

**MEETING OF AMERICAN HOTEL & LODGING ASSOCIATION
AND THE DEPARTMENT OF JUSTICE
January 20, 2010**

MEETING SUBJECT:

ADA Title III NPRM – Critical Issues That Will Affect the Lodging Industry

ISSUES:

- (1) Regulatory Impact Assessment. The Regulatory Impact Assessment (“RIA”) fails to comply with OMB Circular A-4 in several key respects, resulting in a significant underestimation of the costs of this regulation on all Americans. (See pages 5-9 of AH&LA’s August 18, 2008 Comments (the “Comments”) for a full discussion on this topic.)
- (2) Transition period to new ADAAG for new construction and alterations. The six-month transition period to the 2004 ADAAG in new construction and alterations is insufficient. The proposed period fails to take into actual account industry lead times for renovation and new construction projects in lodging facilities. In addition, the proposal to base the triggering event on the start of construction is not sensible where projects require permits that can be delayed for reasons outside of the owner/operator’s control. **A one-year transition period for renovation projects and a two-year transition period for new construction projects is the minimum amount of time needed to ensure that projects do not have to incur tremendous and unforeseen costs to be redesigned.** In addition, the start of construction is not an appropriate trigger event where a project requires a permit. For those situations, **the date of permit application should be the triggering event.** (See pages 10-15 of AH&LA Comments for a full discussion on this topic.)
- (3) Time for compliance with brand new requirements that create new barrier removal obligations. The NPRM only specifies when the new ADAAG standards will take effect for new facilities and facilities that are going to be altered or constructed. It does not specify when the new ADAAG standards will take effect with respect to barrier removal in existing facilities. The new ADAAG requirements are relevant to existing facilities because the DOJ and litigants use them to determine whether any barriers exist in existing facilities. Because the new ADAAG sets standards for a number of elements for which no standards have ever existed (e.g. wading pools, spas, swimming pools, saunas, and playgrounds), these elements will arguably be considered new barriers the moment that the new standards take effect. AH&LA has proposed a two-year transition period for barrier removal for newly covered elements to allow lodging facilities to identify the barriers, budget for their removal, and implement the barrier removal. (See pages 15-17 of AH&LA Comments for a full discussion on this topic.)

- (4) The New Definition of “Barrier” under proposed section 36.3049d(3). The Department’s new definition of what is a “barrier” (i.e. any condition that does not comply with the new ADAAG), when combined with its positions on what is “readily achievable” barrier removal, results in the imposition of the more rigorous accessibility standards reserved for alterations and new construction, contrary to the ADA’s mandate. (See pages 17-22 of AH&LA Comments for a full discussion on this topic.)
- (5) New requirements for guest room bathrooms and restrooms. The NPRM requires currently compliant accessible guest room bathrooms and single user restrooms in lodging facilities to comply with new toilet clear floor space and comparable vanity requirements in future alterations. This requirement poses a very serious problem for lodging facilities. Making currently compliant accessible restrooms and guestroom baths comply with the new requirements in future alterations will require the relocation of plumbing and electrical fixtures and infrastructure, construction and/or demolition of bathroom walls, and in some instances the permanent loss of room count. These requirements cannot be justified and the Department has significantly underestimated the cost of these requirements. **DOJ should make clear in the final regulations that compliance with the new requirements for toilet clear floor space and comparable vanity requirements is only required in currently compliant bathrooms whenever fixtures are relocated within a bathroom** (See pages 24-34 of AH&LA Comments for a full discussion on this topic.)
- (6) Accessible room dispersion for pre-1993 facilities. AH&LA urges the Department to reconsider its new position that accessible rooms created in Pre-1993 Facilities through alterations must be dispersed among every room type. The current regulations contain no such requirement. Thus, the new position is extremely unfair for those many lodging facilities who relied on the language of the current regulations in creating accessible rooms that are not dispersed. The Department should maintain the current no dispersion rule for Pre-1993 Facilities. If it chooses to change the rule on a going forward basis, Pre-1993 Facilities that have already created accessible rooms that are not dispersed – consistent with the 1991 ADAAG requirements – must be protected by proposed Section 36.304(d)(2) (the “Element by Element Safe Harbor”). (See pages 35-42 of AH&LA Comments for a full discussion on this topic.)
- (7) Accessible room dispersion -- need for clarification. The Department’s accessible room dispersion requirements have been expanded to consider so many factors that they have become impossible to implement. Lodging owners and operators will be exposed to enormous litigation risk even if they have made a good faith effort to comply. The Department must clarify these rules in a reasonable manner with specific examples so that our members know how to comply. (See pages 35-42 of AH&LA Comments for a full discussion on this topic.)

- (8) Service counters. Under the current regulations, sales and service counters do not have to be any particular depth and fold-out and auxiliary counters are explicitly permitted as equivalent facilitation. Under the new ADAAG, these counters must be the full depth of the main counter and no fold out or auxiliary counters are allowed. These are significant changes but the NPRM fails to recognize them so that they are not presently included in the Element by Element Safe Harbor. Many lodging facilities have paid to have flip up counters installed at their service counters in compliance with current law, and they should be protected by the safe harbor until the counters are altered. (See pages 43-45 of AH&LA Comments for a full discussion on this topic.)
- (9) Reservations systems. The new reservations requirements will add significant cost and complexity to the reservations process and not necessarily ensure that guests with disabilities will be more likely to get accessible rooms. More flexibility in the requirements is necessary, and most importantly, **lodging owners and operators cannot be held accountable for the ADA compliance of third party reservation services over which they have no control**. (See pages 60-70 of AH&LA Comments for a full discussion on this topic.)
- (10) Power driven mobility devices other than scooters. The requirement that lodging operators allow persons with disabilities to use a limitless array of power-driven mobility devices without regard to their size, engine type, and speed capability, subject only to very limited defenses, is unreasonable and creates a serious public safety hazard. The rule must allow public accommodations to exclude power mobility devices with certain inherently dangerous characteristics from their facilities. In addition, because these devices are just as likely to be used by persons without mobility disabilities, all persons seeking to use such devices should have to produce documentation showing that they need the device because of a disability that affects mobility. (See pages 70-79 of AH&LA Comments for a full discussion on this topic.)
- (11) Condo-hotels. It is not possible for operators of rental programs that offer individually and privately owned condominium units to comply with accessible room scoping requirements. Special exemptions for such accommodations – especially in existing facilities -- are required. (See pages 82-90 of AH&LA Comments for a full discussion on this topic.)