



**BEFORE THE
U.S. DEPARTMENT OF JUSTICE**

**COMMENTS OF THE
NATIONAL RETAIL FEDERATION**

**Americans with Disabilities Act Accessibility Guidelines
28 CFR Parts 35 and 36
CRT Docket No. 2004-DRS01; AG Order No. 2736-2004
RIN 1190-AA46 and 1190-AA44**

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**COMMENTS BY THE NATIONAL RETAIL FEDERATION
TO THE ADVANCE NOTICE OF PROPOSED RULEMAKING
ISSUED SEPTEMBER 30, 2004 BY THE U.S. DEPARTMENT OF JUSTICE
REGARDING ITS PROPOSED ADOPTION OF THE
REVISED AMERICANS WITH DISABILITIES ACT
ACCESSIBILITY GUIDELINES**

May 31, 2005

The National Retail Federation ("NRF") submits the following comments regarding the Department's Advance Notice of Proposed Rulemaking ("ANPRM") to adopt the recently revised Americans with Disabilities Act Accessibility Guidelines ("Guidelines" or "ADAAG") issued by the U.S. Access Board on July 23, 2004, as the Department's own Standards for Accessible Design ("Standards"), 28 C.F.R. pt. 36, app. A. NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 23 million employees - about one in five American workers - and 2004 sales of \$4.1 trillion. Some of its members have thousands of buildings and facilities nationwide. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations. NRF's members, therefore, clearly have a substantial interest in the ANPRM, and the revised Standards ultimately issued by the Department.

In addition, NRF is concerned that the Department's potential application of the revised Standards to existing facilities may nullify the expensive and time-consuming actions that many retailers have undertaken to make their buildings and facilities accessible under the current Standards and applicable state and local law. NRF strongly supports the creation of, at a minimum, a safe harbor for existing facilities, so that retailers will not have to repeat this time-consuming, expensive and arduous process. As discussed below, a safe harbor alone will not address the very significant issues the Revised Guidelines pose for existing facilities. NRF strongly urges the Department to adopt a "blended approach," relying on a combination of the three options the Department currently is considering -- safe harbor, reduced scoping for certain requirements and complete exemption from certain scoping/technical requirements -- so that all owners and operators of places of public accommodation (both of existing facilities and new construction) are afforded the maximum flexibility in providing access, as opposed to issuing rigid rules that force all covered entities into the same inflexible and potentially costly framework.

NRF also is concerned that the Access Board has not appropriately assessed the costs versus the purported benefits of complying with several specific provisions in the revised Guidelines. Several changes recommended by the Access Board are not supported by any explanation of the additional benefit, if any, that purportedly will be

derived from the revised requirements, or what segments of the protected class, if any, would benefit from the changes to the current Standards. Moreover, the Access Board has drastically understated real world costs in complying with these requirements. Accordingly, such unsupported changes in the current requirements should not be adopted by the Department.

I. General Issues

Question 1. *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.*

NRF supports the adoption of an 18-month implementation period for the revised Standards. Although even an 18-month period may prove problematic for many larger projects, it is far superior to the other alternatives being considered by the Department -- 6 months and 12 months. The alternative periods simply are not realistic in terms of most design/construction project timelines. The 18-month period also is consistent with the effective time period established for Title III's new construction requirements when the Standards were first issued in 1991.

Question 3. *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.*

As noted above, NRF strongly supports the Department's adoption, at a minimum, of a safe harbor for existing facilities. Under the formulation adopted by both the Department and the federal courts, a facility's barrier removal obligations presently run hand-in-hand with the current Standards. If the revised Standards are similarly applied to existing retail facilities, the substantial time and expense that retailers have already expended will be for naught. Facilities that comply with the current Standards are by definition already "readily accessible to and usable by" persons with disabilities. Therefore, there appears to be no justification for requiring such facilities to expend even more sums in making further modifications to comply with standards that appear to provide no better access, just different access. The barrier removal process can be a very expensive and time-consuming process, particularly for retailers with numerous locations. Some retailers have hundreds if not thousands of facilities, each with dozens of already accessible elements that would ostensibly require change. The logistics alone involved in surveying the facilities, identifying the changes to be made and then formulating a plan to complete such barrier removal are both expensive and extensive. Then, there is considerable expense in making the modifications once the appropriate changes are identified.

Given that the Standards may be subject to further revision in the future, failure to provide a safe harbor also creates an endless cycle of "barrier removal" for all

covered facilities which, to the extent such barrier removal is even structurally possible, is a very expensive undertaking. For this very reason, building codes typically only apply prospectively to newly constructed facilities -- not retroactively to those already built in accordance with a prior edition of the applicable code. The Department should follow a similar approach with respect to the ADA Standards, and adopt a safe harbor for existing facilities. Such an approach is imperative for minimizing the impact of the revised Standards on existing retail facilities.

The safe harbor should apply not only to those elements of existing facilities in compliance with the current Standards, but also those in compliance with state or local codes that the Department has certified as providing equivalent or greater access than the current Standards. Such facilities should be encompassed within the safe harbor, even if such codes do not retain their certification after the revised Standards are promulgated.

In adopting a safe harbor, the Department should also address those current facilities that are subject to a settlement or consent decree regarding accessibility. Litigation or threatened litigation under Title III of the ADA frequently results in a settlement or consent decree. Many such agreements do not result in full compliance with the Standards, but represent the parties' agreement as to what is readily achievable and/or technically feasible. Such facilities should not be subject to the risk of further litigation under the revised Standards merely because there arguably has been an intervening change in the law.

While adoption of a safe harbor for existing facilities is absolutely imperative, the alternative options under consideration by the Department (exempting existing facilities from certain technical or scoping requirements, and/or applying reduced scoping requirements) also are an important part of balancing the barrier removal obligations of existing facilities and should be available to operators of places of public accommodation as a defense to claims that existing facilities do not meet new standards. No single option that the Department presently is considering will suffice for all conditions. The widely varied physical conditions in millions of U.S. places of public accommodations, coupled with the incalculable number of disparate individual elements, ensure that no single option will assure access while providing business owners with protection from unfair and unnecessary compliance costs. Therefore, with respect to all facilities existing on the effective date of the final rule, we strongly urge the Department to allow operators of places of public accommodation to provide accessibility and comply with the ADA utilizing any a mixture of the three options proposed in the ANPRM (*i.e.*, a "blended approach") with respect to individual elements within a covered facility.

The current Standards already contain several provisions that apply more moderate technical requirements for alterations to existing facilities than for new construction, which serve to mitigate the costs of barrier removal for existing facilities. See Standards, § 4.1.6(3)(a) (slope requirements for ramps); -(b) (handrail extensions on stairs); -(c) (minimum dimensions and equivalent facilitation for existing elevators); -(d) (door clear width and thresholds); -(h) (dressing rooms). The revised Guidelines

retain some of these provisions, but one very important exception has been deleted. The Figure 30(b) toilet stall (48" wide), which previously was permitted in alterations where there is insufficient space for a Figure 30(a) stall (60" wide), Standards, § 4.17.3 Exception, has been eliminated. The Figure 30(b) stall is a critical alternative for many existing retailers, particularly those operating in older buildings and in smaller facilities. Many such facilities lack sufficient space for a Figure 30(a) stall and cannot reduce the fixture count required by state or local building code. Retention of the Figure 30(b) configuration also is vital for existing facilities that do not have a viable option for creating an alternative accessible single-user restroom.

NRF strongly encourages the Department to restore the Exception to § 4.17.3, and to further explore adopting other provisions to mitigate the impact of the barrier removal obligation on existing facilities.

II. Specific Issues

A. Employee Work Areas

The question of whether barrier removal must be undertaken in employee work areas has caused considerable confusion. NRF agrees with the Department's determination that the ADA's barrier removal requirement does not apply to employee work areas, as the Department notes in the ANPRM. 69 Fed. Reg. 58,772 (Sept. 30, 2004). To avoid continued confusion, however, the Department should expressly exempt employee work areas in places of public accommodation¹ from the barrier removal requirement set forth in 28 C.F.R. § 36.304. Prior to the Department's issuance of the ANPRM, the Department's only statement of its position was a mere sentence buried in the lengthy, non-binding commentary set forth in Appendix B to its regulation, 28 C.F.R. pt. 36.

NRF strenuously objects to the expanded accessibility requirements for employee work areas set forth in the revised Guidelines because they erode the distinction between Titles I and III of the ADA. The current Standards essentially require that an employee with a disability be able to approach, enter and exit an employee work area, a requirement that is entirely consistent with the distinction between Title I and Title III. Accessibility within such areas is left to the individual reasonable accommodation process under Title I of the ADA. Standards, § 4.1.1(3). The revised Guidelines mandate that "common use circulation paths" within employee work areas be accessible (subject to certain limited exceptions), and that emergency alarm systems in such areas be wired to permit easy integration of visible alarm appliances. Revised Guidelines, §§ 206.2.8, 215.3.

¹ NRF notes that Title III's barrier removal requirement applies only to places of public accommodation, and does not extend to commercial facilities. Compare 42 U.S.C. §§ 12182(a), -(b)(2)(A)(iv) (prohibiting discrimination based on disability in "any place of public accommodation" and defining such discrimination to include failure to remove architectural and communication barriers to access), with 42 U.S.C. § 12183(a) (applying new construction and alteration requirements to both public accommodations and commercial facilities).

The erosion of the distinction between Titles I and III of the ADA is problematic because the distinction is a critical part of the balance between providing accessibility against the costs incurred in doing so. Whereas Title I requires that an employer be *reactive* to the needs of a known individual *employee* with a disability, Title III requires that places of public accommodation, such as retailers, be *proactive* to the needs of anticipated but unknown *customers* with a disability. Because an employer can discern the actual needs of the employee with a disability, under Title I an employer's resources are specifically targeted to providing precisely the accommodations that will actually benefit an employee, rather than doing so based on a mere speculation that at some unknown point in the future the employer might hire an employee who needs such accommodations. Title I's reasonable accommodation process, therefore, provides an efficient method of providing access where it is needed, and avoiding the unnecessary imposition of costs when it is not. Title III, by contrast, requires a heightened degree of accessibility precisely because the needs of a particular customer with a disability typically cannot be known in advance, and the nature of many interactions with such customers is such that providing structural accessibility on an individualized basis can be impractical. The qualitative differences between an employer's relationship with an employee and a retailer's relationship with a customer present no such limitation in the employment context. For all these reasons, Title I's reasonable accommodation process is the more appropriate avenue for addressing accessibility within employee work areas, and is more consistent with the balance created by Congress in enacting the ADA. Thus, we recommend that the Access Board's approach be rejected.

1. Common Use Circulation Paths

The expanded requirement for accessible "common use circulation paths" raises other concerns as well. Most significantly, the definitions of "circulation path" and "common use" are drafted so broadly that essentially all open floor space in a work area could be considered a common use circulation path.² There is no clear demarcation between a "common use circulation path" and any other space. The resulting ambiguity creates significant confusion and disputes regarding this requirement. Indeed, the only application of the new requirement free of ambiguity would appear to be in the context of an office setting, where circulation paths in the overall office would have to be accessible, but presumably the interior spaces of individual employee offices or cubicles would not. Retail facilities, of course, are arranged in an entirely different manner than office spaces. Nearly all work areas in retail facilities, whether they be on the retail floor or in back areas such as a stockroom, arguably are "common use" areas.

This problem is further exacerbated by the fact that § 206.2.8 of the revised Guidelines appears to require that all common use circulation paths in work areas (subject to certain limited exceptions) be accessible, regardless of business needs, contrary to the rationale underlying the application of Title III to places of public

² "Circulation path" is defined as "an exterior or interior way of passage provided for pedestrian travel, including but not limited to, walks, hallways, courtyards, elevators, platform lifts ramps, stairways, and landings." Revised Guidelines, § 106.5. "Common use" is defined as "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." *Id.*

accommodation and irrespective of whether an alternative accessible route is available. See § 206.2.8 (“Common use circulation paths” shall comply with 402). Scoping provisions for accessible routes in non-work areas, however, generally require only one accessible route. See § 206.2.1 (“at least one” accessible route from site arrival points); § 206.2.2 (“at least one” accessible route within a site to accessible elements); § 206.2.3 (“at least one” accessible vertical route in multi-story buildings and facilities); § 206.2.4 (“at least one” accessible route connecting accessible building entrances with accessible spaces and elements). The Access Board has provided no rationale for imposing a more stringent accessible route requirement on work areas, which are more appropriately left to consideration under Title I, than on the public areas of a facility.

To the extent that Section 206.2.8 presages an intent to require that all common use circulation paths in retail sales areas (which are work areas for sales personnel) also be accessible, the NRF strongly opposes this change.³ Such an interpretation would contravene 15 years of guidance by the Department that not all paths between movable merchandise display fixtures need to be accessible and show blatant disregard for the Department’s careful balancing of the needs of customers with disabilities against the realities of retail business.

While NRF opposes adoption of the accessible common use circulation path requirement for the primary reasons stated above, NRF also wishes to note that Exception 1 to Section 206.2.8, which excepts common use circulation paths in work areas with less than 1000 square feet that are “defined by permanently installed partitions, counters, casework, or furnishings,” is problematic for additional reasons and requires further explanation and clarification. Warehouse facilities, and/or stockrooms often exceed 1000 square feet and should be exempted entirely from this requirement. Many warehouse facilities and stockrooms are designed and intended primarily for the use of materials handling equipment, such as forklifts. These areas often are not intended for individual or pedestrian travel. Furthermore, merchandise, packaging and packing materials are frequently moved and transferred within these areas, often blocking paths of travel.

Moreover, work areas typically have both “fixed” and modular or portable elements, and sometimes even only modular/portable elements. The Advisory to 206.2.8 notes that modular elements are not directly subject to this requirement, but are the purview of the Department and/or the Equal Employment Opportunity Commission. Given that the Department consistently looks to and applies the Standards to “non-fixed” elements as well, 69 Fed. Reg. 58768, 58775 (Sept. 30, 2004), the exception should apply even if the elements within are modular or portable. Although modular elements provide greater flexibility in arranging a workspace, they do not eliminate the space constraints posed in smaller work areas. For this reason, requirements within all

³ NRF acknowledges that the definition of “employee work area” includes those areas used only by employees, and not by members of the public. Revised Guidelines at § 106.5 (“employee” work area”). As is best exemplified by the confusion over barrier removal requirements in work areas, however, ADA requirements often are not interpreted as intended.

work areas, and especially those that are less than 1000 square feet, should be the exclusive province of Title I's reasonable accommodation process.

2. Visual Alarms

NRF is pleased to note that the final revised Guidelines do not require that emergency alarm systems in work areas be equipped with visual alarms, as the Access Board initially proposed. See 64 Fed. Reg. 62,297 (Nov. 11, 1999) (Access Board's NPRM § 203.3). The revised Guidelines still require, however, that the alarm systems in employee work areas be "designed" so that visual alarm appliances can easily be adapted into these systems. Revised Guidelines § 215.3. Provided the Department continues to adhere to its articulated policy that employee work areas are not subject to Title III's barrier removal obligations, the enormous costs of retrofitting all such areas will be avoided. The Department should note, however, that the revised requirement will still pose significantly higher costs for new construction and alterations, particularly for large warehouse facilities.

Additionally, all stockroom areas (both in new construction and existing facilities) should be exempt from requirements for visual alarms due to the nature of these rooms and the practical problems presented in providing visual alarms in such spaces. Stockrooms are typically filled with merchandise, stacked or on shelving clear or near to the ceiling. To ensure that visual alarms function properly and comply with the requirements of NFPA 72, merchandise would have to be rearranged so that it does not interfere with visibility of visual alarm appliances. (NFPA 72 specifies the number of visual alarm appliances required based on both the field of view and distance between appliances.) Ensuring that visual alarms are not blocked from view by merchandise stock would result in the loss of at least 30% of stock space.

B. Sales/Service Counters

The revised Guidelines contain a new requirement that knee and toe clearance be provided if there is only a forward approach to a sales or service counter that is required to be accessible.⁴ See Revised Guidelines, § 904.4.2. Additionally, although not noted in its NPRM or the "draft final guidelines" circulated by the Access Board in April 2002, the final version issued in July 2004 includes a new requirement that the

⁴ The Revised Guidelines, like the current Standards require that at least one of each type sales counter and service counter be accessible and that where counters are dispersed throughout a facility, the accessible counters must be dispersed as well. See Revised Guidelines, § 227.3; Standards, § 7.2(1). The Advisory to § 227.3 provides yet another example, however, of the Access Board's attempt to limit the use of equivalent facilitation, *see infra* pp. 15-16. The Advisory notes that one continuous counter can be used to provide different types of service, such as "order" and "pick-up," at different locations on the same counter and indicates that both locations must be made accessible. In the retail setting, a single, continuous customer service counter may provide different designated stations or queues for return or exchange of merchandise, pick-up of Internet or catalog orders, credit card payments, etc. These designations, which are made for convenience and to facilitate quicker processing of the transactions, in no way preclude or hinder a retailer's ability to handle any of the transactions at any given station and the designations themselves can change depending on staffing levels and customer volume. The Advisory appears to suggest that each and every different station would have to be accessible. The equivalent facilitation of accommodating individuals with disabilities at a single location of such counters should be permitted.

accessible portion of the counter must extend the same depth as the rest of the counter. *Id.* §904.4.

As discussed below, the revised guideline for knee and toe clearance will impose significant economic costs on retailers, both in terms of lost sales space and in retrofit requirements. Even more importantly, there is no demonstrable evidence establishing that it will result in any added benefit for individuals with disabilities. Sales transactions are generally brief transactions. The counter typically is used more by the sales personnel than by the customer, who at most only uses the counter to sign a credit slip (and even that requirement is being eliminated by new "wave and pay" devices and other developing technologies).⁵ Given that alternative equivalent facilitations, such as a folding shelf or a clipboard, easily provide an adequate writing surface, there appears to be practically no benefit to be derived in providing knee and toe clearance at such great additional cost. Additionally, compelling retailers to suffer the even more significant cost of lost sales space is both unnecessary and unwarranted.

The requirement for knee and toe clearance for forward approaches to display cases and cash/wrap counters will produce significant expenses for department stores in particular. During its own rulemaking, the Access Board dismissed concerns from the retail industry about the impact such a requirement would have on elements such as glass display cases that also serve as sales counters and cash wraps. It apparently did so based on the fact that the Guidelines also permit a parallel approach. The Board's conclusion, however, ignores the fact that a parallel approach to such counters is difficult to maintain for retail facilities that are small in size and/or during certain seasonal sale periods. During peak sales periods and during seasonal holiday selling periods, retailers typically increase the amount of merchandise on a sales floor, and one prime area to place such merchandise is immediately in front of a sales or service counter, which can limit the approach provided to a forward approach.

The requirement for knee and toe clearance (even if only for a forward approach) will significantly reduce available sales space, and consequently lost sales. The present value of expected lost sales over the next 20 years is more than \$5 billion. The cost of replacing/refitting existing display cases and counters is estimated at more than \$943 million. The expenses will not be offset by increased sales. It is extremely questionable whether the arguable and at best marginal benefits generated by the revised guideline warrant such expenses. No estimate of benefits has been provided by the Access Board.

The amount of sales lost is a function of the size and number of display cases and point-of-sale cash/wraps affected by the revised guidelines, as well as the placement of the display cases and cash/wraps in the department stores.⁶ Display

⁵ See, *infra* note 11.

⁶ For example, multiple cash register cash/wraps may be placed at the front of major entry and exit points within a store. This is done for the convenience of the customers wishing to pay for purchases and leave the store. This placement also ensures that the customer must pass within close range of the point-of sale counter, allowing the store to monitor sales carefully.

space is lost because portions of the counter used for display of merchandise offered for sale must be removed to provide for knee and toe clearance. This space is often used for high value merchandise such as watches, jewelry, fine purses, etc. The data used as a base for this analysis is based on information from 1470 stores representing both low to mid-priced merchandise, and up-scale merchandise.⁷ The stores were asked to estimate the number of cash/wrap counters and display cases affected by the requirement for front-in approaches. They also provided information about the number of shelves for display counters and the length of both display and cash/wrap counters. The stores also provided information on the cost of refitting/replacing counters to provide required knee and toe clearance space. Based on the information provided, it was estimated that stores would lose on average \$1682 annually per million dollars of sales due to lost selling space related to provision of knee and toe clearance.⁸ Applying this estimate to total annual industry sales, projecting sales forward for twenty years, and calculating the net present value of lost sales led to an estimate of \$5,096,000,000 or slightly more than \$5 billion.⁹

The cost estimates for replacing/refitting display cases and cash/wrap counters differ significantly between department store groups. Larger stores handling high end merchandise are likely to have more display cabinets per store, and are likely to spend much more per cabinet to enable safe storage of valuable inventory, and to prevent breakage or pilferage from the display area. The department store groups were asked to estimate their refitting/replacement cost per display cabinet and/or cash wrap counter. Separate estimates were calculated for both larger and smaller stores. For smaller stores, estimated cost of replacement/refitting was \$771 per million dollars of total sales. For larger stores the number was considerably higher: \$7,133 per million dollars of total sales. This disproportionately large cost of replacement/refitting for larger stores may reflect that larger stores may build more secure and better fitted counters to safeguard merchandise such as jewelry and cosmetics. There were 7,275 smaller stores with less than \$25,000,000 of sales per store in 1997.¹⁰ Estimated total cost for replacement/refitting of counters for these stores was \$74,230,000. Estimated total costs for the 3,091 large stores with sales over \$25,000,000 (average sales of \$39.4 million per store) were \$868,885,000. Added together, estimated costs for the

⁷ The data was collected in early 2004.

⁸ Full detail on the preparation of the lost sales and replacement/refitting costs for the general merchandise department stores are provided in **"Estimating the Impact of Proposed ADAAG Guidelines Requiring Clearance for Wheelchair Front In Approaches to Point of Sale Counters and Display Cabinets,"** presented to the Access Board and the Office of Management and Budget/Office of Information and Regulatory Affairs on April 7, 2004.

⁹ This number may seem relatively small relative to industry sales, but the comparison should not be to sales but to profits. This comparison provides a much better basis for estimating the burden placed on the industry. For the most part, the industry cannot make up for lost sales by raising prices due to the intense competition within the industry. Nor can the industry provide additional sales space without increasing the average size and cost per store.

¹⁰ Industry data for 1997 was used because the results of the 2002 Business Census have not yet been published. The first tables from the 2002 Census were released on March 29, 2004, but they do not have sufficient detail to separate department stores from all general merchandise stores.

department store industry were \$943,115,000. This represents a significant one-time cost for the department store industry.

The Access Board has provided no basis for the number of individuals who purportedly will benefit by the forward approach requirements, nor have they estimated the number of transactions that will be facilitated through these arrangements, as distinct from the current Standards. Given that parallel approaches are compromised in many cases due to the presence of seasonal displays, etc., it is unclear what the value per unit benefit needs to be to make the annual flow of benefits equal the annualized flow of costs (primarily the lost sales from lost display space), but this estimated value per unit benefit may have to be very high. The extensive replacement/refitting expenditures may also be unnecessary given the many approaches to equivalent facilitation which are being used by the retail industry. New point-of-sale devices make it easier to use credit cards.¹¹ By their very nature sales assistants stand ready to assist with the moving and wrapping of merchandise to facilitate completion of a transaction. Equivalent facilitation and the introduction of new technology obviate the need for expenditures for front-in approaches without any negative effects on the population of individuals using wheelchairs.

The annual loss of sales and the cost of refitting/replacing display cases and point-of-sale cash/wrap counters will have significant effects on the department store industry. Total sales will increase at a slower rate unless the industry adds sufficient square footage to make up for space lost based on the revised Guidelines. Adding space to existing buildings is difficult, and building additional stores is expensive. Industry members will face a continuing annual loss of sales over the next twenty years, with a present value of lost sales exceeding \$5 billion.

The one time cost of \$943,000,000 for replacement/refitting of display cases and cash/wrap counters will have a severe effect on industry profits during the year when adjustments are made.¹²

It should be noted that these estimates are only for department stores. Other specialty retail stores are not covered by the analysis. These specialty stores account for another 35 to 40 percent of general merchandise sales. Specialty stores may also expect significant costs in adjusting to the revised Guidelines.

Given the magnitude of the costs that are noted above, NRF respectfully requests that the Department ask the Access Board to revisit this issue and provide some estimate of the benefits to be generated by the required changes. At the present

¹¹ New "Wave and Pay" credit cards are being introduced that will make it even easier for a person with a disability to complete a purchase transaction. The State of California has introduced requirements that stores provide point-of-pay devices in several different configurations which ease payments for people in wheelchairs. There are continuing technological improvements which may eliminate the need for knee and toe clearance for forward approaches.

¹² The one-time costs may be spread over time if the expenditures are financed through long-term loans. This will increase the annual flow of interest expense for retailers.

time, the Board has provided neither cost estimates nor benefit estimates to help assess the impact of the revised guideline for knee clearance for forward approach to sales and service counters.

C. Dressing Rooms

The revised Guidelines significantly alter the technical requirements for accessible dressing or locker rooms and will broadly impact retailers. The primary change pertains to the requirement that a 30" x 48" clear floor space be provided at the end of the bench seat required in dressing/changing rooms, positioned parallel to the short axis of the bench to facilitate transfer. See Revised Guidelines § 903.2. The current Standards specify only that the clear floor space be positioned "alongside the bench" to allow for a parallel transfer. Standards, § 4.35.4. Consequently, the clear floor space often is provided in front of the bench, positioned parallel to the long axis of the bench. Although the revised Guidelines also include other changes (such as a slight reduction in the bench size and permitting an inward door swing) to partially offset the increased floor space this would require, the overall square floor space required for an accessible dressing/changing room will still increase with respect to new construction. The impact of the proposed changes will be especially onerous for existing facilities unless a safe harbor is adopted.

NRF commends the Access Board for responding in part to the comments it filed regarding this issue. In response to NRF's comments regarding the increased footprint resulting from the revised requirements for dressing rooms proposed in its NPRM, the Access Board revised its guideline to permit the door to swing inward, into the turning space within the dressing room, provided a 30" x 48" clear floor space is provided outside the swing of the door. While the change in direction of the door swing (coupled with the decreased bench size proposed in the Board's NPRM and retained in the final guideline) does reduce the additional floor space required, the net effect of these changes still requires additional floor space and alters the dimensions of the room. This appears problematic for both large and small retail clothing and general merchandise businesses, particularly with respect to existing facilities. The need to move at least one wall of the accessible dressing room which meets current Standards in order to comply with the revised Guidelines in many cases triggers a requirement to make numerous other adjustments, both within the dressing room bank and/or outside of the area, to offset the increased space requirements. These changes appear necessary to maintain the overall appearance of the dressing rooms in the bank, and also to maintain a path of travel to all the dressing rooms in the bank (and an accessible path of travel to the accessible dressing rooms). In about half of the cases examined, some net expansion of the dressing room bank is called for. This expansion must come from either sales display space or inventory storage space.¹³ In either case the store is likely to lose

¹³ A net loss of sales space results in lost sales. Since less stock is available directly to customers, sales clerks are more frequently asked to check for stock in the backroom inventory storage space. This type of transaction removes the clerk from the sales floor, decreasing the availability of help for other customers, and forcing customers to wait for information which they could have picked simply by examining the stock on display prior to the expansion of the dressing room bank. If the choice is made to take the additional space from the

some potential sales or experience higher costs to maintain customer service capability. Store designers attempt to minimize the total space used for dressing rooms in order to maximize sales and inventory storage spaces. Based on experience the managers strive to provide a sufficient number of dressing rooms to insure that customers do not have to wait unnecessarily for access to a dressing room. Oversupply of dressing rooms is rare because the unused space is less productive than sales or display space.

Larger stores in particular take great care with design and fit and finish of dressing rooms in order to make the sales experience as pleasant as possible. Any change in the dimensions of an accessible dressing room, and any changes consequent to this change, may call for expensive renovations. One large general merchandise chain with approximately 500 stores and with an average of 17 accessible dressing rooms per store estimated that it would cost \$33,388,000, or \$4,000 per accessible dressing room to meet the revised standards. Another group of general merchandise chains, also with approximately 500 stores, estimated that it would cost \$23,952,000 to make adjustments to almost 3000 accessible dressing rooms. The estimated per unit cost varied from \$5,500 to \$10,000 depending on the chain and store locations, and the relative price range of the stores (luxury versus upper level, etc.). A third group, with more than 1000 stores and a more middle-of-the-road price point, estimated that it would cost \$35,900,000 to alter slightly more than 6000 accessible dressing rooms that met existing accessibility standards.

The approximately 200,000 small retail clothing stores generally will spend less per accessible dressing room in order to meet the revised standards. Based on data from approximately 700 stores, per unit expenditures are likely to be more in the range of \$3,000 to \$3,500 per unit.¹⁴ While most large stores have already made the investment to make the requisite number of accessible dressing rooms meet current standards, a greater proportion of smaller stores have not yet made this expenditure. On average, smaller stores operate in more constrained spaces and feature smaller and less well finished and appointed dressing rooms than larger stores. Smaller stores, therefore, are more likely to have to undertake extensive changes to all of their dressing rooms than larger stores, and they are likely to lose a greater proportion of their sales display or inventory storage space than larger stores.¹⁵

backroom, then total inventory available declines and all customers are left with a decreased choice of styles and/or sizes.

¹⁴ All of the price and cost estimates presented here are from professional facilities managers who are experienced in the planning and implementation of alterations to existing facilities. Management of the change process is not inexpensive. In the case of the \$35,900,000 expected cost to alter 6000 accessible dressing rooms in a 1000 stores, management planning, contracting and quality control costs were estimated to be \$5,000,000 of the total cost.

¹⁵ These comments focus only on the costs of making conversions to meet the revised accessible dressing room standards. In an earlier paper NRF estimated the loss in sales per \$1,000,000 of sales for both general merchandise stores and retail clothing stores. Those losses per \$1,000,000 of sales for general merchandise stores ranged from \$622 per \$1,000,000 to \$3,815 per \$1,000,000 depending on the price range of the merchandise. Smaller clothing stores lost anywhere from \$1,888 to \$3,360 per \$1,000,000 of sales. Since it is difficult to determine exactly how much sales space will be lost under the revised standards and the provision of a parallel

The NRF questions whether the large expenditures typified in these examples are warranted in terms of the questionable or marginal additional benefits to be produced by these changes. The NRF notes that the issue here is not one of accessibility, since accessible dressing rooms are already broadly available throughout the industry. Access will not be *improved*, just made different. The relocation of the approach to the bench may or may not have some positive effect for some people with disabilities. The Access Board has provided no estimate of the number of people with disabilities who will be helped, nor have they said how many times per year one of these individuals might make use of the relocated approach. If we could estimate the expected number of uses per year, we could estimate the value per use necessary to provide an annual flow of benefits equal to the annualized cost of producing such benefits. This would greatly facilitate the Regulatory Impact Analysis to be conducted by the Department of Justice.¹⁶ Without any viable use data presented by the government for comparison, the NRF strongly believes that the additional benefits to be produced by the revised accessible dressing room standards are not warranted given the expenditure of funds needed to produce these benefits.

D. Accessible Entrances

These expanded accessible entrance requirements are problematic for both large general merchandise department stores and for smaller retail stores of all types. 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 on retailers. 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 only rationale the Access Board proffered for the last-minute increase in scoping in the final guideline is that certain comments submitted by individuals urged that scoping be increased to provide "comparable choices" and convenience in terms of relation to accessible parking.¹⁷ The requirement for an additional accessible entrance is of marginally increased benefit,

approach, no formal estimate is made here of total lost sales, but they almost certainly would exceed \$100,000,000 per year. See "Estimating the Impact of the Proposed ADAAG Guidelines on Accessible Fitting Rooms in Retail Clothing Stores and General Merchandise Department Stores," presented to the Access Board and the Office of Management and Budget/Office of Information and Regulatory Affairs, April 7, 2004.

¹⁶ The NRF is focusing on costs to owners of existing facilities, since new buildings and buildings undergoing major alterations may be able to deal with the issue more straightforwardly. Nevertheless, NRF believes that costs for new builds to meet the revised accessible dressing room standards will not be trivial and should be considered when comparing total benefits and costs.

¹⁷ The Board's reliance on proximity to accessible parking as the justification for this scoping increase is quite puzzling given that the current Standards already require that accessible parking be located on the shortest route to an accessible entrance. Standards, § 4.6.2.

however, given that an accessible entry is already provided. Consequently, the additional costs imposed by this increased scoping requirement are not justified.

Large general merchandise department stores, whether they are stand-alone stores or anchor stores in large malls generally have multiple entrances, 50 percent of which are already accessible based on the current Standards. For one group of 400+ general merchandise department stores, organized into a number of sub-groups by merchandise price range and market segment, the typical store has 6 entrances, three of which are already accessible. The revised Guidelines would call for almost 400 of these stores to add an additional accessible entrance at a total cost of \$10,543,000 and a per unit cost ranging from \$19,750 to \$25,750. Another large chain estimates that it will cost \$12,275,000 to modify more than 470 entrances to buildings that average four total entrances, two of which are already accessible. Most large general merchandise department stores already have significant numbers of accessible entrances. Given that the expected number of users will not increase with these expenditures and modifications, and given that the average number of visits by people with disabilities will probably not increase, NRF questions whether the additional benefits to be gained from these significant expenditures warrant the cost of making these changes and imposing such huge costs on this one industry.¹⁸

Smaller retail businesses frequently have two entrances, one of which is accessible. The second entrance is frequently in the rear of the store and is intended primarily for delivery of merchandise or for use by staff. Nevertheless, when parking is available at the rear of the store, many stores make this entrance available to the public. The entrance is often through an inventory storage area or through office space or other back-of-the-store facilities. The path of access through these areas may not meet current Standards, and the combination of making the entrance accessible and improving the path of access may overwhelm many small business owners. In these circumstances, many of the stores will eliminate the public access through this second entrance, rather than spend the money to bring the entrance into compliance with the Standards. This will inconvenience many potential customers. This inconvenience is an offset to any accessibility benefits that may be generated through the expanded accessible entrance requirement. Since potentially many more people are inconvenienced than are benefited, this decision might lead to a net loss in benefits for the total customer population.

E. Reach Range to Self-Service Merchandise Racks

The revised Guidelines regarding reach ranges will be extremely problematic if applied to merchandise display racks, and NRF requests that the Department retain the

¹⁸ Store owners also face potentially expensive costs for providing back-up power at accessible entrances or installing doors with 32" or greater breakout panels at accessible entrances. The NRF understands that these are safety-related expenditures that will be given high priority by store facility managers. In combination with the installation costs for additional accessible entrances, total expenditures may be very large and produce a real burden on some stores.

current exception for all self-service display fixtures, regardless of type, in mercantile settings. Although the current Standards expressly exempt all self-service shelves and "display units" in mercantile occupancies from reach range requirements, see Standards, § 4.1.3(12)(b), the exception set forth in the revised Guidelines is limited only to "self-service shelving." Revised Guidelines, § 225.2.2. The narrowing of this exception, coupled with the reduction in the allowable reach range,¹⁹ is a significant logistical problem for retailers. "Shelving" is but one method of displaying merchandise for sale. Merchandise racks, whether they be clothing/hanging racks, shoe racks, purse racks, etc., are the more common method for many retailers.

There is no logical reason why self-service shelving, but not other types of display apparatus used in the retail setting, should be exempted from the reach range requirements. Merchandise fixtures of all types can be stacked, similar to shelving, so that a store can maximize use of its valuable space. Moreover, the tops of certain merchandise display fixtures frequently must be higher than 48" in order to properly display and prevent damage to the merchandise. For example, the merchandise display fixtures for long coats must be higher than 48" so that the coats do not drag on the floor, where they can be soiled and otherwise damaged by customers inadvertently stepping on (or wheeling over) them. Women's dresses, evening gowns, slacks, bathrobes and men's trousers present similar issues. For all the foregoing reasons, Section 225.2.2 of the revised Guidelines should be expanded and clarified so that the current exception in Section 4.1.3(12)(b) is retained for all types of self-service merchandise display fixtures.

F. Point-of-Sale Devices

In issuing the Revised Guidelines, the Access Board wisely refrained from extending the requirements for ATMs and fare machines to point-of-sale devices. 69 Fed. Reg. 44,135 (July 23, 2004). As commenters noted, point-of-sale devices differ significantly in structure and use from ATM machines and rarely have the capacity for added functions, such as speech output. NRF is not aware of the existence of any commercially available point-of-sale device that complies with all the requirements for ATMs (speech output, volume control, privacy and differentiation of controls by sound or touch without activation).

For these reasons, NRF strongly encourages the Department to similarly refrain from extending the requirements for ATMs to point-of-sale devices.

G. Comments on other Specific Provisions of the Revised ADA Accessibility Guidelines

In addition to commenting on the foregoing issues, NRF also submits the following comments on additional provisions in the revised Guidelines.

¹⁹ The revised Guidelines lower the maximum side unobstructed reach range from 54" to 48" AFF. Compare Revised Guidelines § 308.3.1 with Standards § 4.2.6 & Fig. 6(b).

Structural Impracticability

NRF strongly believes that neither the Department nor the Access Board has authority to negate the general exception for structural impracticability, which is currently set forth in Standards, § 4.1.1(5)(a). Even though the structural impracticability exception is a statutory exception expressly legislated by Congress, see 42 U.S.C. § 12183(a)(1), that is applicable even to new construction, the revised Guidelines purport to eliminate this exception. This critical component of the law should be retained in the revised Standards.

Construction Tolerance

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, NRF 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. NRF 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.

The Department'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. The Department 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.

Equivalent Facilitation

Although the revised Guidelines retain the general provision permitting equivalent facilitation, throughout the Guidelines specific types of equivalent facilitation previously expressly sanctioned have been deleted (e.g., providing a clipboard or a folding, flip-down or other auxiliary counter at sales/service counters). This is a very short-sighted approach, unsupported by any evidentiary foundation that any benefits will accrue from

the change. Overall, this serves to de-emphasize the valuable role that equivalent facilitation can play in providing access, both for new construction and for existing facilities. Equivalent facilitation typically provides a less costly solution for providing accessibility without any sacrifice in accessibility.

Elimination of the specific provisions identifying permissible forms of equivalent facilitation also makes reliance on the equivalent facilitation provision more difficult and uncertain, which serves to increase the uncertainty in complying with the Standards, the risk of litigation over acceptable forms of equivalent facilitation and the risk of conflicting court holdings that will certainly follow. The specific equivalent facilitation provisions contained in the current Standards provided a critical "safe harbor" for covered facilities. Facilities could employ these alternatives free of risk that they would later be deemed not equivalent. The approach utilized in the revised Guidelines essentially throws the issue to the various courts and the plaintiffs' bar.

To eliminate the uncertainty that the elimination of specific equivalent facilitation provisions from the revised Guidelines will create, the Department should either restore these provisions to its revised Standards or otherwise provide a more explicit provision in its Title III regulation that reinforces the use of equivalent facilitation and provides clearer guidance on acceptable forms of equivalent facilitation.

Automatic Doors

The revised Guidelines require that automatic or power-assisted doors have back-up power unless the break-out leaf provides 32" clear width or the doors remain open in the power-off position. Revised Guidelines, § 404.3.1. Back-up power is also required if there is insufficient maneuvering clearance at the door, unless the door remains open in the power-off position. *Id.* § 404.3.2. This change will be particularly problematic for existing facilities (including those who have not yet completed the barrier removal process), because automatic or power-assisted doors are typically the only available solution for providing access at doors where appropriate maneuvering clearance cannot be achieved, and adding back-up power can be expensive. Furthermore, the alternative option of ensuring that doors remain open in the power-off position also raises serious concerns about security and safety, as well as possible conflicts with building safety codes.

Parking

Scoping for van accessible parking spaces has been increased from 1:8 to 1:6. *Compare* Revised Guidelines, § 208.2.4 *with* Standards, § 4.1.2(5)(b). The Access Board acknowledges that it did so largely based on "anecdotal" information that the use of accessible vans is increasing, that one State has increased its requirements for van accessible spaces, and the fact that cars also can use these spaces. 69 Fed. Reg. 44,096-44,097 (July 23, 2004). The Board indicated that the impact of this change is lessened due to the fact that the overall number of required spaces remains unchanged. This argument ignores the fact that van accessible spaces are three feet wider than a standard accessible space. This change likely will have a significant impact on facilities

with large parking areas, such as shopping malls/centers and big-box retailers. Additionally, while the impact on small shopping malls/centers likely will not be as great, the resulting economic impact may be more substantial.

Additionally, the Access Board apparently overlooked the fact that many of the new accessible vans are designed and manufactured so as to reduce the need for additional space to the side of the van. Many accessible vans now provide for a narrow lift offering a parallel approach to the van.²⁰ Still other accessible van designs provide for entrances from the rear of the van as opposed to the side of the van.²¹ These new accessible vans can easily use a standard accessible parking space.

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. Standards, Fig. 28. The revised Guidelines require clear floor space at the water closet which is at least 60" minimum from the side wall. Revised Guidelines § 604.3.2. 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 on existing retail facilities, particularly if they are precluded by the applicable building code from reducing fixture count.

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 convenient lavatory, most facilities will opt for the latter.

Dining Tables/Spaces

Many retailers also offer some type of in-store dining area, and will be significantly impacted by the revised requirements for dining tables. The current Standards require that 5% of fixed dining *tables* (or a portion of a dining counter) be accessible. Standards, § 5.1. The revised Guidelines require that at least 5% of *seating spaces* and *standing spaces* at dining surfaces be accessible. Revised Guidelines, § 226.1. 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

²⁰ See, e.g., the Swing-A-Way lift from the Braun Corporation, at <http://braunlift.com/consumer/SwingAway/index.htm>

²¹ See, e.g., The Vision Wheelchair Access Minivan, at <http://www.viewpointmobility.com>.

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.

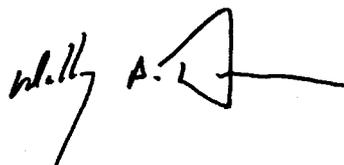
III. Miscellaneous Issues

Effect of the Revised ADA Standards on Certified Accessibility Codes

Issuance of the revised Standards should not operate retroactively to "undo" certifications previously issued. Facilities constructed in accordance with currently certified accessibility codes also must be afforded a "safe harbor" from the revised requirements.

We appreciate the opportunity to provide these comments. Should you have additional questions please feel free to contact me at (202) 783-7971.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Duncan", with a stylized flourish extending to the right.

Mallory Duncan
Senior Vice President, General Counsel