

August 18, 2008

The Honorable Grace C. Becker  
Acting Assistant Attorney General for Civil Rights  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Ave, NW  
Washington, DC 20530

**Re: RIN 1190-AA44: Comments on the Department of Justice's Notice of Proposed Rulemaking for Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities**

Dear Assistant Attorney General Becker:

On behalf of the International Franchise Association (IFA), I write to comment on the Department of Justice's Notice of Proposed Rulemaking on the Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, published in the *Federal Register* on June 17, 2008.

IFA is the largest and oldest franchising trade group, representing more than 85 industries, including more than 10,000 franchisee, 1,200 franchisor and 470 supplier members nationwide. IFA protects, enhances and promotes franchising by advancing the values of integrity, respect, trust, commitment to excellence, honesty and diversity. According to a 2008 study conducted by PricewaterhouseCoopers, there are more than 900,000 franchised establishments in the U.S. that are responsible for creating 21 million American jobs and generating \$2.3 trillion in economic output. Franchising operates in industries including automotive, commercial & residential services, restaurants, lodging, real estate and business and personal services.

On behalf of our members, I respectfully submit these comments and I appreciate the opportunity to share our views on the proposed regulation. Members of the IFA strongly support the spirit and intent of the Americans with Disabilities Act of 1990 (ADA). Over the past 18 years franchised businesses have experienced the benefits of fully integrating individuals with disabilities into the workplace. By providing good jobs and economic opportunity to more Americans, the ADA has definitively achieved its goal. Moreover, the accessibility guidelines adopted under Title III of the ADA have allowed millions of individuals to receive access and enjoy the variety of services many franchises provide.

However, the immense scope of this landmark civil rights law and its implementing regulations have undoubtedly led to some unintended consequences. The IFA feels that the Department should fully take advantage of these lessons learned by franchised businesses during this rulemaking. Since the IFA represents companies from over 85 diverse industries,

our comments will focus on some of the chief concerns facing all franchised businesses. The IFA believes that the comments provided here, and by other business trade associations that represent our members, will greatly benefit all stakeholders and individuals impacted by this proposed regulation. In addition, we strongly support the comments submitted by groups such as the U.S. Chamber of Commerce, the American Hotel & Lodging Association, the National Restaurant Association and the National Federation of Independent Business.

### **Proposed “Safe Harbor” Provisions**

Of the utmost concern to franchised businesses, is exactly how the Department is proposing to handle the obligation of owners of existing facilities to adopt the changes specified in the 2004 Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines (ADAAG) revised guidelines. For the most part, we are pleased the Department has chosen to exempt any existing facility that meets the 1991 guidelines. We commend the Department for acknowledging the due diligence and great expenses undertaken by hundreds of thousands of small businesses in this country to ensure their facilities were in compliance. It would be an unfortunate step backward to penalize those businesses who did the right thing by improving accessibility according to law, if the 2004 ADAAG were to apply to all businesses retroactively. It would also be unfair to those small businesses who complied with the 1991 standards to change course every few years and continuously adjust the guidelines.

At the same time, some franchised businesses have been the victims of “drive-by” lawsuits. Since many small business owners are not experts in the ADA or the vast federal regulations that implement it, creative trial lawyers have tried to take advantage of the situation. In many instances, these suits end up being settled for cash going to the plaintiff without achieving the sought after compliance.

First, in order to ensure a business qualifies for a “safe harbor”, it would have to conduct a review of each element (i.e. ramps, handrails, all components of restrooms, door handles, accessible parking spaces, doorway widths and clearances, lavatories, counter heights and depths, elevators, and appropriate signage, etc.) to determine that they are all in compliance with the current guidelines before they could be confident that no changes are necessary. If an element is not in compliance, it would have to be made compliant in accordance with the new guidelines. This review alone could be very costly given the range and detail of the analysis. Furthermore, those individuals seeking to take advantage could file discovery motions to ascertain whether or not a business has come into compliance. The absence of a review would create liability for small businesses and add to the cost of compliance.

If each element is found to be in compliance with the current guidelines, owners would not be required to change out elements to be compliant with the new guidelines unless they undergo alterations affecting those elements after the effective date of the regulation. However, what constitutes an alteration is a matter of debate. Any new construction occurring after the effective date would also have to be done in compliance with the new guidelines. The Department should provide greater clarity as to what exactly constitutes an alteration.

Finally, the Department has also proposed a specific small business safe harbor. Pursuant to this safe harbor, a qualified small business (meeting the SBA's definition for a small business) would have met its readily achievable barrier removal obligations for a given year if, in the preceding tax year, it spent at least one percent (1%) of its gross revenues on barrier removal. We fully commend the Department for its efforts to seek new and improved ways to reduce regulatory compliance burdens on small franchised businesses. However, this new and creative proposal carries with it some concerns:

- One percent of a franchise'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.
- Given the ebb-and-flow of the economy, some small franchise businesses can operate on a profit margin of two to three percent of gross revenues. Mandating them to spend one percent of gross revenues to take advantage of this safe harbor could seriously reduce their profitability and consequently their competitiveness.
- 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 over its compliance with Title III.
- 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.
- In order to use this exemption, the small franchised 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.
- Identifying what was spent on barrier removal could be very difficult and presents a significant additional paperwork burden.

Appreciating the effort taken to address the concerns of small franchised business owners, the IFA urges the Department to provide as much bright-line clarity as possible in its final regulations. Since the proposal is introducing a new way of showing readily achievable barrier removal, great care should be taken to ensure it is workable for small business. Introducing a spending mandate creates new liabilities and uncertainties—such as creating a minimum annual spending floor and bookkeeping burdens. We would prefer that the Department provide as much guidance as possible with regard to the proposed “safe harbors.”

#### **Circulation Path in Employee Work Areas**

As a result of changes in the revised guidelines that will be implemented through this regulation, areas used exclusively by employees while performing their jobs will be required to have increased access. Subject to several exceptions, the proposed rule mandates compliance with the technical requirements for accessible routes. The IFA is concerned that requiring employee work areas be subject to ADAAG requirements for accessibility will blur the line between Title I and Title III.

### **Industry Specific Concerns**

Franchising operates in more than 85 industries including automotive, commercial & residential services, restaurants, lodging, real estate and business and personal services. The proposal will inevitably impact a majority of franchise enterprises in this country that provide services or accommodations to the public. However, the IFA would like to take this opportunity to highlight some areas of concern to specific industry sectors.

The 2004 ADAAG and the Department's proposal will have a significant impact on the hotel and lodging and restaurant industries. Far and away, the majority of IFA members in these hospitality industries have dedicated themselves to providing quality services to all of their consumers and guests. Many facilities—small and large—have ensured their facilities meet the 1991 standards the Department promulgated. Many more go above and beyond meeting the guidelines required by law. The restaurant and hotel industries are highly customer service intensive. In order to be successful, it makes good business and common sense to provide the best experience to each customer. Franchise restaurants and hotels and their valuable employees go to great length to ensure a happy customer.

We urge the Department to carefully consider the implementation of the new guidelines for hotels and restaurants. For these types of businesses, profitability is achieved through strong customer service and actively managing available space. The amount of table space in a restaurant is critical to profitability. Restaurant owners will do everything to accommodate a customer with a disability or an individual who requests one. In the same respect, hotels have a never-ending task in filling every vacancy. Hotel owners are equally committed to accommodating every guest. New regulations that compel franchised restaurants and hotels to sacrifice space and resources to comply with a government mandate will certainly harm the competitiveness of these two sectors.

### **Broad Impact Concerns**

It has been estimated that in total, there are more than 100,000 federal regulations that cost \$1.11 trillion to the public. Unfortunately, a disproportionate amount is borne by small businesses. Thousands of pages of fine print in 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 can make good faith compliance errors. The IFA urges the Department to carefully weigh the

potential impact of its proposal with the 18 years of experience employers and public entities have had with the ADA.

We are concerned that the new guidelines will trigger a new wave of litigation where facility owners will have to establish various defenses: that every element is already in compliance with the old guidelines; that they have not done any alterations that would have triggered an upgrade; that they qualify under the historical building exemption; or the sought after compliance would not be “readily achievable.” If the case ends up going to court, the court may order a wall to wall compliance audit of the entire building. The defense, court fees and auditing costs could be staggering for a small franchised business.

Finally, the IFA and its members strongly believe the ADA and its implementing regulations are not only guidelines and laws with consequences. They are good business principles— providing superior customer service to every individual with a disability. The Department’s proposal should not be seen as a “gotcha” opportunity, but rather an opportunity to assist all places of public accommodation in providing the best service to individuals with a disability. It is our hope that in its final regulation, the Department will provide the most clarity and guidance to franchised businesses. Rather than creating opportunities for complaints and legal actions, we should be working to assist every business get into compliance in a reasonable manner. The law rightly protects the individual who is wronged and provides compensation; however, the actual cost is wasted resources on settlements rather than improvements toward compliance or correcting the inaccessibility for the benefit of others.

Thank you for this opportunity to share the views of the International Franchise Association on the proposed regulations to Title III of the Americans with Disabilities Act. We look forward to the promulgation of final regulations that include suggestions offered here so that franchised businesses can be assured of their responsibilities to provide accessible public accommodations.

Respectfully submitted,



David French  
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International Franchise Association