COMMENTS ON THE DEPARTMENT OF JUSTICE NOTICE OF PROPOSED RULEMAKING FOR TITLE III OF THE AMERICANS WITH DISABILITIES ACT

Submitted by

THE AMERICAN HOTEL & LODGING ASSOCIATION

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I. INTRODUCTION

The American Hotel & Lodging Association (AH&LA) is submitting these comments in response to the Department of Justice's (the "Department") June 17, 2008 Notice of Proposed Rulemaking under Title III of the ADA ("NPRM").[1] AH&LA is the sole national association that represents members from all sectors and stakeholders in the lodging industry. Our members consist of individual property owners and/or operators as well as hotel companies that own and/or operate lodging facilities in the United States. Some of our members also own and/or operate timeshare properties. Issues that are unique to timeshares will be addressed in the submission by the American Resort Development Association.

AH&LA's members have spent billions of dollars in the last 16 years making their facilities accessible to individuals with disabilities in compliance with the ADA. They have done so — not only because it is the law — but because their mission is to make every guest feel comfortable and welcome. These ADA compliance efforts have, at times, been challenging, particularly in lodging facilities that were constructed for first occupancy before January 26, 1993 ("Pre-1993 Facilities"). In many respects, the current regulations and ADA Standards for Accessibility (the "1991 Standards") recognize these challenges and provide reasonable standards for accessibility with equivalent facilitation options (e.g., service counters). In this NPRM and recent enforcement actions against the lodging industry, however, the Department seems to be giving less consideration to the real world conditions that AH&LA's members face as well as the enormous costs that would have to be incurred to meet the exacting 2004 ADA Guidelines' ("2004 ADAAG") standards of accessibility. Our members also have noted a disturbing trend in the attitude of both the Department and the disability rights community that,

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[1] Page citations to the NPRM in this document will refer to pages in the Federal Register, Volume 73, No. 117 (June 17, 2008).

so long as a lodging facility owner or operator has operating capital, a Pre-1993 Facility must meet the highest levels of accessibility set for altered facilities and new construction. This position is contrary to the language of the ADA as well as the Department's prior interpretations of what is "readily achievable" barrier removal in Pre-1993 Facilities. We urge the Department to respect the important distinction between Pre-1993 Facilities and those that were altered or constructed after the effective dates of the current ADA regulations.

The AH&LA's members are also very concerned about the suggestion by some groups that owners and operators of lodging facilities — after having spent billions of dollars to comply with the 1991 ADAAG — should be required to immediately retrofit elements that have been considered accessible and lawful for the last 16 years under the barrier removal requirement. We commend the Department for resisting this unfair and unwise position which would reward those facilities that never bothered to comply with the ADA in the first place, and send the message that there is no point to trying to comply because the standards can always change and covered elements will have be retrofitted to new standards again.

The NPRM raises many issues of concern for our members, some of which cannot be adequately addressed in the 60-day comment period. For example, this comment period is not adequate for AH&LA's economist to conduct a full review of the Regulatory Impact Analysis ("RIA") and prepare a cost benefit analysis using more realistic assumptions. Studies of the cost impacts of certain key requirements also cannot be done within this very short comment period. Accordingly, AH&LA is only providing comments on the most critical issues for its members based on information that can be reasonably gathered under the Department's timetable. That information may not be perfect, but it is sufficiently compelling to cause the Department reexamine some key requirements and change them in the Final Rule.

Some of AH&LA's concerns are as follows:

(1) AH&LA believes that 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.

(2) The six-month transition period to the 2004 ADAAG in new construction and alterations is insufficient. The proposed period fails to take into 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.

(3) There is no transition period for lodging facilities to engage in readily achievable barrier removal based on new 2004 ADAAG requirements.

(4) The Department's new definition of what is a "barrier", when combined with its recent position 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.

(5) Requiring currently compliant accessible guest room bathrooms and single user restrooms in lodging facilities to comply with the new toilet clear floor space and comparable vanity 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.

(6) The Department's new position that accessible rooms created in Pre-1993 Facilities through alterations must be dispersed among every room type, and its failure to recognize that the 1991 ADAAG contains no such requirement, is arbitrary and unjust. 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").

(7) 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 so that our members are not told after the fact by litigants and the Department that they should have dispersed their accessible rooms differently.

(8) The Department has failed to recognize that the depth requirement for sales and service counters and the elimination of fold out and auxiliary counters are incremental changes that should be covered by the Element by Element Safe Harbor.

(9) 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.

(10) 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.

(11) 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.

In issuing the Final Rule, we urge the Department to be reasonable and to respect Congress' desire to balance the need for accessibility with the need to avoid placing unnecessary burdens on businesses. The Department will undoubtedly receive many comments from individuals with disabilities and their advocates urging it to adopt stringent and complex rules with little or no concern about their cost or practical real world consequences. The adoption of such an approach by the Department would be counterproductive. Public accommodations are much more likely to voluntarily comply with clear and reasonable rules that are consistent with their business practices and do not impose unreasonable costs.

Furthermore, although the RIA incorrectly assumed otherwise (see RIA at 25) — the high cost of these regulations will ultimately be borne by every person in this country. Whether they are taking family vacations or on business travel, Americans are already paying substantially more in gasoline and airline tickets in order to get to their destination. If the issues set forth in these comments are not addressed, Americans will pay more for their lodging as well. AH&LA

urges the Department to carefully consider the concerns set forth below as well as the costs associated with certain rules which, if properly calculated, cannot be justified.

II. GENERAL ISSUES

A. Flaws in the Department's Regulatory Impact Analysis

All regulations issued by the Executive Agencies, including those proposed in this NPRM, must comply with Executive Order 12866. This Executive Order states:

> The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that are effective, consistent, sensible, and understandable.

Fed. Reg. Vol. 58, No. 190 (Oct. 4, 1993) at 51735 (emphasis added). To comply with EO 12866, the Department is required to conduct an RIA of the proposed rule. To assist agencies in conducting their analyses, the Office of Management and Budget issued Circular A-4 to "defin[e] good regulatory analysis" and to "standardiz[e] the way benefits and costs of Federal regulatory actions are measured and reported." See OMB Circular A-4 at 1.

OMB Circular A-4 states that "[a] good regulatory analysis should include the following basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs – quantitative and qualitative – of the proposed action and the main alternatives identified by the analysis." Id. at 2. AH&LA's concerns about the Department's RIA pertain primarily to the third requirement.

The third element of a good regulatory analysis requires an evaluation of the costs of the proposed regulatory action. In this regard, AH&LA believes that the Department has failed to include the full costs of the proposed regulation in a number of ways that directly impact the lodging industry. Although a full discussion of the Department's cost analysis is contained in the

sections infra which specifically address each requirement, the following a summary of the problems identified by AH&LA:[2]

1. Inadequate Transition Period to the 2004 ADAAG. Requiring compliance with the 2004 ADAAG within six months after the effective date of the Final Rule will require the substantial redesign of virtually every lodging facility renovation and new construction project in the country, jeopardize construction financing, increase carry costs, and result in lost profits. The RIA does not account for any of these costs.

2. Water closet clearance and comparable vanity requirement (Requirements 28 and 45). In calculating the cost impact of these two requirements in future alterations, the Department:

(a) incorrectly assumed that toilets and vanities would only be replaced every 40 years (RIA at 31)[3] which resulted in the erroneous conclusion that only 31.96% of single user restrooms and accessible guest room baths would be affected in the next 15 years. In an informal survey conducted by AH&LA for this submission, eight national hotel companies reported that vanities and toilets are replaced, on average, every 13 to 14 years. This means that virtually all existing toilets and vanities in existing hotels will be replaced in the 15 year period examined by the Department.

(b) significantly underestimated the cost of making a currently accessible guest room bathroom comply with the new toilet and vanity requirements to be a mere $3,750 per room. This underestimation may have resulted from the Department's failure to provide its cost estimator with any diagrams of 1991 ADAAG-compliant hotel guestroom bathrooms and 2004 ADAAG-compliant guestroom bathrooms for comparison.

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[2] As explained in the attached letter from AH&LA's counsel to the Department dated August 14, 2008, AH&LA's economist was unable to replicate the cost estimates calculated in the RIA. See Attachment 1. Such replication is necessary to verify the accuracy of the calculations as well as to determine the effect of alternative assumptions on the results. AH&LA requested a sample calculation so that it could examine the methodology and use the same calculation method using more appropriate assumptions to derive alternate cost estimates. AH&LA awaits the Department's response to its request.

[3] AH&LA confirmed this assumption in a meeting with Department officials on August 12, 2008.

(c) did not account for the lost revenues associated with a longer renovation period resulting from the extensive work that would be required to comply with 2004 ADAAG toilet clearance and comparable vanity requirements.

(d) failed to account for instances where two rooms would have to be joined to create one accessible room because of the bathroom space required to comply with 2004 ADAAG toilet and vanity requirements. This would result in a very significant loss of revenue for the entire 15 year period examined by the Department.

See discussion at III.A.

3. Accessible Guest Room Dispersion. The Department did not account for the barrier removal and alterations costs associated with its new requirement that Pre-1993 Facilities must disperse their accessible rooms across all different room types using a variety of factors. See discussion at III.B.

4. Sales and Service Counters. The Department did not account for the barrier removal and alterations costs associated with its new requirement that the lowered section of sales and service counters extend the full depth of the counter, or the cost associated with its elimination of equivalent facilitation options for service counters such as auxiliary tables or flip up counters. These equivalent facilitation options as less expensive but equally effective alternatives that should have been considered under OMB Circular A-4. See discussion at III.D.

5. Exercise Facilities. The Department incorrectly assumed that motels and inns do not have exercise facilities that would be affected by the new accessible route and clear floor space requirements for exercise equipment. In fact, the results of AH&LA's 2008 Lodging Survey show that anywhere from 26% to 85% of motels and some inns have exercise rooms. See American Hotel & Lodging Association 2008 Lodging Survey, Question 60 (Hotels with Exercise Room/Health/Fitness Facility by Room Range) (Attachment 6). The Department also incorrectly assumed that only 50% of hotels would have to incur barrier removal costs associated

with relocating its existing equipment to comply with these two new requirements – an assumption that defies common sense. The Department also did not take into account the amount of increased wait time that would result from reducing the number of pieces of equipment in exercise rooms to comply with the new requirements. See discussion at III.E.

6. Steam room and saunas. The Department incorrectly assumed that no hotels, motels, inn, or spas have saunas and steam rooms that would be affected by the new accessibility requirements for such amenities. The Department also failed to consider the cost to society resulting from shutdowns of such facilities as a result of the new requirements. See discussion at III.I.

7. Spas and Wading Pools. Given the high cost associated with retrofitting these elements to comply with 2004 ADAAG ($6,000 and $142,500 per unit for spas and wading pools, respectively), lodging facilities may simply shut down these amenities instead of retrofitting them). See discussion at III.H. The Department must take into account the cost to society of these possible shutdowns. See OMB Circular A-4 at 3, 26.

8. Power-Driven Mobility Devices. The Department has not considered the cost of its new requirement that all public accommodations must presumptively allow into their facilities all manner of power-driven devices that persons with disabilities may chose to use for mobility. The use of these devices is likely to result in higher insurance premiums, more personal injury claims, and greater property damage. The Department has considered none of these costs. In addition, the Department has not considered the costs that public accommodations will incur to hire lawyers to help them develop policies mandated by the proposed rule if they wish to limit the use of these power-driven mobility devices in their facilities.

9. Incremental Costs Incurred by Lodging Facilities and Their Impact on Consumers. The RIA does not take into account the effect that the increased costs incurred by the lodging industry will have on consumers. It states: "The incremental costs incurred by facilities are not transferred to consumers as a change in prices in facilities. This assumption is reasonable since the incremental cost to facilities is expected to be small, especially considering implementation with safe harbor and readily achievable determinations." RIA at 25 (emphasis added). The failure to take into account this negative impact is inconsistent with OMB Circular A-4. OMB Circular A-4 states that "[g]ains or losses in consumers' or producers' surpluses" should be taken into account "when they are significant." OMB Circular A-4 at 37. To the extent that the proposed regulations impose incremental costs on lodging facility companies, these costs will ultimately be recouped through higher room rates and facility fees. These higher prices will reduce facility utilization, causing a loss in consumer surplus.

B. The Department's Authority To Modify the 2004 ADAAG Without Sending it Back to the Access Board For Revision.

As discussed infra, there are a number of serious problems in the 2004 ADAAG that should be corrected or clarified in the Final Rule. The Department's position that it cannot make any changes to the 2004 ADAAG and that any substantive revisions must be sent back to the Access Board for its consideration and adoption is inconsistent with Supreme Court precedent. Although the ADA states that DOJ must issue regulations that are "consistent with the minimum guidelines and requirements" issued by the Access Board, 42 U.S.C. § 12186(c), the majority of the Access Board members are not appointed in a manner that gives them the authority to dictate minimum regulatory standards. Thus, allowing them to do so would violate the Appointments Clause of the Constitution.