, the restaurant industry in the U.S. has made a multi-billion dollar investment in improving access and eliminating barriers to persons with special needs over the past years. The substantial economic investment, commitment and hard work continue today in all restaurants across this nation. The architectural progress to build new facilities and to modify existing buildings, and to eliminate barriers for our customers has been particularly rapid given the life expectancy for new buildings which may range from 20 to 30 years.

In 1992 the National Restaurant Association, in cooperation with the Department of Justice (DOJ), developed educational and informational materials based upon the current

Standards to rapidly and accurately disseminate access information to the restaurant industry. The publications and materials have assisted hundreds of thousands of restaurants in the identification and elimination of barriers to our customers. "A Warm Welcome" is the title of one of our information videos on ADA and we believe it typifies the hospitality industry's attitude towards the accommodation of customers with special needs.

While DOJ moves forward with proposed rulemaking for an ADAAG revision, we want to applaud them for recognizing the potential significant cost burden on restaurants that have already complied with the ADA standards in their existing facilities and the economic disruption to the restaurant industry of any proposed changes. However, DOJ and others must also be fully aware that technical and other changes to the existing ADAAG benchmarks which have the potential to create such enormous cost burdens and business disruptions to restaurants may not necessarily result in substantially improved access for persons with special needs. We are particularly concerned with the economic and operational effect of changing dimensional benchmarks and definitions, and the effect on existing restaurants that have already made significant investments to comply with current Standards.

Clarification and simplification of the current ADAAG definitions and dimensional benchmarks are encouraged and welcomed by the restaurant industry. Indeed, many of the proposed revisions are consistent with current Standards and afford a measure of clarification. However, expanded definitions and dimensional changes without substantial new information and an absolutely clear and compelling benefit to a majority of special needs individuals should be avoided. We are not opposed to reasonable changes or clarifications; however, we encourage the DOJ to consider the cost benefit relationship of proposed changes, the broad spectrum of special needs and appropriate, less costly, alternative technologies.

We have limited our discussion to only those changes we believe will have the greatest direct impact upon the restaurant industry and have responded to those questions posed by DOJ whose resultant outcome may directly impact the restaurant industry.

General Issues

Question 1: Effective Date: Time Period

Should the effective date of the proposed revised ADA Standards be modeled on the effective date used to implement the current ADA Standards – eighteen months after publication of the final rule – or a shorter period? If you favor a shorter period, please indicate which period you favor and provide as much detail as possible in support of your view.

National Restaurant Association Response

The Department of Justice notes that when ADA was enacted into law in the early 90's, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. For new construction under Title III, the ADA requirements were not applicable for eighteen months following their issuance by DOJ. Recognizing that the proposed guidelines issued by the Access Board are extensive, with 800+ changes in the new ADAAG, and will potentially make hundreds of changes to the current guidelines when these standards are finalized, the National Restaurant Association recommends that DOJ allow for a lead time of more than 18 months after the publication of a final rule. In our view, more than 18-months is the most reasonable and appropriate time frame for our restaurant members to fully comprehend and implement the new ADA Standards during the construction of new facilities and major alterations of existing facilities. When looking at new construction, DOJ must consider the increased cost associated with development of construction warranty contracts between the affected company and the contractor further assure the restaurant company that the work completed will meet the new standards.

In the ANPRM, DOJ posts that an 18-month time period may be “inappropriately long” given that the original Standards were issued in the context of a new law and that the scoping and technical changes set forth in the revised Guidelines are “primarily incremental.” The Association emphatically disagrees with the DOJ’s statements, and notes that DOJ appears to be erroneously equating “incremental” with “minor.” The changes are “incremental” only in the sense that they represent changes from the current Standards. Many of the revised Guidelines are a substantial and significant departure from the current Standards, which may pose significant challenges for projects already planned or underway at the time the final revised Standards are published.

For example, the scoping for accessible entrances has been increased from 50% to 60% of public entrances. While at first blush this increase would appear minor, due to the fact that for scoping purposes all fractions must be rounded up, this 10% increase on paper represents a 100% increase in the required number of accessible entrances for covered facilities that have only two public entrances. Whereas previously only one of the two entrances would have to be accessible, under the revised Guidelines both entrances would have to be accessible. This is a substantial and potentially onerous change for facilities located on sites characterized by severe topography issues.

Therefore, the 6-month and 12-month options will not even provide sufficient time to deal with the overall impact of design decisions and should not even be considered by DOJ as an option. Again, more than 18 months is reasonable for implementation.

Question 2: Effective Date: Triggering Event

National Restaurant Association Response

The Association believes that the requirements for barrier removal and the triggering mechanisms based on alterations and new construction are clearly defined in the ADA and do not require additional clarification.

Question 3: Existing Facilities “Safe Harbor”

Should the Department provide any type of safe harbor so that elements of facilities already in compliance with the current ADA Standards need not comply with the revised ADA Standards? Please provide as much detail as possible in support of your view.

a. Should the Department adopt Option II, and develop an alternative set of reduced scoping requirements for the barrier removal obligation? If so, which specific requirements or elements should be addressed? If possible, provide detailed information about the costs or difficulties that would be incurred in making the modification.

b. Should the Department adopt Option III and exempt certain scoping and technical requirements in the revised ADA Standards that will not be required for barrier removal? If so, which specific requirements or elements should be addressed? If possible, provide detailed information about costs or difficulties that would be incurred in making the modification.

National Restaurant Association Response

The Association strongly believes there should be a safe harbor, including exemption from barrier removal requirements. The application of the revised Standards to existing facilities will impose substantial economic costs on existing facilities, many of which have already expended considerable sums of money in modifying their facilities pursuant to Title III’s barrier removal requirement. It is imperative that existing facilities be afforded an exemption or safe harbor from the revised Guidelines.

Of the three options DOJ is currently considering, however, no one option adequately addresses this issue. The Association respectfully submits that the more practical solution for addressing the burden of the revised Guidelines will pose for existing facilities would be for DOJ to modify its current approach of using the Standards to define barrier removal requirements and to restore the “readily achievable” defense to Congress’ original intent.

Existing facilities face onerous burdens in satisfying their barrier removal obligations under Title III, as that requirement has been interpreted and implemented by DOJ. The Association respectfully submits that the Department’s position on barrier removal is not consistent with Congress’ intent in enacting Title III of the ADA. Enactment of the ADA enjoyed broad bi-partisan congressional support and the support of the business community because it was carefully crafted to balance providing accessibility for individuals with disabilities against the costs such accessibility would impose on covered

facilities, particularly existing facilities. For that very reason, Title III was drafted so that the new construction and alteration provisions would be the main driving force in providing structural accessibility. There was widespread recognition that requiring retrofitting of existing facilities to comply fully with the Standards for new construction and alterations would impose enormous costs on affected businesses. Requiring accessibility at the time of new construction and alterations, which naturally occur as the nation's existing facilities age, was recognized as a far less costly and more reasonable approach for achieving accessibility.

The interpretation of DOJ and implementation of the barrier removal provisions of Title III have rendered the "readily achievable" defense largely illusory, thus destroying the balance carefully crafted by Congress. And, although DOJ asserts in its technical assistance materials and on its ADA website that existing facilities are not required to comply fully with the Standards for Accessible Design, in practice the Standards serve as the *de facto* requirement for barrier removal. Although an architectural barrier is nowhere defined in the statute or DOJ's regulations, DOJ, the federal courts and the plaintiffs' bar have regarded any aspect of an existing facility that does not conform to the Standards or ADAAG as a barrier to access.

When looking at the Options provided by DOJ, Option 1 does discuss providing some sort of a "safe harbor", but how Option 1 is currently written, existing small business operators and restaurant chains will face the challenge to determine with certainty that they have complied with the current standard and that every element would be in compliance. Also, Option 1 provides no clear guidance with respect to facilities that are subject to a settlement or consent decree regarding accessibility. Litigation or threatened litigation regarding the accessibility of a facility (whether it be new construction, an alteration or an existing facility) often results in a settlement or consent decree. It is important to consider the relative value of enforcing the revised Guidelines on existing facilities that have achieved compliance with the current Standard. Therefore, DOJ must move forward and grant an exemption or safe harbor from the revised Standards for existing facilities.

Question 4: Reducing or exempting specified requirements.

a. Should the Department adopt Option II, and develop an alternative set of reduced scoping requirements for the barrier removal obligation? If so, which specific requirements or elements should be addressed? If possible, provide detailed information about the costs or difficulties that would be incurred in making the modification.

b. Should the Department adopt Option III, and exempt certain scoping and technical requirements in the revised ADA Standards that will not be required for barrier removal? If so, which specific requirements or elements should be addressed? If possible, provide detailed information about the costs or difficulties that would be incurred in making the modification.

National Restaurant Association Response

These other options presented by DOJ would impose confusion among restaurant owners if they are in compliance with the ADA that would require them to re-evaluate their facilities even further.

The Standard was developed with the understanding that it would be used for new construction, similar to the many other local and state model codes and standards which the restaurant industry complies with during construction of their facilities. These standards should not be applied retroactively, nor should they be used as the standard for barrier removal. Clearly, any mandate for retrofitting of existing facilities would be unreasonable and an undue burden across the spectrum of the restaurant industry. The Association strongly believes that the current ADA Standards continue to represent a very valuable benchmark that serves to promote a high degree of accessibility for places of public accommodation.

Additional costs associated with imposing the new ADA Standards on existing facilities would far outweigh any additional accessibility enhancement for individuals with disabilities. As noted above, it is absolutely imperative that existing facilities be exempted from the revised Guidelines so that such facilities can avoid the “double jeopardy” of having to repeat barrier removal already undertaken. Data we have reviewed indicates even the imposition of a select few requirements from the revised Standards on existing facilities will result in economic costs greatly in excess of \$100 million per year. As DOJ recognizes in the ANPRM, it is an extremely inefficient use of resources to require such facilities to retrofit once again to the revised Standards, particularly where the revised requirements result in only a minimal improvement in accessibility.

Specific Issues

Data Collection Questions, By Type of Entity

Question 9.

Many of the new and changed requirements in ADAAG are expected to have negligible cost for new construction and alteration, such as the change in the maximum side reach from 54 inches to 48 inches (ADAAG 308.3). See Chapter 6, item 6.20, of the regulatory assessment for ADAAG at www.access-board.gov. Other new and changed requirements are expected to have a cost impact for new construction and alterations. See Chapter 7 of the above cited regulatory assessment for ADAAG. The Department invites comments from covered entities, individuals with disabilities, and individuals without disabilities on the benefits and costs of applying these new and changed specifications to existing facilities pursuant to the readily achievable barrier removal requirement of Title III. Please be as specific as possible in your answers. (Changed requirements would not be applied under the barrier removal obligation to elements that comply with the current ADA Standards if the Department adopts the safe harbor provision addressed under

Question 3. New requirements would be applied even if the Department adopts the safe harbor provision but their impact could be reduced under the options addressed under Question 4.)

National Restaurant Association Response

As previously noted in this document, in our response to question 3, the National Restaurant Association does support creating a “safe harbor” for existing facilities, including an exemption from barrier removal requirements in order to eliminate incurring additional expenses to small business owners and chain restaurant companies due to incremental changes made to the standard. However, the Association represents a vast membership base. Our membership consists of many different facets of the industry from tableservice and quickservice restaurant operators, chains, franchisees and independents, as well as institutional foodservice operations nationwide. With such a diverse membership base, it is rather difficult to gain any true insight regarding whether a generalized regulatory assessment for the restaurant industry could be differentiated when looking at various facilities. In fact, the Association has not seen any technical background information to assure that the changes included in the new standards are beneficial from a technical standpoint. Without this information, it is unclear whether the changes will achieve the underlying goal of increasing accessibility in facilities.

In order to determine this, a true cost benefit analysis would have to be completed and a great deal of research must be conducted appropriately to prove that the number of persons that would benefit from the specific changes would outweigh the costs to restaurant business owners, as well as the various other facilities types which fall under this standard.

The National Restaurant Association encourages DOJ to conduct this analysis, but acknowledges that it must clearly represent the various facility types and include not just fixed costs of materials, but also, costs which are associated with making these changes from beginning to end. For example, it would be necessary to provide the cost of materials, labor, and training of new standard requirements to the appropriate individuals who would be needed to meet the new requirements. Additionally, in order to determine the benefits, at this time, it can only be anecdotal, because this information, to our knowledge, has not been captured to date. Once that research is complete, the benefits can be weighed against the costs, as a whole, to determine the overall cost impact of the changes to the ADAAG.

In the ANPRM, DOJ indicates that, “*Many of the new and changed requirements in ADAAG are expected to have negligible cost for new construction and alteration, such as the change in the maximum side reach from 54 inches to 48 inches (ADAAG 308.3)*” The Association insistently disagrees with this statement made by DOJ. When looking at manufactured items that are built at a certain height or depth, DOJ must consider the cost of replacing all equipment to comply with the change, the cost passed on to the customer by the vendor to redesign and retool that manufactured item and the increase in price to receive the product in a timely fashion. There are sufficient costs associated with making

such changes and DOJ should also look at all manufactured items used in restaurants, such as self serve condiment stations and incorporate not just fixed costs of materials, but also, costs which are associated with making these changes from beginning to end to determine if the cost would be negligible. The Association believes the cost would not be negligible, but rather, quite burdensome.

Question 10.

Consistent with the Regulatory Flexibility Act (RFA) and Executive Order 13272, the Department will determine whether a proposed rule adopting all or part of the Access Board's ADAAG revisions would be likely to have a significant economic impact on a substantial number of small entities, and if so, what the Department could do to reduce that economic impact while achieving the goals of its regulation. The Department welcomes comments providing information on the rule's potential economic impact on covered small entities, including retrofitting costs. Also, please provide any potential regulatory alternatives that could reduce those burdens.

National Restaurant Association Response

The Association is certain that the revisions made will have a significant cost burden to small business owners, with nearly seventy percent of our restaurant membership falling in this category. As previously stated, the Association represents a vast membership base. Our membership consists of many different facets of the industry from tableservice and quickservice restaurant operators, chains, franchisees and independents, as well as institutional foodservice operations nationwide. With such a diverse membership base, we are still in the process of collecting data. However, DOJ has the obligation to obtain such data and determine whether a proposed rule adopting all or part of the Access Board's ADAAG revisions would be likely to have a significant economic impact on a substantial number of small entities. This economic impact to small business owners is an enormous concern to the Association and we recommend the economic burden placed on small business be considered by DOJ during this process.

Because we have experienced too many instances in the past where "technical deviations" from vague provisions or dimensional benchmarks of the current ADAAG were pursued by regulatory authorities with great zeal, we have learned the resultant cost of "technical compliance and litigation" did not ultimately improve the access for the majority of restaurant customers with special needs. In some instances, the technical compliance and litigation costs literally devastated the smaller restaurant businesses.

Question 11.

The Department is considering excluding as a barrier removal obligation for existing facilities, if it selects Option II under Question 4, above, the requirement at ADAAG 210 that accessible handrails be added to stairs in buildings with elevators. The Department is soliciting comments from all stakeholders on this approach. Please be as specific as possible in your response.

National Restaurant Association Response

The National Restaurant Association opposes Option II in question 4 and does not see the point DOJ is attempting to make. Handrails for the most part, are required for safety reasons in buildings that possess stairs. These types of questions only further confuse all stakeholders of what the true intention of the ADAAG is and does not assist facilities in complying in any fashion. Again, the Association would like to state that there should be an exemption from barrier removal requirements with regard to existing facilities.

Question 12.

ADAAG 229.1 is a new requirement that at least one window unit be accessible to persons with disabilities in a room with windows that can be opened by persons without disabilities. The Department wishes to collect data about the effect of this new requirement if it is applied to existing facilities under the barrier removal requirement of Title III. Do you have rooms with windows that open, of the sliding or double hung type, in your existing facility? If so, how many? Would the hardware that works for new windows in new buildings work on these windows in your existing facility without additional cost?

National Restaurant Association Response

We strongly believe that requiring a maximum sill height in the revised ADA standard that would allow for persons using wheelchairs to look through the window to view ground level activities could inadvertently create a safety hazard in public spaces that may contain young children. The provision of the revised Guideline governing windows, in essence, requires that accessible windows be operable by all potential building occupants, including those with disabilities. Obviously, for a window to be in compliance for disabled persons, who use wheelchairs, the sill of operable, accessible windows must be lowered—creating a window that may now be accessible and operable by children, leading to possible accidents. Hence, we do not support this change in the standard. There will also be a significant cost associated with alteration of windows that must be considered in regard to the need for such changes.

General Data Collection Questions Concerning Benefits

Question 48 *Do you have any general comments or concerns about the Department's proposed methodology for determining benefits? As discussed in the text of the proposed framework, the Department is charged with ascertaining the value of the benefits that the revised ADA Standards will provide for both people with disabilities and others. The Department is seeking comments from the public on how best to quantify, monetize, or describe the benefits provided by the proposed revised regulations, including suggestions on how to quantify, monetize or describe use values, insurance values, and existence values, each as described in Appendix A.*

National Restaurant Association Response

Again, in order to determine the true benefit, a cost-benefit analysis would have to be completed and a great deal of research must be conducted to prove that the number of persons that would benefit from the specific changes would outweigh the costs to restaurant business owners, as well as the various other facilities types which fall under this standard. Additionally, we believe that it will be very challenging to capture adequate data to determine the true benefit due to the fact that essentially every building will be impacted in some fashion.

Question 50. *The proposed framework states that the Department will “roll up” the elements by type of building facility, the five principal regulatory groupings, new construction and alterations, and the entire proposed revisions. Is this a sufficiently detailed organization of the benefits and costs? Will it give all stakeholders an accurate picture of how the proposed revisions will be of benefit? If not, what sort of organization of the benefits would be more useful for accurately conveying the important information?*

National Restaurant Association Response

The Association must reiterate that it will be extremely difficult for DOJ to provide all stakeholders with an accurate picture of how these revisions will be of benefit. As noted, there is such a variety of facility types just within the restaurant scope and a “one size fits all” approach in addressing the costs vs. benefits would clearly not represent the restaurant industry as a whole, and therefore, not be sufficient.

Specific Sections

Section 103 Equivalent Facilitation

Nothing in these requirements prevents the use of designs, products, or technologies as alternatives to those prescribed, provided they result in substantially equivalent or greater accessibility and usability.

Although the guide specifically permits “equivalent facilitation” it does not provide any examples of a specific technology or design which could be an equivalent. The Association recommends that DOJ include specific procedures for determining equivalent facilitation as part of the revised guidelines. Without including such language, the development of other designs or technologies would not be encouraged and thus may not be developed due to the uncertainty.

Section 104.1.1 Construction and Manufacturing Tolerances

All dimensions are subject to conventional industry tolerances except where the requirement is stated as a range with specific minimum and maximum end points.

This standard will be a challenge for each and every building to comply with, especially those which fall under barrier removal. The revised Guidelines drastically alter the allowance for construction tolerances. Although the current Standards allow for construction tolerance with respect to all specified dimensional requirements, in most instances, the revised Guidelines substitute a dimensional range for previously absolute dimensions (e.g., toilets which currently have to be positioned 18" from the side wall may now be 16"-18" from that wall).

Overall, the Association believes this is a positive change and is more realistic of the construction process, in that absolute dimensions are difficult to achieve and all specific dimensions are subject to a tolerance range. The revised Guidelines, however, also restrict the application of construction tolerance only to those few requirements that remain expressed as an absolute dimension. Compare Revised Guidelines § 104.1.1 with Standards § 3.2. The Association is concerned that the elimination of construction tolerance for all dimensions other than those expressed as an absolute likely will have significant (and perhaps unintended) problematic consequences, particularly where the specified dimensional range for compliance is very narrow (e.g., shower seats can be mounted no more than 1½" from the wall, cross slopes on ramps and walking surfaces can be no more than 1:48). The approach is also contrary to the approach being undertaken in certain states, such as California, which are moving toward allowing more tolerance, rather than less, in their codes.

DOJ's Standards also should provide greater tolerance for exterior conditions, such as the cross slopes of concrete sidewalks and asphalt surfaces that change over time. The cross slope requirement of 1:48 (approximately 2%) itself can be difficult to achieve in even the original built condition. Over time, particularly in areas with severe freeze/thaw cycles, exterior cross slopes can change, often exceeding 1:48. DOJ needs to provide some relief to the onerous costs facilities may face in repeatedly having to redo such areas, particularly if the change in cross slope does not materially affect usability of the space.

As such, it is strongly recommended by the Association to include dimensions and criteria for what these conventional industry tolerances are and to prescribe them to the degree possible. The Association foresees much inconsistency regarding the implementation of these tolerances as currently written.

Section 106.5 Alterations

A change to a building or facility that affects or could affect the usability of the building or facility or portion thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, resurfacing of circulation paths or vehicular ways, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.

The prior definition did not include “resurfacing of circulation paths or vehicular ways” as an example of an alteration. Under the new definition, inclusion of this reference of resurfacing of circulation paths indicates compliance must be met if the carpet needs to be patched in a restaurant setting or repaving the exterior as a matter of regular maintenance and therefore, does not reflect that a facility is conducting any sort of “alteration.” As such, these simple maintenance procedures should not be referenced in this definition. Therefore, DOJ should clarify the term “alteration.”

106.5 Common Use

Interior or exterior circulation paths, rooms, spaces, or elements that are not for public use and are made available for the shared use of two or more people.

The Association is concerned that by using the language “not for public use” this definition would somehow have employee areas such as kitchens, or areas behind the counter fall under this category. This would expand the coverage of ADA Title III and include areas which are already covered in ADA Title I. As a reminder, Title III covers public accommodations only.

206.2.8 Employee Work Areas

The Association strongly opposes to the requirement of common use circulation paths to the employee work area. We challenge the appropriateness of such a requirement because state and local sanitation laws generally bar customers from restaurant kitchens; thus, restaurant kitchens and work areas are clearly not public areas. Title III of the ADA's intent was to clearly establish accessibility in areas of "public accommodation" for individuals with disabilities. To require changes in a restricted area such as restaurant kitchens, is clearly a misapplication of the Title III access requirements. This is a matter that Congress clearly decided should be addressed under Title I of the Act, which is implemented by the EEOC.

Essentially, this type of requirement would fundamentally change the definition of a work area and would appear to be an initial attempt to force a one-size-fits-all employee accommodation model. We believe that the special needs of employees are more appropriately addressed on a case-by-case basis as provided in ADA Title I requirements. Not only would this requirement, if implemented into the final rule, be massive and costly, we believe it would generally afford no increased restaurant access to the large majority of special needs individuals.

If the ADAAG requires access to individual work areas, it could be economically devastating for many small or medium sized restaurants and could virtually eliminate the popular "compact restaurant kitchens." If implemented as regulation, this proposed change could require expensive, massive changes in the design of new kitchens and the redesign of many currently accessible restaurant kitchens. Access to freezers, dishwashers and walk-in refrigerators would be impossible or problematic in some

locations. The massive new design, redesign and disruption costs would not improve public accommodation and would be on top of the time, money and effort expended by the restaurant industry over the last eight years to truly improve public accommodations in the dining and public areas. Under the current Standards, accessibility within a work area is tied to the identified needs of an employee with a disability and unnecessary expenditures are avoided. This is significant because of the importance in minimizing non-productive space, to maintain market competitiveness.

The new requirement for accessible common use circulation paths also poses potential ergonomic, productivity and safety concerns. Certain work areas (such as kitchens and certain manufacturing lines) are deliberately designed to minimize the distance between elements within the area, to reduce physical motion for ergonomic purposes, for safety of employee and ensure that workers' time is more productively spent.

The fact that the exemption for work areas with less than 1000 square feet is tied to the presence of permanently installed partitions or furnishings provides no protection for work areas in restaurant facilities using modular furnishings or equipment, which are typical of many restaurant work areas. Although the modular nature enables some reconfiguration of a work area, reconfiguring the entire space to provide accessible common use circulation paths raises the possibility that doing so may result in the displacement of particular equipment, furnishings or even other employees from the space. As such, it is imperative that DOJ define "work areas that are an integral component of work area equipment" to clarify what is exempt in restaurant work areas.

We strongly believe that the years of experience and other factors that go into the development of safe, compact and functional kitchen designs (employee safety, public health, ventilation, traffic flow and cost efficiency) would needlessly be disrupted if this requirement were included in the new ADAAG. If mandated, this new requirement would require dimensional isle spacing and turning radii for access to work areas within restaurant kitchens and work areas. These requirements would necessitate complete redesigns of equipment such as dishwashers, walk-in freezers and refrigerators. Many existing restaurant work areas could not incorporate an accessible circulation path under the proposed change.

Additionally, the proposed revised Guidelines also differ from the current Standard in that they require employee work areas to be equipped with visual alarms where audible alarms are provided. We believe that the current Standard's requirement is most appropriate as the accessibility guidelines are designed for areas of "public accommodation." Employee work areas, specifically in restaurants, are not public use areas. We are not arguing that accommodations should not be made for disabled employees; however, we do maintain that the associated costs for visual alarm installations may constitute an "undue burden" under the terms of ADA Title III, definitions.

206.4 Entrances

The revised Guidelines increase the total number of accessible public entrances from 50% to at least 60% of all public building entrances. *Compare* Revised Guidelines, § 206.4.1 *with* Standards, § 4.1.3(8)(a)(i). This increase in scoping, coupled with the new provision which mandates that for scoping purposes, fractions be rounded up (§ 104.2), will have a significant impact. For example, for facilities with only two entrances, both would have to be accessible under the revised Guidelines, whereas previously only one was required to be accessible. For facilities with four entrances, three (as opposed to just two) would have to be accessible. The Access Board's NPRM retained the current requirement of 50%, which is consistent with the 2003 edition of the International Building Code. IBC, § 1105.1 (2003). The requirement for an additional accessible entrance is of minimal marginal benefit, however, given that accessible entry is already provided. Consequently, the additional costs imposed by this increased scoping requirement are not justified.

F219 Assistive Listening Systems

Since this section clearly highlights “...*each assembly area where audible communication is integral to the use of the space, an assistive listening system shall be provided.*” The restaurant industry is very concerned with the language in this section. This appears to be a significant change to this section. As we read it, the proposed revision would now apply to all assembly areas, any size with or without fixed seating. This new provision may also require assistive listening systems in restaurants with TV or radio amplification, given the removal from the current Standard of the fixed seat provision. The Association believes that the DOJ did not intend this type of change. While it is certainly appropriate to include the language “areas where audible communications are integral to the use of space”—a critical component to establish the need for assistive listening systems—the proposed revision lacks clear and well understood definitions regarding what is considered “integral to the use of space.”

For example, this could mandate that *any* restaurant, with or without fixed seating, that provides no entertainment (other than background music or television) provide assistive listening devices for customers, if the music is deemed “integral to the use of space.” Conceivably, restaurants that have a single television behind the bar or that announce seating or order pick-up might logically be required to install such devices, again if the announcements are “amplified or integral to the use of space.”

The Association is not opposed to a requirement for assistive listening systems in assembly areas, where communication is integral to the use of space, per se. However, without reasonable, clear, and well-understood definitions of the terms or phrases “areas where communications are integral to the use of space” and “audio amplification,” the proposed revision is vague and could greatly expand the requirement for assistive listening devices in restaurants. We believe that DOJ must incorporate concise clarification and definitions into the revision to alleviate ambiguous interpretations of the

requirement. We strongly recommend clarification of the term “integral communications” in this provision.

213.3.4 Lavatories.

Where lavatories are provided, at least one shall comply with 606 and shall not be located in a toilet compartment.

This change will require restaurants to provide additional accessible lavatories and sinks in many restaurant locations in States that have mandated accessible lavatories be located inside toilet compartments. The cost-benefit relationship of providing two accessible lavatories in many small restroom facilities should be further assessed. We suggest that a more cost effective way to approach this issue may be to convince State authorities that have mandated in-toilet-compartment accessible sink requirements modify their regulation’s to allow sink placement outside the toilet compartment.

Additionally, we question whether there is clear and compelling evidence that special needs customers are being denied reasonable access to lavatories in small rest rooms or if this is simply another anecdotal or preference issue. Again, this is a costly change in an established benchmark without the exploration of modifying conflicting state regulations.

Comments on Specific Provisions of the Revised ADA Accessibility Guidelines

Enlarged Clear Floor Space at Water Closets

The current Standards permit a lavatory to be positioned next to the water closet, as long as the leading edge of the lavatory is at least 36” from the side wall adjacent to the water closet. The revised Guidelines require clear floor space at the water closet which is at least 60” minimum from the side wall. This essentially will require that single-user restrooms will have to be two feet wider. The only alternative is to recess the lavatory, which may not even be possible in most locations. This will have a significant impact not only on existing facilities, but also on new and/or altered facilities which are limited on space based on the design of their restaurants.

The requirement also provides a substantial disincentive for facilities to provide a lavatory inside the accessible stall, and thus many may choose to forgo offering such amenities. Although Florida requires the provision of a lavatory in the accessible stall, most jurisdictions do not. The lavatory is provided as a convenience to the user. When faced with a choice between providing a larger stall or simply removing the lavatory, most facilities will opt for the latter.

Dining Tables/Spaces

The current Standards require that 5% of fixed dining *tables* (or a portion of a dining counter) be accessible. The revised Guidelines require that at least 5% of *seating spaces* and *standing spaces* at dining surfaces be accessible. The switch from scoping based on tables to scoping based on seats potentially represents a significant increase in scoping,

particularly given the ambiguity in what represents a seating or standing “space.” Dining facilities offer a wide range of seating options, from individual chairs (or individual fixed seats) to booths and sometimes even benches. While calculating scoping is straightforward with respect to individual chairs, reasonable minds will differ as to the total number of seating spaces other types of seating provide. Determining the number of “standing spaces” provided at a particular counter bar or drink rail is even more problematic. The current requirement of basing scoping on the number of tables is a more straightforward approach that is easier to implement and enforce.

Additionally, given that an accessible route would be required to each required accessible space (as opposed to just the table), the overall dining occupancy of a facility also may be reduced. The current approach is to ensure that there is an accessible route to at least one space (not necessarily all spaces) at the accessible table. Basing scoping on “spaces” rather than on the number of tables, increases the number of accessible routes required, which results in a reduction of dining occupancy. This requirement would mean less seats and therefore, less potential for generation of revenue.

The National Restaurant Association takes a great interest in the "New ADAAG" proposals, and we believe it is in our best interest to work with businesses, interest groups and government officials to remove barriers to any potential restaurant customers. We thank you for the consideration of input on this important rulemaking process. Please feel free to contact us at any time to discuss our comments and specific concerns.

Sincerely,



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