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UNITED STATES OF AMERICA

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August 18, 2008

The Honorable Grace C. Becker
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Office of the Assistant Attorney General, Main
Washington, D.C. 20530

By electronic submission: www.regulations.gov (CRT Docket No. 106)

Re: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; Notice of Proposed Rulemaking, 73 Fed. Reg. 34508 (June 17, 2008)

Dear Assistant Attorney General Becker:

The United States Chamber of Commerce (“the Chamber”), presents the following comments 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.

THE UNITED STATES CHAMBER OF COMMERCE

The Chamber is the world’s largest business federation, representing more than three million businesses and organization. The Chamber’s federation includes state and local chambers throughout the United States and 98 American Chambers of Commerce overseas. The Chamber’s membership includes businesses and organizations of every size and in every sector of the economy. The Chamber, in making these comments, represents a broad spectrum of interests within the business community, including, but not limited to retail, restaurant and hotel

establishments. These comments are also joined by the following entities: the Asian American Hotel Owners Association, the Food Marketing Institute, the International Council of Shopping Centers, the National Restaurant Association, and the North American Equipment Dealers Association.

- Asian American Hotel Owners Association (“AAHOA”)

7000 Peachtree Dunwoody Road, Building 7
Atlanta, Georgia 30328
(404) 816-5759

AAHOA represents more than 8,700 members and is one of the leading forces in the hospitality industry. Its members own more than 22,000 hotels, which have in excess of 1 million rooms representing over 50 percent of the economy lodging properties and nearly 37 percent of all hotel properties in the United States.

- Food Marketing Institute (“FMI”)

2345 Crystal Drive, Suite 800
Arlington, VA 22202
(202) 452-8444

FMI is a trade association representing the interests of food retailers and wholesalers, and has 1,500 members in the United States and around the world. FMI’s U.S. members operate 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume represents three-quarters of all retail food store sales in the United States. FMI’s retail membership is composed of large multi-store chains, regional firms and independent supermarkets.

- The International Council of Shopping Centers (“ICSC”)

1221 Avenue of the Americas
New York, NY 10020.
(646) 728-3800.

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.

- National Restaurant Association (“NRA”)

1200 Seventeenth Street, NW
Washington, DC 20036
(800) 424-5156

The NRA is the leading business association for the restaurant industry. Its 60,000 member companies represent more than 300,000 restaurant establishments. The Association represents, educates and promotes a rapidly growing industry comprised of 900,000 restaurant and foodservice outlets employing 12.2 million people.

- North American Equipment Dealers Association (“NAEDA”)
1195 Smizer Mill Road
Fenton, Mo 63026
(636) 349-6220

The NAEDA represents over 4,900 agricultural, industrial and outdoor power equipment dealerships in the U.S. and Canada. Collectively, these dealerships represent tens of thousands of owners and company employees.

INTRODUCTION

The Department’s amendments to its Title III regulation and its proposed adoption of 2004 ADAAG, which will apply not only to “places of public accommodation” but also to “commercial facilities,” will have a substantial impact on essentially all businesses operating in the United States. Accordingly, the Department’s NPRM is of significant interest to the members of the U.S. Chamber and those associations who are listed on these comments.

As an initial matter, the Chamber and the business community in general support the goals of the ADA and recognize the importance of accessibility for all individuals, as well as having a clear and consistent definition of “accessible.” The Chamber strongly believes, however, that in revising its regulation and adopting 2004 ADAAG, the Department must carefully balance the benefits derived against the costs incurred from the revisions. The Chamber appreciates that the Department undertook a Regulatory Impact Analysis to assess the anticipated economic impact and potential benefit of the NPRM, not only with respect to new construction and alterations, but also with respect to existing facilities. The Chamber also appreciates the fact that the Department has attempted to mitigate the impact of 2004 ADAAG on covered entities, most notably through inclusion of safe harbors for existing facilities and for qualified small businesses.

As discussed herein, the Chamber has concerns regarding the methodology utilized in preparing the Regulatory Impact Analysis. The Chamber also is concerned that the proposed safe harbors will in practice provide far less protection than the Department appears to envision and that application of the safe harbors also will result in associated costs and other burdens for covered entities. With respect to the Department’s proposal to adopt 2004 ADAAG, the Chamber understands that the ADA requires the Department to adopt standards consistent with 2004 ADAAG, and therefore appreciates that the Department has identified eight issues that it is considering returning to the U.S. Access Board for further consideration. The Chamber respectfully submits that certain other issues enumerated below also should be returned to the U.S. Access Board for further consideration. As the Chamber noted in its response to the Department’s Advance Notice of Proposed Rulemaking (“ANPRM”) submitted May 31, 2005, certain provisions in 2004 ADAAG will unnecessarily increase the costs of new construction and alterations--costs that will be particularly and disproportionately burdensome to small businesses – without conferring identified and/or significant benefits for individuals with disabilities.

While the Chamber supports accessibility as an important goal, as with any regulation, there must be an appropriate assessment of all the associated costs, and such costs must be appropriately balanced against credible and quantifiable benefits to be derived from the regulation. Accessibility is not a free good nor is it a one-time expense. Whether a business enterprise leases a commercial space (where the leasing rate is typically based on total square footage) or owns a facility, and therefore must shoulder the added expenses of maintaining a larger space (higher taxes, utilities, etc.), structural accessibility affects initial and ongoing managerial and operational costs, as well as initial construction costs. It also imposes economic costs in that accessibility requirements can negatively impact revenue-producing space, for example reducing the amount of available sales space or merchandise display space, the number of dining tables or the number of hotel rooms. In those cases, space is allocated to serve the compelling goal of providing an accessible facility, at the cost of providing more revenue-producing space for those who do not need the modification.

Furthermore, although the ADA is a civil rights law, it is the only civil rights law that mandates more than a change of mind. The Department's current regulation and the 1991 Standards already impose extensive requirements on businesses that not only are costly in their own right, but also have been much abused in litigation. The Chamber appreciates that the Department is proposing to revise its regulation to provide greater clarity with respect to certain obligations under Title III, such as for service animals and powered mobility devices. The Chamber encourages the Department to take this opportunity to provide more clarity with respect to other issues, including what constitutes an "alteration" and for the parameters of readily achievable barrier removal generally.

An ideal method for providing such clarity would be the Small Entity Compliance Guide the Department is obligated to produce as a result of the Department's determination that this regulation will have a significant economic impact on a substantial number of small entities. This requirement was recently amended to give the Department more specific guidance on what is expected in this guide, and to specify that it is to be available no later than the effective date of the regulation.¹

The Chamber further wishes to emphasize what should be obvious to all regulators, but often is not—which is that the burdens and costs of this proposal (along with its benefits) should be viewed in the context of the numerous and complex regulations with which businesses must already comply. Unfortunately, one of the major problems of government and its enforcement agencies is that its initiatives tend to be read in isolation, and silos, rather than against this backdrop of the huge existing panoply of regulations. Currently, there are more than 100,000 regulations on the books with an estimated cost of over \$1.11 trillion to the public. Thousands of pages of fine print of the Code of Federal Regulations, which are then interpreted by agency directives, and ultimately by the courts against the backdrop of numerous statutes, truly present a huge compliance burden to business and is daunting to any employer. State and local laws add to the confusion. Even the best intentioned employer and even those well staffed by lawyers can make good faith compliance errors which open them to enforcement actions by agencies, and/or lawsuits from plaintiffs' lawyers. Indeed, much will be expended on attorney fees to determine, in good faith, if there even was an error, given the vagueness of many legal requirements. The

¹ See, P.L. 104-121, Sec. 212, as amended by P.L. 110-28, Sec. 8302.

extensive proposal before us today can certainly be viewed with the same potential problems in mind.

Indeed, the threat represented by private litigation frequently outweighs any concerns, among business owners and small businesses, about enforcement from the Department of Justice. While the ADA provides advocates for those with disabilities the opportunity to bring suits to compel compliance, too often this litigation is focused on minor deviations from the Standards or is brought only in the hopes of forcing a monetary settlement without even producing the change in accessibility that is at issue in the suit. These suits have become the scourge of Title III and all too often create a negative impression about the goals of this important law. The Chamber is committed to seeking solutions that will curtail these “drive by” lawsuits. One such approach that could inhibit these suits would be a legislative solution mandating that businesses who successfully defend themselves against such suits receive full reimbursement for their attorney’s and legal fees. Another legislative approach that might have an impact would be to require an opportunity for the business to fix the problem before the lawsuit could ripen.

The Chamber’s comments to the NPRM are organized into the following sections: 1) commentary on issues of general application set forth in the proposed amendments to the body of the regulation, including the proposed safe harbors; 2) responses to certain specific questions raised in the Department’s NPRM; 3) additional commentary regarding specific provisions of 2004 ADAAG; and 4) commentary on the Regulatory Impact Analysis.

RESPONSE TO NOTICE OF PROPOSED RULEMAKING

I. Issues of General Application

A. Effective Date

The Chamber respectfully submits that an effective date of six months after publication of the final rule² does not afford sufficient time for covered entities to familiarize themselves with the revised requirements in 2004 ADAAG, let alone incorporate such requirements into renovation and construction plans, long-standing design/construction contracts and budgetary commitments. Additionally, prudence dictates that covered entities intending to rely on the element-by-element safe harbor, discussed *infra*, would assess their facilities to verify that they are in fact compliant with the 1991 Standards. Given that a facility, including new construction, is rarely 100% compliant in light of the multitude of accessibility requirements set forth in the 1991 Standards and that maintaining the accessibility of a facility requires ongoing vigilance, facilities that believe they are compliant would be well-advised to verify that fact before the effective date of the revised regulation, even if they have previously assessed the accessibility of their facilities. Six months provides little time for such facilities to complete this assessment, and make any necessary modifications before the effective date, particularly if they have multiple facilities, or are a small business dependent on limited staff.

² The Department states in its summary analysis that it proposes that the revised regulation take effect six months after publication of the final rule, 73 Fed. Reg. 34,542, in the proposed regulation itself, the Department states that it will apply to new construction and alterations commenced on or after “six months after the effective date of the final rule.” *Id.* at 34,556 (§36.406(a)).

The Department proffers two rationales for selecting a six month period for the effective date (the shortest of the time periods posited in the ANPRM): 1) covered entities are no longer dealing with a new statutory obligation, but rather transitioning between “two similar editions” of the Title III regulation; and 2) the approach is consistent with that of other agencies that either have adopted, or are in the process of adopting, 2004 ADAAG. 73 Fed. Reg. at 34,542.

The Chamber strongly disagrees with the Department’s characterization of 2004 ADAAG and the 1991 Standards as “two similar editions” of its Title III regulation. There are numerous changes between these two “editions.” Many provisions in 2004 ADAAG represent a substantial and significant departure from the 1991 Standards. The education required to learn and properly identify all the changes between the two will be extraordinarily time-consuming and difficult for affected entities. The process is made more difficult and time-consuming by the fact that 2004 ADAAG was substantially reorganized and reformatted. The vast majority of affected entities, and small businesses in particular, simply lack the internal resources to be able to identify these differences and will have to obtain outside expertise for this purpose. This fact alone represents a significant cost of compliance. The need to rely on outside expertise underscores the fact that a longer time period is necessary.

The Department’s other proffered rationale--that other federal agencies have taken a similar approach--is equally problematic. The sheer scope of the Department’s Title III regulation and the number of facilities subject to its regulation far exceeds the scope and number of facilities covered by the other regulating entities to which the Department refers. Moreover, those agencies primarily regulate accessibility with respect to governmental, or at the very least, quasi-governmental facilities. The General Services Administration regulations pertain only to facilities, owned, constructed or leased by the federal government. The Department of Transportation regulations pertain only to facilities associated with the provision of transportation or public transit facilities. The majority of such facilities either are government facilities, or at least are operated by quasi-governmental authorities.

For the foregoing and several additional reasons, the Chamber proposes that 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. First, 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. Additionally, certain businesses, particularly those that are “chain” establishments, have invested in one or more master facility designs that they then replicate at numerous locations to minimize the design cost of new facilities and to maintain their brand identity. The 18-month period provides a more appropriate interval to allow such entities to make required adjustments to their master

designs, particularly as those entities with interstate operations must consider not only federal accessibility requirements, but also a patchwork of state and local accessibility requirements.

Over the 17 years since the 1991 Standards were first issued, many states and localities have adopted their own accessibility requirements or modified existing requirements. Some have done so to be more consistent with the 1991 Standards; some have done so to harmonize their building requirements with the 2003 International Building Code and either 1998 or 2003 ANSI A117.1 which are similar, but not identical, to 2004 ADAAG; yet others have done so to adopt the 2006 International Building Code; and some jurisdictions have adopted requirements that differ in some respects from all of these standards. Reconciling 2004 ADAAG with existing state and local requirements will present no less a challenge, and in many states and localities will be a greater challenge, than existed in first learning the federal Standards in 1991. This is particularly true for businesses with facilities in multiple jurisdictions.

Finally, we wish to note that the incremental benefit that individuals with disabilities will derive from a shorter time period is far outweighed by the difficulties that a shorter time period will create for covered facilities. The past 17 years have resulted in far greater accessibility than existed at the time the Standards were originally issued in 1991. Unlike the situation posed then, a longer interval preceding the effective date of the Standards does not pose a choice between accessibility and inaccessibility, but rather an incremental change between two levels of accessibility.

For all the foregoing reasons, the Chamber submits that an effective date 18 months after publication of the final rule is more appropriate than the proposed six months.

B. “Triggering Event”

In the NPRM, the Department essentially jettisons the previous two-prong test triggering event for applying the ADA Guidelines to new construction. The “first occupancy” set forth in the current regulation, which considered two criteria: 1) the completion of the permit application; and 2) issuance of a certificate of first occupancy, is replaced by a single test focusing on “commencement” of either new construction or alterations. 73 Fed. Reg. at 34,542-34,543. While the Chamber recognizes the need for the Department to fashion a test that also provides clear guidance for alterations or new construction that do not require permit applications, or for which a certificate of first occupancy would not be issued, the Chamber respectfully submits that looking solely to “commencement” of construction or alterations is not appropriate, particularly with respect to construction or alterations for which a permit is required and/or a certificate of first occupancy issued. First, Congress expressly chose to utilize the concept of “first occupancy,” rather than “commencement” of construction, to define “new construction.” The Chamber questions the Department’s legal authority to abandon this approach, at least with respect to facilities for which a certificate of first occupancy would be issued.

Second, for projects requiring a permit application, some version of the first prong of the current regulatory test should be retained. The time between submission of a permit application, approval of the permit application and actual commencement of construction, let alone completion of construction, can vary greatly depending on several factors. The current test, which looks both to submission of a complete permit application and issuance of a certificate of first occupancy, implicitly recognizes this fact. Projects for which designs have been completed and permit applications submitted should not have to be redesigned (resulting in significant

additional cost and construction delay), merely because actual construction does not “commence” until after the effective date of the revised regulation (particularly where the Department is proposing such a short time period for the effective date of the regulation).

A test which takes into account the date the permit application is complete also would be more consistent with the standard practices adopted under state and local building codes. In that context, the date of the permit application determines which edition of the jurisdiction’s building code will apply. This not only alleviates the inequities that can arise when the effective date occurs after submission of the permit application, but before construction commences, but also avoids the inherent uncertainties in attempting to identify when construction in fact commences. Accordingly, at the very least, the Department’s final rule should set forth alternate tests for the triggering event – one that applies to construction and alterations requiring a permit and one for construction and alterations that do not.

Finally, utilizing “commencement” of either construction or the alteration as a triggering event is ambiguous, and likely will result in uncertainty and confusion that will only further frustrate efforts to comply with 2004 ADAAG and generate litigation. What constitutes “commencement” of the construction or alteration? With respect to new construction, does it include the razing of current structures on the site to make way for the new facility being construction? Does it include other steps to prepare a site, such as regrading of the site, whether following demolition of an existing structure or simply of a vacant site? Does it include excavation of the site in preparation for laying the foundation of a facility, or does construction commence only with the laying of the foundation for the facility? Alterations or additions to existing structures also sometimes involve the demolition of certain portions of the existing structure. Would such demolition qualify as “commencement” of the alteration?

C. Safe Harbors

The Chamber appreciates the Department’s efforts to recognize the substantial economic costs that would be imposed on existing facilities if they were required to implement all of the changes in the 2004 ADAAG, the proposed safe harbors for such facilities. The Department rightly recognizes that it is an extremely inefficient use of resources to require facilities that already comply with the 1991 Standards and/or have completed the barrier removal that is readily achievable to retrofit to the revised Standards, particularly where the revised requirements result in only a minimal improvement in accessibility. 73 Fed. Reg. at 34,533.

As noted in the Chamber’s response to the ANPRM, the Chamber respectfully submits that the more practical solution for addressing the burden 2004 ADAAG would pose for existing facilities would be for the Department to modify its current approach of using the Standards to define barrier removal requirements and to restore the “readily achievable” defense to Congress’ original intent. Safe harbors for existing facilities are necessitated by the Department’s broad and expansive interpretation of the obligation to remove barriers where readily achievable. The “readily achievable” defense, which requires only barrier removal that is “easily accomplishable” and “able to be carried out without much difficulty or expense,” 42 U.S.C. § 12181(9), was created for the sole purpose of mitigating the economic burden barrier removal would impose on existing facilities. Indeed, Congress characterized the barrier removal requirement as involving only “modest” expense and expressly cautioned that “readily achievable” should not be confused with “readily accessible,” as the two concepts are “polar opposites in focus.” S. Rep. No. 101-

116, at 65 (1989) (Labor and Human Resources); H.R. Rep. No. 101-485(II), at 109-110 (1990) (Education and Labor); *see also* H.R. Rep. No. 101-485(III), at 60 (Judiciary).

The extent to which the Department has strayed from the original congressional intent is underscored by the Department's own Final Regulatory Impact Statement regarding its original Title III regulation. That analysis concluded that because "required removals are confined to readily achievable measures that can be accomplished without significant difficulty or expense, their cost over time may average as low as \$100 to \$300 in present value terms per affected firm." *See Final Regulatory Impact Analysis of the Department of Justice Regulation Implementing Title III of the Americans with Disabilities Act of 1990*, at 37 (Dec. 18, 1991, revised April 8, 1992). By contrast, the Department's proposed safe harbor for just the *annual* barrier removal obligations of qualified small businesses is a cap of one percent (1%) of that entity's gross revenue, which the Department notes cannot exceed \$6.5 million for most small business under the Small Business Administration's size criteria, translates into an *annual* expenditure up to \$65,000. 73 Fed. Reg. at 34,520.

For all the foregoing reasons, the Chamber respectfully encourages the Department to reconsider its approach to implementing Title III's barrier removal requirement, in particular the Department's interpretation of what is readily achievable. Should the Department persist in its current interpretation of readily achievable barrier removal, however, the Chamber strongly encourages the Department to retain a safe harbor for existing facilities in the final rule. The Chamber nevertheless submits that as presently proposed, neither of the two safe harbors adequately addresses the questions and problems surrounding the readily achievable threshold for barrier removal.

1. Element-by-Element Safe Harbor

As the Chamber previously noted in its response to the ANPRM, a safe harbor for elements of existing facilities that comply with the 1991 Standards is a critical component for existing facilities given the enormous costs associated with retrofitting to 2004 ADAAG, particularly for the many facilities that already retrofitted to comply with the 1991 Standards. The Department's element-by-element approach is just a first step (and a complicated one), however, and does not adequately address several issues that will arise in implementing a safe harbor provision.

By limiting the safe harbor only to those elements that "comply" with the 1991 Standards and are not altered subsequent to the effective date of the final rule, the element-by-element safe harbor raises several key implementation issues that require further clarification.

First, the phrase "comply with the 1991 Standards" must be clarified. By referencing only the 1991 Standards, the safe harbor appears to read the "readily achievable" defense for barrier removal set forth both in the ADA statute and the Title III regulation out of the safe harbor. In practice, plaintiffs and their counsel typically identify any element that does not fully satisfy the scoping and technical provisions set forth in the 1991 Standards as "noncompliant" and a violation of Title III irrespective of the applicability of the readily achievable defense. The Department's phrasing of the element-by-element safe harbor unfortunately buttresses this approach.

The Department's explanation of the safe harbor further confuses the issue. In the NPRM's summary analysis, the Department statements suggest that the readily achievable defense remains available. The Department also posits that barrier removal which previously was not readily achievable could become so due to changed circumstances (such as improvement in the entity's financial resources or technological advancements), and in the event that should occur after the effective date of the final rule, the barrier removal would have to comply with 2004 ADAAG to the extent readily achievable. This entire discussion further confuses the critical issue of whether "comply with the 1991 Standards" encompasses only those elements that comply fully with the 1991 Standards, or also encompasses elements that comply with the 1991 Standards to the extent readily achievable. This issue is critical in that the former interpretation would significantly restrict the scope of facilities that could rely on the safe harbor, and arguably would result in the safe harbor affording greater protection to facilities that qualify as new construction under Title III of the ADA than to those that do not. An existing facility that brought the required elements into compliance with the 1991 Standards to the extent "readily achievable," but not within 100% compliance, remains vulnerable to claims that compliance with 2004 ADAAG is readily achievable even if no barrier removal is undertaken subsequent to the effective date of the final rule. By contrast, new construction that complies with the 1991 Standards would be encompassed within the safe harbor unless altered after the effective date.

Second, the extent to which alteration of an element subsequent to the effective date of the final rule results in loss of the safe harbor also requires greater clarity. A particular element required to be accessible often has multiple characteristics that factor into its accessibility. For example, an accessible water closet must satisfy requirements respecting seat height, distance from the side wall, location of the flush control, positioning of grab bars and clear floor space. If the water closet presently complies with the 1991 Standards, but also has an adjacent lavatory (located as permitted in the 1991 Standards, but within the enlarged minimum clear floor space required in 2004 ADAAG), would the mere fact that the facility replaces the water closet (whether due to malfunction, desire to install a model with greater water efficiency or with automatic controls, etc.) require the facility to bring the clear floor space into compliance with 2004 ADAAG? Conversely, if the clear floor space presently complies with the 1991 Standards, but the water closet itself is not otherwise compliant (*e.g.*, the flush control is not on the open side), is the clear floor space protected within the safe harbor, even though the water closet is not? The Chamber supports the narrowest possible reading of the term "element" to limit confusion and exposure to liability.

Third, the safe harbor requires greater clarification of which requirements in 2004 ADAAG are "new" or changed requirements, as opposed to mere clarifications or codifications of requirements in the 1991 Standards. One of the U.S. Access Board's stated objectives in preparing 2004 ADAAG was to clarify in text, requirements that previously were depicted only in illustrations, or were not entirely clear in the illustrations. The Board also added additional provisions and advisory notes to codify or clarify interpretations of current requirements. Consequently, in many instances, whether a particular requirement is "new" to 2004 ADAAG will be debatable, providing yet additional fodder for litigation. The Chamber appreciates that the Department has included as Appendix 8 to its Regulatory Impact Analysis a matrix that identifies those incremental changes in 2004 ADAAG the Department deems subject to the safe harbor provision. The Chamber respectfully submits that additional items should be included in the matrix. For example, the requirement in 2004 ADAAG that the accessible portion of a sales or service counter must extend the full depth of the counter is not included, even though Section 7.2 of the 1991 Standards does not include this express requirement. The requirement in 2004

ADAAG that sales and service counters with only a forward approach must provide knee and toe clearance similarly is not included in the matrix, again despite the fact that such a requirement does not appear in Section 7.2 of the 1991 Standards. The Chamber respectfully submits that the Department should reconsider the addition of other items to the matrix. The Department should publish the revised matrix as an appendix to the final rule, or utilize another option for ensuring that this information is otherwise provided in the final rule,³ as opposed to being available only on the Department's Web site.

Fourth, the element-by-element safe harbor should be modified to address those elements for which there are no current requirements in the 1991 Standards. The Department has indicated in the summary analysis to the NPRM that such elements do not fall within the protection of the element-by-element safe harbor, although the Department has to some extent proposed other limited safe harbors for certain such elements. Imposing such requirements on an existing facility will provide a strong incentive for such facilities to eliminate these elements entirely, particularly where they are ancillary to the primary purpose of the facility (*e.g.*, play facilities in fast food restaurants, saunas or swimming pools at hotels) and/or the cost of retrofitting is significant. At the very least, where state or local jurisdictions previously have adopted accessibility requirements for elements not covered by the 1991 Standards, the element-by-element safe harbor should be modified to encompass these elements where they have been built in compliance with applicable state or local law.

In addition to the difficulty the foregoing issues present in merely understanding the correct scope and operation of the element-by-element safe harbor, the element-by-element approach poses additional costs and burdens associated with identifying those elements that fit within the safe harbor and in tracking and/or documenting dates elements were installed, altered, etc. so that a facility can avail itself of this safe harbor. All these processes, not identified by the Department, are real and critical to implementing the element-by-element safe harbor. As noted above, in order to determine whether particular elements of a facility actually are "compliant" with the 1991 Standards, a covered entity would have to assess their facilities to verify that they are in fact compliant with the 1991 Standards, and to establish a benchmark for identifying the state of elements as they existed prior to the effective date of the final rule. Any facility, including new construction, is rarely 100% compliant in light of the multitude of accessibility requirements set forth in the 1991 Standards. This is true even of construction and alterations that are reviewed and permitted as accessible by State and local building officials, as such officials do not check for compliance with federal requirements. Additionally, even covered facilities that had previously assessed their facilities would be prudent to reassess their facilities. Maintaining the accessibility of a facility requires ongoing vigilance, as previously accessible elements can become inaccessible as the result of usage, malfunction, environmental factors, etc.

Affected entities also would face additional costs and administrative burdens in merely retaining information sufficient to establish when elements of the facility are installed or altered. The alternative to a benchmark assessment of the facility is to establish a system for documenting and retaining all installations of and alterations to elements required to be accessible so that the facility has a basis for proving which "edition" of the Standards applies.

³ One option would be to highlight those provisions that represent incremental requirements using a different type font, in much the same way that the 1991 Standards utilize italics to identify those provisions that differ from ANSI A117.1.

Most covered facilities, particularly small businesses, simply do not maintain such documentation, at least not with respect to anything other than major alterations.

2. Qualified Small Business Safe Harbor

Question 46. Should the Department adopt a presumption whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during the previous tax year, the entity spent at least one percent (1%) of its gross revenues on barrier removal? Why or why not? Is one percent (1%) an appropriate amount? Are gross revenues the appropriate measure? Why or why not?

a. The need for a Small Business Safe Harbor

Before moving to answer the Department's questions the need for a small business safe harbor should be explained. The Department has proposed a general safe harbor which provides that elements which meet the 1991 Standards prior to the effective date of the 2004 ADAAG will not have to be brought into compliance with the 2004 ADAAG until an alteration to the facility occurs. Notwithstanding our comments above about the problems with this safe harbor, this general safe harbor is critical to the owners/ operators of commercial facilities or public accommodations built before the Title III effective dates of the 1991 standards or before the adoption of the 2004 ADAAG. This general safe harbor offers protection for both small and large businesses from the difficulties of relying on the readily achievable counterweight to the ongoing barrier removal obligation.⁴

As the Chamber's testimony at the Department's July 15 hearing noted:⁵

Title III's barrier removal requirements for existing facilities were a carefully negotiated compromise. The goal was to provide a reasonable level of accessibility in existing facilities, while avoiding the imposition of onerous costs in retrofitting. The "readily achievable" defense, which requires only barrier removal that is "easily accomplishable" and "able to be carried out without much difficulty or expense," 42 U.S.C. Para.12181(9), was created for the sole purpose of mitigating the economic burden barrier removal would impose on existing facilities. Indeed, Congress characterized the barrier removal requirement as involving only "modest" expense⁶ and expressly

⁴ The Chamber also notes that the inconsistent manner in which the Department has described the small business safe harbor has created confusion among entities wishing to comment on this issue. Section 36.304((d)(5) of the proposed regulation states that a small business has met its barrier removal obligation "for a given year if, *during that tax year*, the entity has spent an amount equal to at least one percent (1%) of its gross revenue in the preceding tax year" on barrier removal. 73 Fed. Reg. at 34,555 (emphasis added). By contrast, in its summary analysis, the Department states that the obligation is met "for a given year if, *in the preceding tax year*, it spent at least one percent (1%) of its gross revenue" on barrier removal. *Id.* at 34,538 (emphasis added). This is a critical distinction that must be resolved in the final rule. The inclusion of illustrative examples in the Department's commentary to the final regulation also would assist in clarifying the manner in which this safe harbor is to be applied.

⁵ Randel Johnson, Vice President for Labor, Immigration and Employee Benefits, U.S. Chamber of Commerce, before the Department of Justice on July 15, 2008.

⁶ Footnote in the original, but omitted here.

cautioned that “readily achievable” should not be confused with “readily accessible,” as the two concepts are “polar opposites in focus. (References omitted)

Further:

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

In addition to the complications of relying on the readily achievable defense, most small business owners are not even aware of the readily achievable defense, nor are they familiar with the extent to which the defense has been eroded by federal policy, court rulings and plaintiffs’ demands. In fact, one argument for a small business safe harbor is that small business owners are totally overwhelmed by the fact pattern associated with the ADA and its implementing regulations.⁷ Small business owners are faced with legally mandated design standards when dealing with new construction and alterations, and DOJ regulations when dealing with existing facilities and attendant additional Title III requirements. They are generally unaware of the technical and scoping standards that they are to meet, not to mention the outcomes of investigations and holdings in lawsuits, settlements and investigations that continue to redefine the meaning of the regulations.⁸

While the hiring provisions of Title I have been widely publicized, the accessibility requirements of Title III have received comparatively less attention. Often small businesses only learn of these if they are sued. Unfortunately, the nature of these suits is frequently more punitive than educational and may not even produce the removal of the barrier at issue.

Even assuming knowledge on the part of business owners concerning their positive duties toward increasing accessibility, small business owners often face budget constraints that argue against making substantial accessibility improvements.⁹ Consider an example of a small grocery store that serves a neighborhood clientele. The grocery business generally produces a high

⁷ For example, many owners of pre-1993 buildings appear to believe that their buildings are “grandfathered” in and are not subject to accessibility regulations.

⁸ The legal fiction is even more extreme. Legally, a business owner is presumed to be aware of the content of regulations on the day they become effective. But there is ample anecdotal evidence that 16+ years has not been a long enough period for many business owners to become acquainted with the voluminous ADA regulations, or when they must be in compliance with them.

⁹ The 1991 Standards from DOJ include the ongoing responsibility to implement readily achievable changes that increase accessibility when there is “not much difficulty or expense” in making the changes. Very small businesses often have very little or no free cash flow to finance even small changes.

volume of gross receipts, but a very low net profit per unit of sales. Most small grocery stores show a profit of less than one cent per dollar of sales (or one percent of sales). Investment in new equipment usually represents no more than one to one and one-half percent of sales.¹⁰ As rational managers, the small business owners of this grocery store carefully review their investment project alternatives, looking at the expected return on each project and holding funds from depreciation of existing equipment available as a sinking fund for replacement of equipment. Projects are arrayed by the expected rate of return and the business owner selects projects according to their return as long as they are above the line established by the availability of funds augmented by the ability to borrow. Accessibility projects may suffer under this analysis. Why? Because projects at the top of the list generally can be expected to benefit all of the store's customers. An example would be the purchase of new, more efficient refrigerators to replace old equipment with higher maintenance costs. Projects that serve only a small subset of customers would generally be at the bottom of the list of available projects.

Many small business owners will have serious difficulty getting to the part of their lists that includes accessibility projects. While some advocates for those with disabilities may regard this decision as discrimination, the business owner sees it as allocating capital in the most effective way to produce the highest return. The advocate will argue that accessibility is defined as a civil right based on the law. However, as compared to other civil rights laws, achieving accessibility under Title III of the ADA means real financial investment. If the investment in accessibility does not produce as high a rate of return as other available investments, then total potential output will be decreased. To use capital inconsistent with these principles can impose losses on people with and without disabilities.¹¹ For instance, if the small local grocery store makes the accessibility improvements, but in so doing exhausts the capital needed to keep the store operating and is forced to close, all the customers who were served by it lose the benefit of having that store.

The Chamber also notes that the inconsistent manner in which the Department has described the small business safe harbor has created confusion among entities wishing to comment on this issue. Section 36.304((d)(5) of the proposed regulation states that a small business has met its barrier removal obligation “for a given year if, *during that tax year*, the entity has spent an amount equal to at least one percent (1%) of its gross revenue in the preceding tax year” on barrier removal. 73 Fed. Reg. at 34,555 (emphasis added). By contrast, in its summary analysis, the Department states that the obligation is met “for a given year if, *in the preceding tax year*, it spent at least one percent (1%) of its gross revenue” on barrier removal. *Id.* at 34,538 (emphasis added). This is a critical distinction that must be resolved in

¹⁰ These numbers are taken from the Food Marketing Institute, Annual Financial Review 2006-2007, for grocery stores with gross revenues less than \$25,000,000. This amount is the SBA standard for inclusion as a small business under SBA's size standards.

¹¹ The advocates for people with disabilities have argued extensively that only small investments are required to reach full accessibility. But potential output must fall if more productive investments are dropped and less productive investments approved. There is an opportunity cost to every investment—doing one thing means that you cannot do something else. Given the ADA law, investments in accessibility must be made—but there is an important question about how rapidly these investments in accessibility can be made without significant negative impacts on society as a whole. The Congress attempted to deal with this through its “readily achievable” barrier removal process. As noted earlier, the value of this language has deteriorated to the point where it is difficult for many businesses to meet the demand for accessibility on the time schedule put forth by advocates or to bear the other costs new construction standards impose to define “readily achievable” access.

the final rule. The inclusion of illustrative examples in the Department's commentary to the final regulation also would assist in clarifying the manner in which this safe harbor is to be applied.

Finally, the very complexity of the accessibility rules can make it difficult for small business owners to know whether they have achieved compliance and satisfactorily implemented some accessibility improvements. Small business owners may find it difficult to hire experts sufficiently versed in ADA requirements to provide unbiased advice about the priorities for accessibility improvements. Some small business owners rely on contractors and their subcontractors to help with accessibility improvements, putting the small business owners in some cases at the mercy of the contractor and their employees to achieve compliance on behalf of the small business owner. Some workmen, brought in to make repairs, may even undo improvements that were previously made by an owner attempting to increase accessibility. Reviewing large construction projects designed by architects indicate that many of the architects are not fully familiar with ADA requirements either. This may be due to court rulings which are affecting the way that regulatory standards are being interpreted. As there is no authority that is capable of certifying when a facility is in compliance, the best many facility owners can do is what they think is appropriate and hope they have met the standard.

b. What are the characteristics of a good safe harbor proposal?

A small business safe harbor should allow small business owners to order their investment projects in a manner which meets the intent of the ADA, without, at the same time, imposing investment requirements that are overwhelming given the constraints that affect many small businesses. As currently implemented, the interpretations of "readily achievable barrier removal" do not provide significant guidance and expose many businesses to the threat of lawsuits that often appear arbitrary and capricious from the perspective of the business owner. The small business safe harbor should inform the advocacy community equally, discouraging suits that are not reasonable. The money spent defending against lawsuits does little to help people with disabilities, since the costs of defense in court or in private settlements may far outweigh the investment resulting from the suit.¹²

A good small business safe harbor proposal should have the following characteristics:

1. The proposal should be easy to understand.
2. The proposal should lend itself to computational rigor. Definitions and thresholds used in the safe harbor should be clear and easy to compute from standard accounting information. The index should not be expensive to compute.
3. The index should be relatively stable over time.
4. The proposal should be equitable across industries. The burden of adjustment imposed on any given industry should be proportional to the need for accessibility in that industry.

¹² Although there is no data base which captures the transaction costs associated with preparing and carrying out a defense, anecdotal information leads to an estimate of \$20,000 to \$25,000 for a lawsuit against a typical small business. Costs may be higher in states which allow for punitive damages in accessibility cases.

If there are not significant differences in accessibility between industries, there should not be differences in relative spending requirements between industries.

5. The proposal should be equitable within an industry. The accessibility investment per firm should be proportional to the index being used. If a capital index is being used, for example, proposed spending should be proportional to assets per firm or assets per employee. The general rule is that the firms in similar circumstances in an industry should be treated similarly.^{13,14}

The first three of these characteristics deal primarily with measurement issues. Whatever criteria are chosen must be relatively simple to compute and relatively stable over time. The last two criteria are much more complex because they are intended to deal with fairness issues: Fairness to both business owners and to individuals valuing accessibility.

The Department of Justice's proposed safe harbor index reflects many of the concerns expressed in these comments with regard to a small business's ability to make accessibility improvements. By focusing on one percent of gross revenues, or some other possible indices such as net profits, the Department is agreeing that small businesses have a limited amount of resources to devote to the pursuit of accessibility. And by using a measure of the business's economic activity, the Department is attempting to base this on observable and defensible data. The Chamber appreciates the Department's creativity and desire to look for such a safe harbor and it recognizing the need to provide small businesses an extra level of protection.

For the small business safe harbor to be effective, business owners need to have some understandable base for calculating potential obligations with respect to accessibility. Some priorities may be clear — an accessible entrance, for example, and an accessible path of travel to major activities or facilities within the business — but many of the requirements of the ADAAG may appear to be less vital and to contribute to a much lesser degree to meaningful accessibility. The business owner wading through the full set of regulations and ADAAG is likely to be left with several tangible fears:

- How much will it cost to deal with each accessibility element, and how much overall?
- How rapidly must I accomplish this work and complete this spending?
- How can I add these requirements to my capital budgeting at the same time that I am trying to maintain my prior capital budgeting cycle?

A well-drafted small business safe harbor can relieve many of these anxieties and perhaps improve the relative balance between the needs of the business and the needs of the disability community. The safe harbor may provide some sort of predictable ceiling on readily achievable

¹³ Note that this requirement does not say that the firm that needs the most expenditures to improve accessibility to some minimally acceptable level should be burdened more intensively. If one firm is singled out with a higher burden level, then it will be disadvantaged relative to competing firms. This is not to say that a firm might choose to specialize more intensively in providing goods or services to individuals with disabilities. There is a significant difference between a choice and a requirement, however.

¹⁴ In many industries larger firms are more likely to have higher sales or assets per employee than smaller firms. Generally, these larger firms will have higher profits per employee and an ability to make proportionally larger accessibility investments than smaller firms in the same industry.

accessibility improvements based on objective information contained in standard accounting reports. This will solve part of the capital budgeting issues. It will not deal with the issues associated when a business is altered or renovated in a manner which mandates that many accessibility elements be brought up to latest standard.

One apparent assumption in the benefit-cost analysis carried out by DOJ as part of issuing the new standards is that major improvements will be made to existing buildings when the buildings are altered as part of their regular long-term maintenance activity. If the incremental cost of making alterations according to the accessibility standards is sufficiently high, however, it may be sufficient to force business owners to rethink alteration plans and downsize or eliminate future alterations. This will have several affects. It will decrease the rate of growth of business accessibility to individuals with disabilities, and it will make buildings less productive and less aesthetically pleasing over time, lowering the growth rate of output in the economy as buildings age more rapidly.

c. Does the one percent gross revenue small business safe harbor meet the criteria?

The proposal appears to be easy to understand, but there are several problems that might lead to computational or implementation difficulty. While the concept of gross revenue is well defined it can become complicated to calculate based on whether the business is using cash or accrual accounting. There is also a question of whether gross revenue or gross business revenue should be used. Gross revenue includes revenue from sales plus miscellaneous revenues from other sources such as interest. Given that gross revenue is a basic accounting term, however, it can be calculated from data that should be available to most businesses as long as they maintain some form of business accounting.

Unfortunately, gross revenue as an index for the one percent spending level fails the equity tests at both the firm and the industry level. Gross receipts may differ considerably from industry to industry depending on the outputs sold in each industry. A grocery store, for example, may have very high receipts per employee while a specialty food store may have much smaller receipts. The specialty food store may have high profits per dollar of sales while the grocery store has very low profits per dollar of sales. Both stores may have identical issues with respect to accessibility, but very different spending requirements given gross receipts and net profit differences between the stores. The spending required by the ADA already creates inequities since owners of existing buildings are asked to overcome accessibility problems that they did not create or anticipate when their buildings were constructed. Some owners are therefore hit with large spending requirements while others escape arbitrarily. Using gross receipts only exacerbates this problem, with some firms bearing relatively large burdens because they have high gross receipts relative to firms in their own industry or in other industries.

Beyond issues involving how to compute the threshold amount of gross revenue, several other concerns with the proposed small business safe harbor are apparent: 1) One percent of a company's gross revenues could still be a large amount of money meaning that a small business could still be spending considerable amounts on barrier removal. 2) Some small businesses operate on a very narrow profit margin of two to three percent of gross revenues. Requiring them to spend one percent of gross revenues to take advantage of this safe harbor could reduce their profitability by as much as a third or even a half and consequently threaten their ability to

continue. 3) Measuring compliance by the amount spent does not provide any indication as to the level of barrier removal achieved and a small business might still be vulnerable to private litigation regarding what it thought was adequate compliance with Title III. 4) Under this provision, a small business would only get relief for the following tax year, meaning that in the next year, it would have to spend one percent of its gross revenues again to get the exemption in the following year, and so on. This on again, off again cycle would at best be confusing, and could be made more confusing based on when the actual barrier removal measures are implemented versus when they are paid for, or accrue on the company's financial records. 5) In order to use this safe harbor, which would most likely come in the form of an affirmative defense, the small business would have to open its accounting records which may not be something they are comfortable doing for a variety of legitimate and competitive reasons. 6) There is a concern that the amount set could become a *de facto* floor and ceiling, that is businesses will be required to spend up to the amount designated even though that might exceed what is "readily achievable" for that particular entity. The final rule should make clear that this is not intended.

d. Can the one percent of gross receipts safe harbor be improved?

This section considers a variety of ways to improve the proposed small business safe harbor. Among the possible alternatives are the following: Using net business receipts (actually net income) as an alternative index; and allowing small businesses a choice between two indices based on other objective criteria. These options are considered in turn below.

e. Using net business receipts (net income) as a basis for a small business safe harbor

The Department of Justice offered one alternative to the one percent of gross revenues index for a small business safe harbor. The option was to choose five percent of net revenues. Net revenues are not defined in the limited discussion of the proposal, but they are assumed to be equivalent to net income less deficit.¹⁵ Table 1, attached as Appendix A, All Industries, shows summary accounting information from the Internal Revenue Service for all firms in the United States for calendar 2003.

The table identifies numerous size categories among small businesses. The smallest income group, for example, those firms with income under \$25,000 are shown in column 2 of the table. The average firm in the class has business receipts of \$6,317.¹⁶ Net income (less deficit) for the typical firm in column 2 is a negative \$1,476.

Net income per firm for other receipt size classes is shown in columns 3 through 11 for small businesses. Larger businesses are summarized in column 11 and partially in column 10 which is a mix of small and large firms. All other size classes show an average positive net

¹⁵ For an individual firm the operating term is net income. Some firms will have positive net income and others will have a deficit or a negative net income. The term net income (less deficit) refers to the income of a group of firms within some business receipts size class. We use the group term to indicate the resources that might be available for accessibility investments for all of the firms within a given size class.

¹⁶ Within a group firms are distributed according to a log normal distribution. This implies that approximately 60 percent of the firms in the class have income below the average for the group

income, although every size class has some firms whose net income is negative.¹⁷ Note that the bottom line in the table shows the ratio of net income (less deficit) per firm as a percent of average business receipts per firm for all firms in the class. The ratio in column 3, for firms with business receipts between \$25,000 and \$100,000 says that net income is equal to 27.4 percent of average business receipts. The ratio for larger business receipt size classes declines as income class size increases, falling eventually to 5.7 percent for large firms. The firms in the \$25,000 to \$100,000 size class had, on average, \$13,698 available as net income from which they could finance new investments.

Positive cash flow available for investment would come from net income per firm perhaps augmented by money taken from depreciation reserves.¹⁸ For a firm with business receipts of less than \$100,000 cash available for investment may be sufficient for some small readily achievable accessibility projects but there is unlikely to be enough cash to support larger projects. It is unlikely that these firms would ever reach full compliance with all accessibility elements in the ADA building standards. These firms would remove amenities (phones, fountains, bathrooms, etc.) and hold off alterations in order to avoid large accessibility investments. Given that future business income is uncertain, many owners of very small businesses are reluctant to borrow to finance investments of any kind. It is probable that banks asked to finance accessibility investments by these very small firms would be equally reluctant to make such loans.

If net income is less than 20 percent of business receipts, then a rational business person would prefer to use net income as the basis for a small business safe harbor. For all industries the only size classes that have net income greater than 20 percent of business receipts are the very small classes under \$100,000 business receipts. There are more than 15 million such firms and many of them do not maintain formal, permanent business premises. Many of them are part-time businesses selling door-to-door, renting kiosks at malls, farmers' markets, etc. Many of these businesses would be unlikely to make, or to be ultimately responsible for, accessibility investments. All of the size classes with income above \$250,000 have net income equal to much less than 20 percent of their business receipts. These firms would be expected to choose five percent of net income as the basis for a small business safe harbor.

f. Small Businesses should be able to choose which index serves them best

Because qualifying small businesses differ widely in their revenues and incomes, to have an effective small business safe harbor, they should be allowed to select which index they prefer to use if they intend to invoke the safe harbor protection. In either case, they would still have to meet the following qualifications:

¹⁷ Some analysts will prefer to calculate average income for those firms only with positive profits. This cannot be done from the available information because the number of businesses with negative net income is not known.

¹⁸ The annual depreciation charge for a size class is shown in the Table in the row labeled "Depreciation." Since depreciation is a non-cash charge it does contribute cash which can be used for investment. This cash is not available for any investment, however, since it is supposed to be a reserve to replace existing equipment as it wears out. Some cash above net income may be available from this source, however.

- First, an existing firm must meet the standards for inclusion in the SBA size standards, the primary component being that it must be an independent company not owned or controlled by another company.
- Second, a firm which is an existing business would have to have a permanent place of business that is a place of commercial activity or a place of public accommodation. This is a current requirement and represents no change in the *status quo ante*.

In addition, when calculating how much they have spent towards barrier removal, small businesses should be able to include all costs related to such improvements. These include such costs as those for consultants, designers, and attorneys. Implementing barrier removal projects is far more complex than normal construction and for this safe harbor to be useful, they must be able to get credit for these additional expenditures.

The Department of Justice is to be commended for introducing the concept of a small business safe harbor. The initial proposal can be adjusted as noted above to relieve many very small businesses of the confusions and burdens associated with complying with Title III, and just as importantly, without diminishing the overall goal of improving accessibility to public facilities. The Chamber encourages the Department to restate its expectations that this safe harbor is intended as a ceiling—that small businesses are protected if they meet the given threshold—not a floor for expenditures that would be interpreted as the minimum they would be expected to spend.

D. Equipment

The Department’s commentary regarding Title III requirements for equipment further exacerbates the confusion regarding accessibility requirements for equipment, whether fixed, built-in or free standing. The 1991 Standards contain specific standards only for equipment such as automated teller machines (ATMs), vending machines and fare 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 a wide variety of equipment, particularly point-of-sale devices, self-service check-outs in retail stores, self-service kiosks in hotels, etc., must be accessible, particularly with respect to individuals with sensory impairments. Such a position is frustrating and incompatible with the Department’s stated goals of providing as much guidance as possible and minimizing the burdens to the extent possible. To the extent the Department asserts that covered facilities have an obligation to make equipment -- whether built-in, free-standing or even temporary -- accessible, it has an obligation to provide such entities with prospective and clear notice of those accessibility requirements. Merely instructing such covered entities to glean guidance from provisions for “analogous” equipment in 2004 ADAAG and/or to guidelines or standards either adopted or currently under

consideration by other agencies dilutes the value of this rulemaking and fails to afford affected entities sufficient notice and opportunity to comment as required under the Administrative Procedure Act.

Accordingly, unless and until the Department adopts specific standards addressing equipment such as point-of-sale devices, self-service check-outs in retail stores, and self-service kiosks in hotels, these devices should not be required to comply with unspecified technical standards.

E. Service Animals

The Chamber appreciates the Department's efforts to bring greater clarity to the definition of "service animal" and to clarify the respective rights and responsibilities of covered entities regarding accommodation of a service animal. The proposed rule provides greater clarity as to the inquiries a covered entity may make to verify that a particular animal is a legitimate service animal. The Chamber respectfully submits, however, that the Department should provide covered entities with greater latitude in verifying that a particular animal is a service animal where the entity has reasonable cause to believe that an individual has falsely claimed that an animal is a service animal. For example, if a customer claims that a teacup dog being carried in a zippered fashion bag is required as 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.

The Chamber supports the Department's proposal to define "service animals" as dogs or common domestic animals that are individually trained to do work or perform tasks for the benefit of an individual with a disability, to exclude emotional support or comfort animals from the definition, and to expressly exclude several categories of farm animals and wild animals from the definition. The Chamber also supports the Department's efforts to delineate the circumstances under which a covered entity can decline to admit a service animal or request that it be removed from the premises. The Chamber strongly encourages the Department to retain these revisions in the final rule.

The Chamber also strongly encourages 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 crowded areas or other areas, such as a restaurant or grocery store, where an unleashed animal could disrupt the facility's operations. In certain respects, the presence of such a leash or harness also can aid a covered facility in distinguishing a legitimate service animal from a pet.

Question 10. Should the Department eliminate certain species from the definition of "service animal"? If so, please provide comment on the Department's use of the phrase "common domestic animal" and on its choice of which types of animals to exclude.

The Chamber agrees with the Department's proposal to exclude certain types and species of animals from the definition of service animal. The exclusions provide a clearer basis for covered entities to determine whether a particular animal is a legitimate service animal. The Chamber also believes that such exclusions properly take into account other concerns associated with the use of nontraditional animals as service animals, particularly the risk of disease transmission.

Question 11. Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the “common domestic animal” prong of the proposed definition?

The Chamber believes it would be advisable for the Department to do so. Given that service animals typically sit to the side or at the feet of the individual with a disability, size and weight limitations would be appropriate as a further step to ensure that the animal can be accommodated by the public accommodation.

F. Power-Driven Mobility Devices

The Chamber welcomes the fact 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. In addition to the four characteristics the Department has indicated will be considered in determining whether use of power-driven mobility devices is reasonable, the Department also should expressly include the nature and type of the facility in which the device will be used, as well as whether a particular facility has any unique characteristics that would impact on use of the device, as additional factors to be considered.

The Department’s regulation also should clearly provide that covered facilities may adopt policies that require individuals using power-driven mobility devices to adhere to certain requirements in operating the device. The regulation also should delineate those circumstances in which a facility may exclude individuals using power-driven mobility devices from the premises (for example, when the individual is operating the device in a reckless destructive or otherwise hazardous manner posing a risk of harm to others or damage to property or merchandise), similar to the manner in which the proposed regulation specifies the circumstances under which a service animal can be excluded from the premises.

The regulation should make clear that motorized devices that use fuel or internal-combustion engines are not appropriate personal mobility devices, particularly for use in internal spaces where exhaust poses safety and health risks for individuals. Nor are they appropriate for use at open air shopping centers, given the greater speeds which they typically can attain.

Finally, the Department needs to further examine its proposed regulation regarding the inquiry a covered entity may make into a person’s use of a power-driven mobility device. The proposed regulation permits the covered entity to make no further inquiry other than whether the device is required because of a disability. Given that an individual intent upon using the device will answer “yes” irrespective of whether or not that person in fact has a disability, the proposed regulation does not provide any meaningful method of distinguishing between individuals using such devices due to a disability and those that are not. The Chamber believes some form of certification, perhaps a sticker with the international symbol for accessibility, or identification for those using Segways® would be appropriate, similar perhaps to the permits associated with using parking spaces reserved for those with disabilities.

Question 13. Should the Department expand its definition of “wheelchair” to include Segways®?

Although the Chamber recognizes that Segways® are used by certain individuals with disabilities as a mobility aid, the Chamber also believes it is important to distinguish between these devices and wheelchairs. As the Department noted in the NPRM, Segways® are capable of operating at higher speeds (more than 12 mph) than wheelchairs and scooters (at 6 mph). They therefore can present a greater safety risk to walking persons, who proceed at a much slower pace (approximately 3-4 mph). This fact means they pose a greater risk of injury to others, particularly in heavily congested areas. Thus, such devices raise concerns in terms of various businesses' (such as an amusement park or shopping center) potential tort liability should such an accident occur. In addition, Segways® present a risk of falling that wheelchairs and scooters do not. According to information provided by the manufacturer, the device can lose "traction" (such as on slippery, wet or even loose surfaces), resulting in the device tipping or falling. This means that certain venues near open water, or exposed to weather, or just spills of various natures would be inappropriate for Segway ® usage.

Expanding the definition of "wheelchair" to include Segways® would result in public accommodations being required to permit use of such devices in any and all pedestrian areas, irrespective of any factors the Department has indicated may be considered in determining whether use of the device is reasonable.

Question 14. Are there better ways to define different classes of mobility devices, such as the weight and size of the device that is used by the Department of Transportation in the definition of "common wheelchair"?

The Chamber encourages the Department to incorporate maximum weight and size dimensions for mobility devices, particularly with respect to scooters. The Department has placed scooters in the same category as wheelchairs. Scooters come in many shapes and sizes, and certain models exceed the clear floor space typically provided for a wheelchair, which may impact the ability of the facility to accommodate the device. Weight and size limitations would better ensure that the scooter can be accommodated within the same parameters used for accommodating wheelchairs.

Question 48. Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?

Motorized devices that use fuel or internal-combustion engines should not be considered personal mobility devices. Such devices are not appropriate for use in interior spaces, where exhaust can pose safety and health risks for individuals. Even in outdoor facilities, such devices generally are not appropriate as personal mobility devices given the greater speeds which they typically can attain.

II. Responses to Specific Questions Posed in the NPRM

Question 2. The Department would welcome comment on whether any of the proposed standards for these eight areas:

- *side reach*
- *water closet clearances in single-user toilet rooms with in-swinging doors*
- *stairs*

- *elevators*
 - *location of accessible routes to stages*
 - *accessible attorney areas and witness stands*
 - *assistive listening systems*
 - *accessible teeing grounds, putting greens, and weather shelters at golf courses*
- should be raised with the Access Board for further consideration, in particular as applied to alterations.*

The Chamber strongly encourages the Department to return these eight issues to the U.S. Access Board for further consideration, particularly with respect to alterations. As the Department noted, its Regulatory Impact Analysis indicates that each of these requirements will impose costs grossly disproportionate to the anticipated monetized benefit. The Chamber also respectfully submits that the issues identified in Section III below should be returned to the U.S. Access Board for further consideration.

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?

The Chamber strongly favors exempting covered facilities from compliance with the supplemental requirements for play areas and recreation facilities. Particularly with respect to facilities where such features are merely ancillary amenities, such as play structures in quick service restaurants or shopping centers and swimming pools at hotels, the facilities are more likely to simply remove these amenities (or not add them to new facilities) if subjected to additional requirements.

Question 17. What are the current practices of hotels and third-party reservations services with respect to “guaranteed” hotel reservations? What are the practical effects of requiring a public accommodation to guarantee accessible guest rooms to the same extent that it guarantees other rooms?

Question 18. What are the current practices of hotels and third-party reservations services with respect to (1) holding accessible rooms for individuals with disabilities and (2) releasing accessible rooms to individuals without disabilities? What factors are considered in making these determinations? Should public accommodations be required to hold one or more accessible rooms until all other rooms are rented, so that the accessible rooms would be the last rooms rented?

Because these questions all involve the same issue, our responses are combined. “Guaranteed” hotel reservations practices, and the extent to which hotels use the internet for reservations and the variety of third-party reservations services which act as intermediaries in a complex and fast-paced system, generally are as varied as the hotel properties themselves. The complexity involves not only thousands of hotel locations, but hundreds of thousands of hotel and motel rooms and rooms at smaller boutique inns. The complexity does not end there. Each place of lodging contains numerous offerings: e.g.; single, double and king-size beds; standard, deluxe and suite accommodations; ocean, mountain, garden, rural and city views; seasonal rates,

group rates and special air/car/hotel fares. To that formula, must be added the technical requirements of each accessible room's accommodation.

Many hotel reservation systems are not operated on site and do not guarantee a specific room. Rather, the guarantee is for *a* room, with the reservation for a specific type (e.g., double room with garden view) subject to availability to be held with a verified credit card for a date and time certain. During daily operations, guarantees for nonaccessible rooms may be compromised especially when a hotel experiences high occupancy, high turnover of staff at its reservation service or computer problems that destroy even a few minutes of incoming requests. Accessible guest rooms are subject to these same situations.

Because each hotel and third-party reservation system is part of a proprietary operation, to the extent possible, the Department should clarify basic elements which may help each operation make practical and reasoned business decisions. Many reservation systems are equipped to designate accessible rooms as the last room to be rented. The system, like any other where technology intersects with guest communications is not infallible. The best approach would be for the Department to specify a set of output goals which must be accomplished by any hotel's reservation system. Hotels will then be allowed to use any set of proprietary services or systems they believe appropriate to accomplish the goals. For example: one goal might be that the hotel successfully honor a minimum of 95% of guaranteed reservations for accessible or nonaccessible rooms.

Question 31. The Department requests public comments with respect to the application of these requirements to existing play areas. What is the "tipping point" at which the costs of compliance with the supplemental requirements for existing play areas would be so burdensome that the entity would simply shut down the playground?

The supplemental requirements in 2004 ADAAG for play equipment appear to have been drafted primarily with areas such as parks and playgrounds in mind, where children's recreation is a primary function. The Department should note, however, that many types of businesses, including certain chain restaurants, hotels, shopping centers and even some retail establishments, currently provide such equipment as an ancillary benefit to their business. For such businesses, the additional cost threshold that will be tolerated is significantly lower than for types of establishments where such equipment is a principle function. It is extremely likely that such businesses will refrain from adding such equipment to future facilities and may remove current equipment if the supplemental requirements are adopted.

Question 36. Should the Department allow existing public accommodations to provide only one accessible means of access to swimming pools more than 300 linear feet long?

The Chamber supports this provision of the safe harbors for existing facilities. Given the significantly greater difficulty and cost in modifying an existing pool to provide two means of entry, than in providing them with respect to a newly constructed pool, such an exception is both warranted and necessary.

Question 37. Should existing swimming pools with less than 300 linear feet of pool wall be exempt from the requirements applicable to swimming pools?

The Chamber supports this provision of the safe harbors for existing facilities. Again, there is significantly greater difficulty and cost in modifying an existing pool than in designing accessibility into a newly constructed pool. Additionally, small pools are more likely to be just an ancillary amenity to a covered facility, such as a hotel.

Question 40. Will existing facilities have to reduce the number of available exercise equipment and machines in order to comply? What types of space limitations would affect compliance?

The answer to this question will depend on the particular circumstances presented. Where the exercise room is just an ancillary amenity (such as an exercise room provided at a hotel) as opposed to being a primary amenity (such as with respect to a health facility), the facility is more likely to face space constraints that will require it to reduce the number or types of exercise equipment provided. For example, with respect to exercise rooms at hotels, particularly smaller hotels, the exercise room may be just a small room or other small space that has been converted to an exercise room. In such locations, there may be a substantial reduction in both the number and type of available exercise equipment.

III. Comments on Specific Provisions of 2004 ADAAG

The Chamber submits the following comments with respect to specific issues in 2004 ADAAG. We also hope that these comments will motivate the Department to pursue reconsideration of these provisions by the U.S. Access Board.

Structural Impracticability

The 2004 ADAAG eliminates the general exception for structural impracticability, which is applicable even to new construction, previously set forth in the 1991 Standards § 4.1.1(5)(a). The structural impracticability exception is a statutory exception expressly legislated by Congress. *See* 42 U.S.C. § 12183(a)(1). Consequently, neither the Department nor the U.S. Access Board has authority to negate this exception. The Chamber acknowledges that the Department is not proposing to eliminate the structural impracticability defense from the body of its current regulation, 28 C.F.R. § 36.401(c). To avoid any possible negative inference regarding removal of this defense from 2004 ADAAG, or argument of resulting conflict, the Department should clarify that it was removed as a redundancy and that such removal does not affect availability of the defense.

Construction Tolerance

The 2004 ADAAG significantly alters the allowance for construction tolerances. Although the 1991 Standards allow for construction tolerance with respect to all specified dimensional requirements, in most instances, 2004 ADAAG substitutes a dimensional range for previously absolute dimensions (*e.g.*, toilets which currently have to be positioned 18 inches from the side wall may now be 16-18 inches from that wall). Overall, the Chamber believes this is a positive change and is more appropriate to the construction process, in that absolute dimensions are difficult to achieve and all specific dimensions are subject to a tolerance range. The 2004 ADAAG, however, also restricts the application of construction tolerance only to those

few requirements that remain expressed as an absolute dimension.¹⁹ For example, under the 1991 Standards, a toilet with its centerline at 18½” from the side wall arguably is within construction tolerance and therefore compliant. Under 2004 ADAAG, it is not.

The Chamber 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.

The Department 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 percent) 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 2004 ADAAG retains the general provision permitting equivalent facilitation, the specific types of equivalent facilitation expressly sanctioned in the 1991 Standards have been deleted (e.g., providing wait service at a nearby accessible table in lieu of providing lowered portion of the bar). 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 and allows businesses more flexibility in meeting the goals of the regulation as well the ability to use new technologies that will likely emerge.

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 both the uncertainty in complying with the Standards and the risk of litigation over acceptable forms of equivalent facilitation. The specific equivalent facilitation provisions contained in the 1991 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. By eliminating these types of equivalent facilitation, the 2004 ADAAG essentially places those elements where equivalent facilitation was employed out of compliance and now subject to the barrier removal requirement and all of its uncertainties. The approach utilized in 2004 ADAAG therefore throws the issue to the various courts and the plaintiffs’ bar.

In certain respects, 2004 ADAAG also appears to improperly preclude specific forms of equivalent facilitation, such as the use of wireless technology and portable devices. For example, the 1991 Standards allow the use of portable notification devices, such as TTY kits,²⁰ to provide communications accessibility in hotel rooms while 2004 ADAAG appears to eliminate this option. *Compare* 1991 Standards, § 9.3.2 *with* 2004 ADAAG, § 806.3. Given the rapid evolution of technology, wireless technology and portable digital devices have become

¹⁹ *Compare* 2004 ADAAG § 104.1.1 *with* 1991 Standards § 3.2.

²⁰ In addition to TTYs, such kits also include other notification devices such as door bells, bed shakers, etc.

commonplace in society, even in private residential homes. Consequently, in certain respects 2004 ADAAG is mandating obsolescence.

To eliminate the uncertainty that the deletion of specific equivalent facilitation provisions from 2004 ADAAG 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 and endorses the use of equivalent facilitation and provides clearer guidance on acceptable forms of equivalent facilitation.

Employee Work Areas

The Department's Title III regulation should expressly exempt employee work areas from the barrier removal requirements of Title III. The Chamber acknowledges that the Department noted both in its ANPRM and again in the NPRM that it has consistently held that such areas are not subject to barrier removal requirements. 69 Fed. Reg. at 58,772; 73 Fed. Reg. at 37011. The Chamber strongly agrees with the Department's position. However, this issue has caused considerable confusion. The Department's statement of its position is buried in the lengthy commentary set forth in Appendix B to its current regulation. To eliminate continued confusion, the Department should include an express exemption for employee work areas in 28 C.F.R. § 36.304 (barrier removal).

The Chamber also has significant concerns about the requirements in 2004 ADAAG for employee work areas, which if adopted will substantially expand the requirements for these areas. The 1991 Standards establish only a minimal requirement for an accessible route to and from employee work areas, *i.e.*, that employees with disabilities be able to approach, enter and exit work areas. 1991 Standards, § 4.1.1(3). The 2004 ADAAG significantly expands those requirements, mandating that "common use circulation paths" within employee work areas be accessible.²¹ 2004 ADAAG, § 206.2.8. At a minimum, this needs to be clarified. **More importantly, we are extremely concerned that this represents a blurring of the distinction between Title I's goal of providing reasonable accommodations to employees, and Title III's goal of providing accessible facilities for members of the public with disabilities.** Accessibility within employee work areas was relegated to Title I because, by definition, such areas are not open to the general public and the reasonable accommodation process, while providing access when it is needed, avoids the unnecessary imposition of costs when it is not. The revised requirements will be burdensome to a broad variety of covered facilities (both public accommodations and commercial facilities), and are likely to severely impact small businesses in particular.

The approach under 2004 ADAAG is problematic because it mandates accessible routes within the work area, irrespective of whether any individuals with disabilities currently are, or are ever likely to be, employed in that particular work area. Certain types of employment have relatively minimal employment of individuals with particular types of disabilities due to the nature of the work involved. It is not surprising, for example, that individuals with mobility impairments comprise a higher percentage of employees in professional occupations than in occupations involving strenuous physical labor. Furthermore, the associated costs and challenges in providing accessible common use circulation paths will vary greatly depending on

²¹ 2004 ADAAG also will require that emergency alarm systems be wired so that visible alarms can be easily integrated into the system. *Id.* § 215.2.

the type of work area. Issues posed in providing accessible common use circulation paths within a typical office setting will differ greatly from providing them on a production floor or line in a manufacturing facility. Under the 1991 Standards, accessibility within a work area is tied to the identified needs of an employee with a disability and unnecessary expenditures are avoided. This is significant because of the importance in minimizing non-productive space to maintain market competitiveness.

The Department's proffered rationale for retaining 2004 ADAAG, § 206.2.8, is that "building codes and fire and life safety codes, which are adopted by all the States, require *primary* circulation paths in facilities, including employee work areas, to be at least 36 inches wide for purposes of emergency egress," 73 Fed. Reg. 37,012 (emphasis added), and that the Department therefore contemplates that covered entities will be able to satisfy the requirement for accessible common use circulation paths simply by making the primary routes, not every common use circulation route, accessible. The Department's rationale ignores several key points. First, even if a particular jurisdiction has adopted this requirement, available variance and waiver procedures enable facilities to obtain relief from the requirement where appropriate. 2004 ADAAG, but for the limited exceptions enumerated below, provides no such mechanism for relief.

Second, the language of § 206.2.8 does not reflect the Department's interpretation. While the Department's proposed interpretation as applying only to primary circulation routes ameliorates the impact of this provision on covered entities, it should be reflected in the language of the standard itself. The general statement in Section 206.2.8 that "common use circulation paths" shall comply with Section 402 appears to require, or at the very least is greatly susceptible to being misconstrued as requiring, that all common use circulation paths (subject to certain limited exceptions) be accessible, even if there are alternate accessible routes available. Additionally, given the prevalent use of the phrase "at least one" in other scoping sections of 2004 ADAAG defining required accessible routes, the failure to incorporate similar language in § 206.2.8 creates the possibility that, irrespective of the Department's currently proffered interpretation, a court (or even a subsequent administration) would interpret this provision differently. *See* 2004 ADAAG § 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 Chamber acknowledges that 2004 ADAAG enumerates certain limited exceptions to the requirement for accessible common use circulation paths: 1) areas that are less than 300 square feet and elevated 7 inches or more above the finish floor or ground, provided the elevation is essential to the function of the space; 2) common use circulation paths in work areas with less than 1000 square feet and defined by permanently installed partitions, counters, casework, or furnishings; 3) common use circulation paths that are an "integral component" of work equipment; and 4) exterior work areas. 2004 ADAAG, §§ 203.9, 206.2.8. Although these exceptions undoubtedly are helpful with respect to many work areas, the overall requirement for accessible common use circulation paths leaves many issues unaddressed and raises considerable questions regarding implementation, as well as raising the likelihood of litigation.

With respect to the second exception, the Department posits that the 1,000 square feet limitation is sufficiently expansive to encompass many employee work areas, including kitchens

of quick service restaurants. However, one large quick service restaurant chain utilizes a standard layout wherein the kitchen is 1,800 square feet. Additionally, the exception must encompass some flexibility in assessing what constitutes the work area, for purposes of calculating the square footage. Modern design of many retail facilities is gravitating more toward an open floor plan. For example, whereas older grocery stores may have separate areas for the deli, bakery etc., modern groceries are more likely to configure the employee side of these areas with an open flow absent permanent partitions.

The fact that the exception for work areas with less than 1000 square feet is tied to the presence of permanently installed partitions or furnishings provides no protection for work areas using modular furnishings or equipment, which are typical of many work areas. Although the modular nature enables some reconfiguration of a work area, reconfiguring the entire space to provide accessible common use circulation paths raises the possibility that doing so may result in the displacement of particular equipment, furnishings or even other employees from the space. Title I's reasonable accommodation process is the appropriate method of ensuring access in employee work areas.

Given the myriad of issues that can arise in expanding accessibility requirements for work areas, the approach under the 1991 Standards is far superior and a more efficient use of resources. This revision is not supported by adequate data and evidence to warrant the confusion, disruption, and potential liability it will cause. The Chamber urges the Department to seek reconsideration of the expanded requirements for work areas by the U.S. Access Board.

Automatic Doors

The 2004 ADAAG requires 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. 2004 ADAAG, § 404.3.1, 404.3.6. 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 that 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 an expensive undertaking. Furthermore, the alternative option of ensuring that doors remain open in the power-off position raises serious concerns about security and safety, as well as possible conflicts with building safety codes.

Van Accessible Parking

Scoping for van accessible parking spaces has been increased from 1:8 to 1:6 accessible spaces. *Compare* 2004 ADAAG, § 208.2.4 with 1991 Standards, § 4.1.2(5)(b). The U.S. Access Board acknowledged that this increase is 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. 44,084, 44,096 (July 23, 2004). The Board indicated that the impact of this change is lessened due to the fact that the overall number of required accessible 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

mall/centers and large sports facilities. Additionally, while the impact on small shopping mall/centers likely will not be as great, the resulting economic impact may be more substantial.

Additionally, the U.S. 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. Still other accessible van designs provide for entrances from the rear of the van as opposed to the side of the van.²² These new accessible vans can easily use a standard accessible parking space, thereby reducing the need to increase the number of van accessible spaces.

The Chamber also notes that with respect to the scoping provision for accessible parking spaces generally, the U.S. Access Board has substituted “facility” for “area.” *Compare* 2004 ADAAG, § 208.2 (required number of accessible spaces based on the total number of spaces provided in the “parking facility”), *with* 1991 Standards, § 4.1.2(5)(a) (required number of accessible spaces based on the total number of spaces provided in each “parking area”). While the Chamber appreciates that the U.S. Access Board apparently has attempted to provide greater clarity in this scoping provision, Section 208.2 remains unclear and ambiguous, and thus will create serious confusion among many shopping center and mall owners and operators as to what constitutes the parking “facility.” The Advisory to Section 208.2 indicates that the scoping provision applies both to parking lots and parking structures, but further states that each parking “facility” must be scoped separately. It does not specify, however, whether scoping is based on the total number of spaces provided in the overall lot or parking structure, or applies separately to subdivided areas within the lot or structure. Additionally, Section 208.2.4 does not specify if the ratio of van accessible parking spaces to non-van accessible spaces is based on the overall number of accessible spaces provided in a lot or parking structure or, given that accessible spaces must be dispersed among the accessible entrances, the number of accessible spaces in each separate grouping. The Department should clarify that the scoping for both accessible spaces and van accessible spaces is based on the total provided in the overall lot or parking structure.

Sales/Service Counters

The 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 businesses, especially 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. It apparently did so based on the fact that 2004 ADAAG also permits 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. As noted in the Chamber’s 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 to the retail industry.

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

²² *See, e.g.*, The Vision Wheelchair Access Minivan, at <http://www.viewpointmobility.com> .

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. 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. Consequently, compelling retailers to suffer the significant cost of lost sales space is both unnecessary and unwarranted.

Side Reach Range

2004 ADAAG lowers the maximum side unobstructed reach range from 54" to 48" AFF (*i.e.*, above the finished floor), and increases 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). This affects a wide range of features, including public telephones, light switches, thermostats, bathroom dispensers, electrical outlets, brochure displays, phone jacks/computer data ports, vending machines, ATMs, etc. The Department's Regulatory Impact Analysis indicates that the economic impact of this requirement greatly exceeds the anticipated monetized benefit. Accordingly, the Chamber encourages the Department to return this issue to the U.S. Access Board for further consideration, and favors retaining the current requirement for side reach range.

Self-Service Shelving and Display Units

2004 ADAAG's revised reach ranges will be extremely problematic if applied to merchandise display racks and other self-service display apparatus. The current exception for all self-service display fixtures, regardless of type, in mercantile settings should be retained. 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 and grocers. "Shelving" is merely one of myriad methods of displaying merchandise for sale. Merchandise racks, 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.

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. 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 frequently, such as those for long coats and dresses, must be higher than 48" in order to properly display and prevent damage to the merchandise. For all the foregoing reasons, Section 225.2.2 of the proposed revised Standards should be clarified so that the current exception in Section 4.1.3(12)(b), which also is incorporated into the International Building Code, is retained for all types of self-service merchandise display fixtures.

Enlarged Clear Floor Space at Water Closets

The 1991 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. 1991 Standards Fig. 28. 2004 ADAAG requires clear floor space at the water closet which is at

least 60” from the side wall. 2004 ADAAG § 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, particularly on existing facilities for which a “safe harbor” does not apply, and on new and/or altered facilities that feature a substantial number of individual bathrooms/restrooms, such as hotels.

In the NPRM, the Department proffered various illustrations to establish that this requirement for increased clear floor space does not significantly increase the overall square footage the restroom will occupy, except for single-user restrooms with an inward-swinging door. Square footage is not the only concern, however. In most of the illustrations, the interior of the restroom is completely reconfigured, which would necessitate the relocation of plumbing pipes. In facilities with stacked plumbing, to the extent this is feasible at all, this may be achievable only at considerable expense, which is not a defense in the context of alterations.

The requirement also provides a substantial disincentive for facilities to provide a lavatory inside the accessible stall, and thus many may choose to forego offering such amenities. Although Florida requires the provision of a lavatory in the accessible stall,²³ most jurisdictions do not. The lavatory is provided as a convenience to the user. When faced with a choice between providing a larger stall or simply removing the lavatory, most facilities will opt for the latter.

Windows

The 1991 Standards contain no technical criteria for windows. 2004 ADAAG provides that where windows are intended for operation by room occupants (other than in hotel rooms not required to be mobility accessible), at least one window must have compliant operating hardware (*i.e.*, within allowable reach range and operable without tight grasping, pinching or twisting of the wrist). For older facilities with operable windows, it may not be possible to retrofit the hardware. This requirement essentially would require the replacement of the window. The requirement is problematic even for new facilities where operable windows are provided due to safety concerns. In such places, hardware is typically placed outside a child’s reach range and the hardware may be configured to prevent easy opening by a child. The new requirement is therefore in conflict with child safety concerns. A business with these windows may be making a choice of which litigation risk they are more comfortable accepting if this provision is implemented.

Alterations to Elevators

2004 ADAAG contains a new requirement that if an elevator is altered, the same alteration must be made to all elevator cars responding to the same call buttons. 2004 ADAAG, § 206.6.1. This is a significant departure from the 1991 Standards, which require that only the altered element comply with the applicable provisions of the Standards. Such a requirement may be particularly challenging for smaller businesses located in older buildings, where the only affordable approach to barrier removal is to address elevators in a piece-meal fashion.

²³ Florida Accessibility Code, § 4.17.3 Exception: New Construction.

Dining Tables/Spaces

The 1991 Standards require that five percent of fixed dining *tables* (or a portion of a dining counter) be accessible. 1991 Standards, § 5.1. 2004 ADAAG requires that at least five percent 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.” Dining facilities offer a wide range of seating options, from individual chairs (or individual fixed seats) to booths, stools and sometimes even benches. While calculating scoping is straightforward with respect to individual chairs, reasonable minds will differ as to the total number of seating spaces other types of seating provide. Determining the number of “standing spaces” provided at a particular counter, bar or drink rail is even more problematic. The current requirement of basing scoping on the number of tables is a more straightforward approach that is easier to implement and enforce.

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

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. 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 square floor space required for an accessible dressing/changing room will still increase with respect to new construction. As discussed in the Chamber’s comment to the ANPRM, 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.

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 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 sales space, and the risk that a bank of dressing rooms overall would have to be reconfigured, that even “creative design” might not overcome.

Scoping of Mobility Accessible Hotel Rooms

Despite the fact that detailed statistical studies previously submitted by the hotel industry throughout the rulemaking process²⁴ establish that existing mobility accessible rooms are drastically under-utilized, scoping of these rooms remains unchanged. The hotel industry should not be forced to bear the substantial economic costs incurred in providing wheelchair accessible rooms for which a market demand has been shown not to exist.

Scoping of Communications Accessible Hotel Rooms

The Chamber strongly opposes any increase in the scoping requirement for communication accessible hotel rooms. The net effect of the scoping the changes affecting communications accessible hotel rooms is that the number of rooms required to have communications accessible features has increased for facilities with more than 500 rooms. For facilities with 501-1000 rooms, the total number has increased from four percent to five percent. *Compare* 2004 ADAAG Table 224.4 (five percent) *with* 1991 Standards §§ 9.1.2, 9.1.3 (2 percent + 2 percent). For facilities with more than 1000 rooms, the required number has increased from 40 plus 2 percent of the number of rooms exceeding 1000 to 50 plus 3 percent of rooms exceeding 1000. *Compare* 2004 ADAAG Table 224.4 (50 + 3 percent) *with* 1991 Standards §§ 9.1.2, 9.1.3 (20 + 1 percent plus 20 + 1 percent). The detailed statistical studies submitted by the hotel industry in response to the ANPRM establish that demand for communications accessible rooms is far less than demand for mobility accessible rooms, which, as noted above, are drastically underutilized. Under the 1991 Standards, the total number of rooms required to be communications accessible is twice the number for rooms required to be mobility accessible. Accordingly, there is no logical basis for increasing the required number of communications accessible rooms, and the Department should return this issue to the U.S. Access Board for their reconsideration.

IV. Regulatory Impact Analysis Issues

The Chamber strongly commends the Department for the extensive Regulatory Impact Analysis (RIA) of the Proposed Revised Regulations Implementing Titles II and III of the ADA. The RIA for the revised Standards reflects sophisticated economic modeling and is comprehensive and enlightening. The RIA appears to cover all of the scenarios mandated by the ADA, i.e., changes related to new construction, alterations, and barrier removal, plus providing additional scenarios for several time-dated variations of the International Building Code (IBC).

The Chamber regrets that a similarly comprehensive cost-benefit and impact analysis was not done when the 1991 Standards were published. The failure to benchmark the costs and benefits generated by the 1991 Standards has resulted in understatement of the costs faced by firms attempting to meet the 1991 Standards today. One significant short-coming of the RIA exercise, however, is the short time allotted to the public in which to absorb the 700 or so pages of analysis and tables contained in the RIA. While analysts have had access to 2004 ADAAG

²⁴ See *Additional Factors Affecting the Establishment of Scoping Requirements for Transient Lodging*, American Hotel and Lodging Association (“AHLA”) (April 17, 2004); *Establishing Scoping Requirements For Lodging Places: An Alternative Approach to ADAAG Requirements*, AHLA (June 13, 2002); *Summary Report of the Survey of Usage of Accessible Hotel Guestrooms by Travelers with Disabilities*, American Hotel and Motel Association (May 15, 2000), presented as appendices to AHLA’s comments on the ANPRM.

for four years, and many analysts have been following meetings, conferences and research findings generated by the U. S. Access Board since 1994, the RIA has been available for only two months. Clearly many economists were occupied in producing the RIA over an extensive time period, but more time would have been helpful in fully analyzing the resultant product.

Although the scope of the analysis is almost overwhelming, there are elements missing from the analysis. The analysis covers 112 different requirements but appears to not cover some requirements that may have significant effects on businesses intending to become compliant with the requirements. Examples of requirements not covered include proposed changes to the location of clear space in dressing rooms; changes in moving from five percent accessible tables in restaurants to five percent of seating and standing spaces in restaurants and related changes in accessible path of travel; and changes to the primary path of travel in employee work spaces.

The Chamber also commends the Department for proposing to remand eight elements back to the Access Board for further consideration. Careful review of the RIA Supplemental Results identifies numerous additional cases where the expected benefits are significantly less than the costs which businesses must bear. These investment costs argue against not improving accessibility when there are other investment proposals (dealing with accessibility improvements or other improvements) with much higher rates of return. The Chamber respectfully suggests that the Department review net present value (NPV) for each of the 112 requirements covered in the RIA to identify those cases where NPV is negative for some reason not related to the elimination or easing of one of the 1991 Standards. Several of these requirements might benefit from reconsideration by the Access Board.

Similarly, benefits may also be overstated for several reasons. Typically, uses of a particular facility are assumed to be distributed among people with disabilities and people without disabilities according to their relative proportion among the population. The analysts identify five types of disabilities and provide a table of their relative numbers within the population fifteen years or older. For some parts of the analysis the assumption appears to be that everyone with a certain type of disability is used to estimate the number of uses of a given facility type. For example, 11.4 percent of the population has problems walking or using stairs. All of these people may be counted in determining how many visits are made to places of public accommodation (e.g., restaurants) by individuals with disabilities. But a sizable portion of this 11.4 percent may not believe or act as if they are disabled. The final count of visits will be too high, therefore, and benefits will be overstated.

Benefits may also be overstated because subjective estimates are used in several cases to estimate variables like the probability of using an element during a visit to a facility. The likelihood of an element being present in a given facility is also a subjective matter. If either of these estimates is higher than reality, then benefits will be exaggerated. The value of time for individuals may also be overestimated particularly when a value of time premium is added to reflect the enhanced quality of access time. Clearly RIA staff attempted to keep their estimates within reasonable bounds. In many cases different estimates were prepared using a low, high, and most likely subjective probability. Unfortunately, the lack of real data to help with at least some of these estimates makes them a weak part of the analysis and subject to producing substantial overestimates of benefits.

The Chamber appreciates the effort made by the Department to produce a credible economic analysis where available data was often lacking. We urge the Department, before finalizing this regulation, to revise this analysis to more accurately reflect the true costs and, in some cases, limited benefits that will flow from these regulations.

CONCLUSION

The Chamber has a long history of supporting the goals of the ADA and recognizes the importance of accessibility for all individuals. The Chamber is concerned, however, that many aspects of 2004 ADAAG have limited benefits but great costs. Accordingly, we urge the Department to carefully balance the benefits derived against the costs incurred in 2004 ADAAG. Businesses, their employees, and their customers do not benefit when the costs of complying with a particular accessibility requirement eclipse the benefit to be derived from that requirement.

We look forward to continuing to work with the Department to ensure continued access for disabled persons without causing detrimental harm to the U.S. business community.

Sincerely,



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Appendix A

**Table 1.--Number of Businesses, Business Receipts, Net Income, Deficit, and Other Selected Items, by Form of Business, Industry, and Business Receipt Size
Tax Year 2003
All Industries**

[All figures are estimates based on samples--money amounts are in thousands of dollars]											
Form of business, item		Under	\$25,000	\$100,000	\$250,000	\$500,000	\$1,000,000	\$2,500,000	\$5,000,000	\$10,000,000	\$50,000,000
	Total	\$25,000	under	under	under	under	under	under	under	under	or
			\$100,000	\$250,000	\$500,000	\$1,000,000	\$2,500,000	\$5,000,000	\$10,000,000	\$50,000,000	more
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
All businesses											
Number of businesses	27,486,691	15,872,235	5,521,119	2,578,962	1,331,692	932,914	686,257	263,211	143,693	124,568	32,040
Total receipts	24,461,950,768	171,850,677	283,643,212	399,675,771	466,753,866	650,698,469	1,064,907,945	918,729,000	995,285,415	2,583,604,931	16,926,801,481
Business receipts	21,860,208,610	100,263,262	276,419,863	390,185,108	457,092,879	637,037,672	1,039,765,144	887,173,968	949,975,233	2,410,333,012	14,711,962,470
Total business deductions	23,328,489,390	190,348,247	213,940,281	334,680,484	421,764,944	611,598,966	1,025,810,423	889,181,279	963,064,128	2,477,531,520	16,200,569,118
Costs of goods sold	13,179,828,225	11,100,905	43,489,089	97,190,455	148,016,595	244,194,770	493,826,380	474,422,109	558,034,784	1,578,363,441	9,531,189,696
Salaries and wages	2,389,996,593	13,835,571	12,420,821	40,735,142	65,026,979	102,127,201	151,872,220	123,510,264	120,362,165	264,299,581	1,495,806,649
Taxes paid	471,011,929	4,194,475	4,523,553	9,900,627	13,068,859	19,137,379	29,597,875	22,757,599	22,041,731	47,279,728	298,510,105
Interest paid	893,217,914	7,957,814	4,537,380	6,201,388	6,821,493	8,735,003	13,468,112	13,130,945	14,835,835	46,419,396	771,110,548
Depreciation	818,611,085	15,502,363	16,217,497	17,575,089	15,649,947	18,498,859	26,553,566	21,473,249	22,769,235	55,550,578	608,820,704
Net income (less deficit)	1,353,802,117	-23,427,608	75,630,471	79,225,921	55,733,253	51,703,038	54,086,095	41,991,902	47,086,139	133,379,079	838,393,827
Net income	1,953,107,513	101,957,965	102,216,371	102,434,743	76,934,973	76,558,442	86,430,835	66,104,422	70,947,361	191,241,492	1,078,280,910
Deficit	599,305,395	125,385,573	26,585,900	23,208,821	21,201,721	24,855,405	32,344,740	24,112,519	23,861,222	57,862,412	239,887,082
Bus. receipts per business	\$795,302	\$6,317	\$50,066	\$151,295	\$343,242	\$682,847	\$1,515,125	\$3,370,576	\$6,611,133	\$19,349,581	\$459,174,859
net Y-deficit	\$49,253	-\$1,476	\$13,698	\$30,720	\$41,851	\$55,421	\$78,813	\$159,537	\$327,685	\$1,070,736	\$26,167,098
net Y as a % bus. receipts	6.2%	-23.4%	27.4%	20.3%	12.2%	8.1%	5.2%	4.7%	5.0%	5.5%	5.7%