



**COMMENTS AND RESPONSE TO THE
NOTICE OF PROPOSED RULEMAKING
TO AMEND 28 C.F.R. PART 36**

Submitted by

**The National Retail Federation
and
The International Council of Shopping Centers**

The National Retail Federation (“NRF”) and the International Council of Shopping Centers (“ICSC”) herein submit this joint comment on the Department of Justice’s (the “Department”) Notice of Proposed Rulemaking (“NPRM”) issued June 17, 2008, to amend its regulation implementing Title III of the Americans with Disabilities Act of 1990 (“ADA”), and to revise and update the Department’s current Standards for Accessible Design (“1991 Standards”), 28 C.F.R. pt. 36, app. A, by adopting the revised ADA Accessibility Guidelines (“2004 ADAAG”), 36 C.F.R. pt. 1191, issued by the U.S. Architectural and Transportation Barriers Compliance Board (“U.S. Access Board”) on July 23, 2004.

INTRODUCTION

NRF is the world’s largest retail trade association, with membership that comprises all retail formats, including department, specialty, discount, catalog, Internet and independent stores. The Federation represents an industry with more than 1.4 million U.S. retail establishments and more than 23 million employees -- about one in five American workers. Some of its members have thousands of buildings and facilities nationwide. As the industry umbrella group, the Federation also represents more than 100 state, national and international retail associations. The Federation’s members, therefore, clearly have a substantial interest in the Notice of Proposed Rulemaking, and the revised Standards ultimately issued by the Department.

ICSC is the global trade association of the shopping center industry. Its 77,000 members in the U.S., Canada, and more than 92 other countries represent owners, developers, retailers, lenders, and other professionals as well as academics and public officials. ICSC’s nearly 66,000 U.S. members represent almost all of the 48,000 shopping centers in the United States.

The Department’s NPRM is of significant interest to, and will have significant economic impact on, the retail industry. Both NRF and ICSC submitted comments to the Department in response to its Advance Notice of Proposed Rulemaking (“ANPRM”). NRF and ICSC recognize the long and diligent hours of work implicit in this voluminous Notice of Proposed Rulemaking. NRF and ICSC also recognize that in several respects 2004 ADAAG contains provisions intended to lessen the costs and difficulties that public accommodations, including retailers, can at times encounter in making their facilities accessible, and we appreciate that consideration. Nevertheless, certain aspects of the proposed revisions to the Department’s Title III regulation and in 2004 ADAAG remain of concern to us and our members.

RESPONSE TO NOTICE OF PROPOSED RULEMAKING

1. Element-by-Element Safe Harbor

NRF and ICSC appreciate the Department's inclusion of a safe harbor applicable to existing facilities in the proposed rule and strongly encourages the Department to retain a safe harbor in the final rule. As both NRF and ICSC noted in their written comments to the Department's Advanced Notice of Proposed Rulemaking, application of 2004 ADAAG to existing facilities would nullify the expensive and time-consuming actions that many retailers have undertaken to make their buildings and facilities accessible under the 1991 Standards and applicable state and local law. In effect, retailers who removed barriers would be penalized for having done so, and the penalties would accrue in proportion to the number of barriers removed! In addition, retailers who constructed new facilities or expanded or remodeled their existing stores in compliance with the 1991 Standards during the past 17 years would have to undertake barrier removal to modify features that are, by definition, already fully accessible, solely to provide somewhat different or arguably more convenient access. Given that the Standards may be subject to further revision in the future, a safe harbor is necessary to avoid the creation of 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.

NRF and ICSC respectfully request, however, that the Department modify its safe harbor proposal so that existing facilities need only comply with the 1991 Standards. As proposed by the Department, a safe harbor applies to elements that currently "comply with" the 1991 Standards, however, the safe harbor is lost if such elements are subsequently altered or, given the uncertainty regarding the scope of "element," discussed *infra* at 3, merely located in an area of a facility that is altered. NRF and ICSC believe that such an approach unnecessarily confuses and complicates the provision of accessibility. When building codes are revised, including when such revisions pertain to accessibility requirements, businesses essentially are grandfathered.

As currently proposed, the element-by-element approach creates a potential quagmire for existing facilities and those built or remodeled in compliance with the 1991 Standards, particularly given the prospect of continuing, future revisions to the Standards. In order to avail themselves of the safe harbor, covered entities would have to maintain detailed and meticulous documentation regarding all changes and maintenance at their facilities, no matter how minor, in order to track which version of the Standards applies to each individual element of their facility and/or to establish that a particular element has not been altered since barriers were removed to render the element accessible. This could be a very expensive and time-consuming process, particularly for retailers with numerous locations. Some retailers have hundreds and others have thousands of facilities, with literally *millions* of existing elements subject to the Standards.

Facilities that comply with the 1991 Standards are by definition already "readily accessible to and usable by" persons with disabilities. In fact, in many respects 2004 ADAAG do not appear to provide better access, but just different access. Requiring that existing facilities need only comply with the 1991 Standards will create a simpler and clearer approach.

Should the Department choose not to implement a clean and certain compliance mechanism, and to retain the element-by-element safe harbor instead, it must be clarified in several respects:

- The safe harbor should be rephrased to make clear that the qualifiers “not altered” and “comply with the 1991 Standards” pertain to “elements” and not existing facilities. Under customary statutory interpretation rules and in grammar generally, modifiers typically are construed as pertaining only to the immediately preceding object – in this case “existing facilities.” To eliminate any possible confusion regarding the proper interpretation of this provision, we recommend that it be reworded as follows: “In existing facilities constructed prior to the effective date of the 2004 ADAAG, elements that are not altered after ... and that comply with the 1991 Standards, are not required to comply with the requirements set forth in the proposed standards.”
- The phrase “comply with the 1991 Standards” must be clarified. By referencing only the 1991 Standards, the safe harbor appears to read the carefully crafted “readily achievable” standard for barrier removal set forth both in the ADA statute and the Title III regulations out of the safe harbor. The phrase “comply with the 1991 Standards” should encompass not only those elements that comply fully with the 1991 Standards, but also elements that comply with the 1991 Standards to the extent readily achievable. Otherwise, facilities constructed prior to January 26, 1993, and not otherwise altered subsequent to the effective date of the final regulation, conceivably could be held to a higher standard of accessibility than facilities that were constructed after that date, or which were altered after January 26, 1992. For this same reason, the proposed safe harbor for path of travel, § 36.403(a)(1), also requires clarification.
- The proposed safe harbor is problematic given the ongoing uncertainty and ambiguity regarding the level and degree of modification required to constitute an alteration. Under both the current and proposed regulation, there is uncertainty regarding the point (if any) at which the owner or operator of a facility has altered a sufficient number of elements in a particular space that the space itself can be said to be altered, as distinct from modifying only particular elements within that space. Indeed, the distinction between what constitutes an “element” as opposed to being a mere feature or aspect of an element also is ambiguous. Accordingly, the extent to which alteration of an element subsequent to the effective date of the final rule results in loss of the safe harbor as to that element also requires greater clarity. A particular element required to be accessible often has multiple characteristics that factor into its accessibility. This poses significant issues for existing “pre-ADA” stores with very small footprints, such as cosmetics and jewelry stores, eyewear shops, card shops, tie shops, hat shops, etc. To the extent the store undertakes any type of remodeling or modification, such as in an employee restroom, it arguably could be required to make the restroom fully compliant with the 2004 ADAAG, even if that results in a significant reduction in the sales area. For these reasons, the term “element” should be given the narrowest possible interpretation. For example, changing out the hardware on a

door should not trigger an obligation to address door maneuvering clearance issues. Likewise, replacing a water closet to provide a compliant seat height should not trigger a requirement to enlarge the clear floor space at the water closet.

- Application of the safe harbor will be complicated by the fact that there is uncertainty regarding whether particular provisions in the revised Standards are in fact changed or new requirements, or merely “clarifications” of current requirements. Although the Department has included as Appendix 8 to its Regulatory Impact Analysis a matrix that identifies those “incremental changes” in 2004 ADAAG that the Department deems subject to the safe harbor provision and those “new requirements” that are not, the matrix appears to omit certain items. For retailers, critical among these omissions are the requirements in 2004 ADAAG that the accessible portion of a sales or service counter must extend the full depth of the counter and that sales and service counters with only a forward approach must provide knee and toe clearance. Both of these requirements will have an enormous financial impact on retailers, both in terms of barrier removal costs and lost merchandise display and selling space. Nonetheless, neither requirement appears in Section 7.2 of the 1991 Standards, and the only reference to sales and service counters in the matrix at Appendix 8 pertains to the length of the counter. The matrix should be revised to reflect all the changes reflected in 2004 ADAAG to eliminate any ambiguity in application of the safe harbor.

2. Effective Date

An effective date 18 months after publication of the final rule is the most appropriate time period of the three options the Department posited in the ANPRM. This time period has ample precedent in that it would be the same effective time period utilized for new construction under Title III when the 1991 Standards were first promulgated on July 26, 1991.

Moreover, an 18-month time period is necessary to lessen the difficulty posed for construction projects that are already in the design and permitting stages at the time the revised Standards ultimately are issued. The 18-month time period utilized for the 1991 Standards served not only to provide an opportunity for affected entities to “learn” the new requirements, but also to lessen the risk that ongoing projects would have new requirements imposed mid-stream. The timeline of many construction projects (especially larger projects) from design to permitting to the completion of construction frequently is much longer than 12 months. The timeline of certain alterations and renovations to existing facilities also can have longer time frames, particularly if some demolition of the existing structure is involved.

3. Reach Range to Self-Service Merchandise Racks

2004 ADAAG lowers the maximum side unobstructed reach range from 54” to 48” AFF (*i.e.*, above the finished floor), and increase the minimum side unobstructed reach range from 9” to 15” AFF. *Compare* 2004 ADAAG § 308.3.1 *with* 1991 Standards § 4.2.6 & Fig. 6(b). The Department’s Regulatory Impact Analysis indicates that the economic impact of this requirement greatly exceeds the anticipated monetized benefit. Accordingly, NRF and ICSC strongly

recommend the Department return this issue to the U.S. Access Board for further review and study, and in favor of retaining the current requirement for side reach range.

The revised requirements regarding reach ranges will be extremely problematic for retailers if applied to merchandise display racks and other apparatus. NRF and ICSC request that the Department retain the current exception for *all* self-service display fixtures, regardless of type, in mercantile settings. Section 4.1.3(12)(b) of the 1991 Standards expressly exempts all self-service shelves and “display units” in mercantile occupancies from reach range requirements. The exception set forth in Section 225.2.2 of 2004 ADAAG is limited only to “self-service *shelving*.” The narrowing of this exception, coupled with the reduction in the allowable side reach range from 54” to 48” above the finished floor, is a significant logistical problem for retailers. “Shelving” is merely one of myriad methods of displaying merchandise for sale. There is no principled distinction between shelving and the scores of other types of display fixtures that retailers use to store and display merchandise for customer self-service. Nothing in their design or their use justifies subjecting other types of display elements to more stringent standards. Merchandise racks that display hanging ready-to-wear and other types of packaged goods, whether they be clothing/hanging racks, wall hooks or brackets, pole fixtures, shoe racks, purse racks, etc., are even more common display fixtures in many retail facilities. The attached photos depict but a few of the various types of display apparatus.

NRF previously noted this issue in its written comment responding to the Department’s ANPRM. Although subsequent informal remarks by various Department and Access Board officials suggested that the failure to exempt other types of display apparatus other than shelving from reach range requirements was inadvertent, this apparent oversight was not addressed in the proposed rule. There is no logical reason why other types of display apparatus used in the retail setting, should be denied the exemption from the reach range requirements accorded by the 2004 ADAAG to self-service shelving. Both shelving and all other types of display fixtures serve exactly the same function and present the same challenges to accessibility. 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, such as those for long coats and dresses, frequently must be higher than 48” in order to properly display, and prevent damage to, the merchandise; so that such merchandise does not obstruct the aisle and impede access. For all the foregoing reasons, § 225.2.2 of 2004 ADAAG should be clarified so that the current exception in § 4.1.3(12)(b) of the 1991 Standards, which also is incorporated into the International Building Code, is retained for all types of self-service merchandise display fixtures.

4. Point-of-Sale Devices

NRF and ICSC are concerned that the Department’s commentary regarding Title III requirements for equipment could lead to confusion regarding accessibility requirements for equipment – particularly point-of-sale devices. The 1991 Standards contain only limited provisions regarding equipment, such as ATMs, vending machines and fare vending machines in transit facilities. In its ANPRM, the Department queried whether it should provide additional guidance regarding requirements for equipment, particularly with respect to free-standing equipment. In its summary analysis accompanying the NPRM, the Department notes that equipment has been covered under its ADA Title III regulation, including the provisions requiring modification of policies, practices and procedures and barrier removal, notwithstanding the fact that no provision specifically addresses equipment. The Department declined to add any

more specific guidance addressing free-standing equipment, stating that covered entities could look to analogous requirements contained in 2004 ADAAG and other federal guidance, such as federal standards implementing section 508 of the Rehabilitation Act of 1973.

The Department's commentary leaves unclear the extent to which the many and varied types of point-of-sale devices currently in use in retail facilities must be accessible. While these devices can be positioned on an accessible route and with the operable parts within reach range, providing "communications" accessibility for individuals with sight impairments is more challenging. Unless and until the Department adopts specific technical standards specifically for point-of-sale devices, these devices should not be subject to any requirements other than the basic requirements regarding accessible route and reach range.

5. Power-Driven Mobility Devices

The question of what qualifies as a mobility device that must be accommodated under the ADA is a significant issue for NRF's and ICSC's members. NRF and ICSC appreciate that the proposed regulation provides clearer definitions for what qualifies as a mobility aid, and also enables covered facilities to adopt policies that specify whether, and under what circumstances, use of power-driven mobility devices is reasonable. The increasing popularity and use of such devices, even when not medically necessary, potentially raises significant concerns for our members, the first of which is safety. The safety of our customers is paramount. Numerous factors, in addition to just the dimensions, weight and operating speed of a particular device, can influence safety. The safety risks differ depending not only on how many individuals in a particular space are using such devices, but also on the number of other individuals in the space. The denser the crowds and the greater the number of power-driven devices being used, the greater the risk of accident or injury. Additionally, electronic personal assistance mobility devices, whether they be carts or Segways® present safety concerns that power wheelchairs do not given the greater speeds they can attain. For all of the foregoing reasons, carts and Segways® should not, without some additional clarification, be included in the definition of "wheelchair."

In the final regulation, NRF and ICSC request that the Department give further consideration to the following:

- That the department develop on its own initiative, or encourage the states to develop, a consistent mark or designation that can be applied to such devices to indicate that they are medically necessary. The department should specifically provide that after a designated date only those devices so denominated need be accorded the protected treatment as is afforded to "wheelchairs" under the current definition. This would be a decided improvement over the currently proposed regulation which merely permits an entity to ask if the device is needed due to a disability. Given that an individual who strongly prefers to use an admittedly convenient transportation option likely may answer "yes," even if he or she does not in fact have a disability, covered entities essentially are left with no meaningful method of determining whether the device is in fact being used due to a disability.

6. Service Animals

NRF and ICSC believe that the proposed regulations respecting service animals bring much needed clarity to the definition of service animal. NRF and ICSC also appreciate that the proposed regulations provide more specific guidance regarding the circumstances under which a covered entity can decline to admit a service animal or request that it be removed from the premises. While the proposed regulations also provide greater clarity as to the inquiries a covered entity may make to verify that a particular animal is a legitimate service animal, they leave the onus on the owner/operator to determine if an animal is a legitimate service animal. In reality, an owner/operator will only be able to establish that an animal is not a legitimate service animal after the fact, when the entity is sued. In the event that a covered entity has a reasonable basis to believe that an individual has falsely claimed that an animal is a service animal, the covered entity should either be permitted to request additional information to verify that the service animal is in fact a service animal, or should be able to refuse to admit the animal. For example, if a customer claims that a miniature dog or other animal being carried in a zippered fashion bag is required due to a disability and identifies the task performed as reminding her to take medication, the Department's proposed regulation leaves the facility with no option but to accept this explanation, even if circumstances strongly suggest that this is not the case, unless it is willing to risk potential legal liability for refusing to admit the alleged service animal.

NRF and ICSC also request that the Department to retain the requirement that service animals wear a leash, harness or other tether. Such a requirement is an important safeguard for control of the animal, especially in retail facilities. A harness, and to some extent a leash, also can aid a retailer in distinguishing a legitimate service animal from a pet.

7. Employee Work Areas

The question of whether barrier removal must be undertaken in employee work areas has caused considerable confusion. NRF and ICSC appreciate the Department's reaffirmation, in its summary analysis to the NPRM and in its ANPRM, that the ADA's barrier removal requirement does not apply to employee work areas. 69 Fed. Reg. at 58,772; 73 Fed. Reg. at 37,011. To avoid continued confusion, however, and given the extent to which the Department has relied on this interpretation in assessing the impact 2004 ADAAG will have on existing facilities, the Department should expressly exempt employee work areas in places of public accommodation from the barrier removal requirement set forth in 28 C.F.R. § 36.304.

NRF and ICSC further object to the expanded accessibility requirements for employee work areas set forth in 2004 ADAAG because they erode the distinction between Titles I and III of the ADA. The 1991 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. 1991 Standards, § 4.1.1(3). 2004 ADAAG mandates 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. 2004 ADAAG §§ 206.2.8, 215.3.

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 a known 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 might need a range of specific 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.

a. Common Use Circulation Paths

For the reasons discussed above, NRF and ICSC believe that the expanded requirement for accessible common use circulation paths in employee work areas should be removed from 2004 ADAAG. Notwithstanding this position, we offer the following additional comments as further rational for the inappropriateness of including this requirement in the final regulation.

NRF and ICSC note that in its summary analysis, the Department has clarified that only primary circulation paths, not all circulation paths in an employee work area would have to be accessible. NRF and ICSC appreciate that the Department specifically notes that only a central aisle, and not all aisles, in stockrooms would have to be accessible. The comment is crucial. As clarified by the Department, the new requirement will merely require extremely expensive changes in retail industry practices; without the clarification, this requirement otherwise would have had a devastating economic impact on our members' inventory rooms and stockrooms. Again, given the extent to which the Department relies on this interpretation in concluding that this requirement would not have an onerous impact on stockrooms, this clarification should be included in the text of either the regulation or 2004 ADAAG.

While NRF and ICSC appreciate the foregoing clarification, we note that Exception 1 to § 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.¹ Work

¹ NRF recently surveyed several hundred storage areas in both large and small chain department and specialty stores. In some, but not all, large full service department stores, the inventory areas are specialized by department and, therefore, small enough in about seventy percent of cases to be exempt from the enhanced requirements, but the fixtures within are not always fixed and the partitions and other elements forming their

areas typically have both “fixed” and modular or portable elements, and sometimes only modular/portable elements. Although modular elements provide greater flexibility in arranging a work space, they do not eliminate the space constraints posed in smaller work areas. For this reason, requirements within all work areas, and especially those that are less than 1000 square feet, should be the exclusive province of Title I’s reasonable accommodation process.

NRF and ICSC also note that the Department’s Regulatory Impact Analysis makes no estimate of either the costs or the benefits of the work area proposal on new, altered, or existing buildings. The NRF is unable to provide a full analysis of potential costs to adjust work area accessibility under 2004 ADAAG 206.2.8. But it appears that costs will be significant compared to any benefits likely to be generated by these requirements. NRF and ICSC strongly recommend that the expanded requirements be remanded to the Access Board for further review and consideration.

8. Sales/Service Counters

2004 ADAAG contains a new requirement that knee and toe clearance be provided if there is only a forward approach to a sales or service counter. *See* 2004 ADAAG, § 904.4.2. This change is significant for a number of retailers. During its own rulemaking, the U.S. 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. NRF had conducted a study of the effects of the proposed requirements for knee and toe clearances on cash/wrap counters and glass display cases. The present value of expected lost sales over a 20 year period (commencing in 2004) was more than \$5 billion.² The more immediate cost of replacing/refitting existing display cases and counters was estimated to be approximately \$943 million. The Access Board apparently made its decision based on the fact that 2004 ADAAG also permits a parallel approach. The Board’s conclusion, however, does not deal with the fact that a parallel approach to such counters is difficult to maintain for many retail facilities that are small in size, squeezed for space because of high rents, or merely crowded with other customers. The Access Board also ignored the widespread usage of rounders, rack displays or other display equipment close to counters to provide convenient access and meet consumer demand for expanded selection and increased inventory availability to customers during certain holiday or seasonal sale periods. As noted in its prior comments to the Department’s ANPRM, this requirement will have a sizable impact on available sales space, which will directly result in an enormous loss of merchandise capacity, display space and the resulting sales to and by the retail industry. Given the high value of expected losses in this case, it is surprising that the enormous costs to be incurred by the retail industry were not compiled or referenced in the Department’s detailed Regulatory Impact Analysis and cost/benefit calculations.

boundaries are often temporary rather than permanently installed and in some cases are even movable. Smaller stores on the other hand frequently use one or two more general use storage areas which are large enough to trigger compliance to the new requirements if they are applied to existing buildings, such as in the context of an alteration.

² It should be noted that this estimate is only for lost sales in large and small department stores. It does not include expected losses in small, independent retail stores, for example, clothing stores, fashion accessory retailers, jewelry stores or other specialty retail stores that rely heavily, as do department stores, on glass display cases as sales and service counters.

Equally important is the fact that there is no demonstrable evidence establishing the new requirement will result in any added benefit for individuals with disabilities. Sales transactions are generally brief transactions. The counter (or top of the display case serving as a sales counter) typically is used more by the sales personnel than by the customer, who at most only uses the counter to check out selected merchandise and perhaps sign a credit slip. 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 clearance. Increasing use of credit or debit cards which can be swiped against movable processing devices should make sales transactions even easier and more convenient to complete. Consequently, compelling retailers to suffer the significant cost of lost sales space is both unnecessary and unwarranted. NRF and ICSC respectfully request that the Department add this requirement to the list of eight other items that may be remanded to the Access Board for further review and study.

9. Dressing Rooms

2004 ADAAG significantly alters the technical requirements for accessible dressing or locker rooms and will broadly impact a wide range of facilities from retail facilities to sports and recreation facilities, as well as newly constructed employee changing rooms. The primary change involves 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* 2004 ADAAG § 903.2. The 1991 Standards specify only that the clear floor space be located "alongside" the bench. 1991 Standards, § 4.35.4. Consequently, the clear floor space is often provided in front of the bench, positioned parallel to the long axis of the bench. Although 2004 ADAAG also includes 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 floor space required for an accessible dressing/changing room will still increase, even given the changes made to 2004 ADAAG, by not less than 20 percent with respect to new construction in a typical retail environment. That is because the additional clear floor space changes not just the amount of space required along the short dimension of the bench, but along the entire width or depth of the dressing room, if the 30" X 48" clear floor space is intended to provide meaningful opportunity for additional access. As discussed in NRF's comment to the ANPRM (and also in a collective industry comment which ICSC joined), the resulting increase in clear floor space will not only involve substantial cost expenditures to make the necessary modification, but will also significantly impact available sales and storage spaces at retailers.

NRF conducted a survey of dressing rooms in large department stores and in smaller specialty retail clothing stores. For the larger stores, some of which have larger-than-average dressing rooms, the 2004 ADAAG 903.2 can be met in approximately 75 percent of existing accessible dressing rooms by adjusting the bench position from the back wall to a side wall of the dressing room. The actual move may be relatively inexpensive, but the costs of refinishing walls, floors, etc., may raise the expected costs significantly. In the other 25 percent of accessible dressing rooms the footprint of the dressing room will have to be expanded. This may involve a loss of space which can be manifested in the loss of another dressing room, the loss of inventory space, or the loss of sales space. The first of these will inconvenience some customers by causing longer waiting times for access to a dressing room at peak use periods. A loss of

inventory space may reduce the variety and breadth of styles and sizes available to consumers or the inventory depth – the number of like items carried in stock in a particular store – thus potentially lowering sales. A loss of sales space will almost certainly have a significant effect on total sales of consumer clothing.

The Department’s only response to this very significant concern in its NPRM was to note that this provision in 2004 ADAAG applies only to new construction and alterations, and that in such contexts “creative designers” can mitigate the impact of the changes. 37 Fed. Reg. at 37,027. The Department’s response fails to consider the fact that many retail facilities renovate or update their facilities on a fairly regular basis, taking such facilities out of the scope of the element-by-element safe harbor. Whereas in new construction “creative designers” may be able to mitigate the impact of this requirement on available sales space, alterations pose a greater risk of lost dressing room, inventory or sales space. Alterations also pose the unique risk that an existing bank of dressing rooms that includes a perfectly accessible – by the 1991 Standards, at least – dressing room would have to be reconfigured to provide the additional 30” x 48” clear floor space at the end of the bench required by the 2004 ADAAG. The NRF and ICSC respectfully submit that these circumstances will present an untold number of design and construction challenges that even “creative design” might not overcome.

Since the Department does not estimate the losses discussed here in its benefit-cost analysis, the expected costs cannot be balanced against expected benefits from the proposed change in clear floor space location. In the absence of credible data tending to substantiate any perceived benefits, it is questionable whether the benefits are even a small fraction of the costs the retail industry will incur in making the physical changes to accessible dressing rooms. NRF and ICSC respectfully suggest that the Department not accept the provision in 2004 ADAAG and return it to the Access Board for further consideration.

10. Dining Tables/Spaces

Many shopping centers serve consumer needs by providing food courts or vendors that provide food to customers and to store staff members, including outdoor dining areas. Some full service retailers including larger, stand-alone department stores and department stores in shopping centers also provide restaurants on their premises as a convenience to shoppers. Such shopping centers and retailers will be significantly impacted by the revised requirements for accessible dining tables. The 1991 Standards require that 5% of fixed dining *tables* (or a portion of a dining counter) be accessible. 1991 Standards, § 5.1. 2004 ADAAG requires that at least 5% of *seating spaces* and *standing spaces* at dining surfaces be accessible. 2004 ADAAG, § 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.” Neither the Department nor 2004 ADAAG provide any guidance as to what constitutes 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. Is it done by allotting so many linear inches along the bar to a person? Or should the decision be up to the fire marshal who establishes a maximum occupancy for the restaurant?

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. Given that accessible routes are wider than many of the current routes to tables in many dining areas (whether they be interior rooms or outdoor spaces), the increase in space requirements will probably be accomplished at the expense of seating (or standing) capacity. A decrease in the number of seating or standing spaces means fewer opportunities to serve customers and lower revenue for the restaurant. This decrease in revenue potential may be especially problematic for existing facilities that were planned and financed on the basis of a given seating capacity and an expected flow of diners.

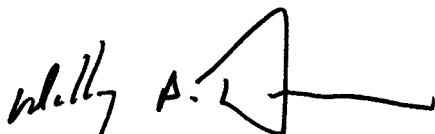
ICSC further notes that the current trend in shopping center design is toward an external layout similar to a town square, with a central feature such as a skating rink, as opposed to enclosed shopping malls. Such designs also offer exterior dining, often in areas that essentially are sidewalks or the equivalent of patio areas. The arrangement of such areas is typically densely packed and can be very challenging in terms of providing accessible seating. Any requirement, therefore, that results in the provision of additional accessible spaces would be difficult to achieve without a reduction in the number of tables that can be accommodated in the space.

11. Play Areas

Question 7. Should the Department exempt owners and operators of public accommodations from specific compliance with the supplemental requirements for play areas and recreation facilities, and instead continue to determine accessibility in these facilities on a case-by-case basis under existing law?

ICSC strongly favors exempting covered facilities from compliance with the supplemental requirements for play areas. Our members whose facilities contain such features typically do so merely as an ancillary amenity. They are more likely to simply remove these amenities (or not add them to new facilities) if subjected to additional requirements.

Thank you for your consideration of our views.



Mallory B. Duncan
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