NFIB

LEGAL FOUNDATION

Protecting the Rights of America's Small Business Owners

October 1, 2007

By Electronic Mail

Ms. Susan Dudley, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
725 17th Street, N.W.
Washington, DC 20503

Re: Department of Justice's Notice of Proposed Rulemaking on Title III of the ADA - Nondiscrimination in Public Accommodations and in Commercial Facilities

Dear Ms. Dudley:

On behalf of the National Federation of Independent Business (NFIB) and the NFIB Legal Foundation, I would like to thank you for agreeing to meet with NFIB's representatives to discuss the Department of Justice's (DOJ) upcoming Notice of Proposed Rulemaking (NPRM) regarding the adoption of the Access Board's revised Americans with Disabilities Act (ADA) Accessibility Guidelines (the "Revised ADA Guidelines").

Small-business owners are proud of the commitment they have made to accommodate the disabled. Since the passage of the ADA in 1990, NFIB members have spent millions of dollars constructing and/or renovating their businesses to remove barriers and provide accessible public accommodations. Nevertheless, NFIB has very serious concerns about the Revised ADA Guidelines that will significantly impact millions of small businesses.

First, in considering any revisions to the ADA Guidelines, it is important to understand that the existing ADA regime has imposed a very significant compliance and litigation burden on small businesses. Next, NFIB suggests that there are regulatory solutions available that could alleviate this burden. Finally, NFIB is very concerned that DOJ will not meaningfully comply with the Regulatory Flexibility Act (RFA) in adopting the Revised ADA Guidelines as enforceable standards.

NFIB appreciates this opportunity to bring these concerns to the attention of OMB. We are hopeful that you will consider returning the NPRM to DOJ if you find that our concerns warrant further attention from the agency.

I. Small Business Problems with the Current ADA Regulations

The ADA was enacted "to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities [and] to ensure that the Federal Government plays a central role in enforcing the standards. . . ." 42 U.S.C. 12101 (b) (2) and (3). Unfortunately, the current regulatory regime does not fulfill the objective of the law.

Many small-business owners rent space in buildings and facilities that were constructed decades ago. Consequently, they are only subject to the ADA's barrier removal requirement unless they make alterations. The theory behind barrier removal sounds simple: Remove barriers where the removal is "easily accomplishable without much difficulty or expense." The reality is that barrier removal is both difficult and expensive, due to DOJ's broad view of what constitutes a barrier (i.e. any condition that does not meet the new construction/alterations standard) and the lack of useful guidance on what kind of barrier removal is readily achievable.

Because the ADA's regulatory and statutory framework is so unclear about what constitutes "readily achievable" barrier removal, many small businesses have become the targets of frivolous lawsuits designed to generate quick settlements and/or the award of attorneys' fees. *See "Why the Disabilities Act Exasperates Entrepreneurs"*, Fortune Small Business (May 1, 2005) (discussing a "scheme of systematic extortion.").

II. Regulatory Solutions to Ease the Burden on Small Businesses

A. Clearer guidance on when barrier removal is not readily achievable

Under the current regime, what is readily achievable for one business may not be for another because the test takes into account a business' resources. While NFIB agrees with the theory that businesses with more resources should have to do more, the problem is that, due to a complete lack of guidance from DOJ, a small-business owner has no way of knowing how much money it must spend to fulfill the ADA's requirements even if it hires a consultant and an attorney. DOJ's NPRM should provide clearer guidance on when barrier removal is not readily achievable based on monetary factors, such as net revenue of a business.

NFIB urges DOJ to consider adopting regulations stating that:

1. For a business with less than $250,000 in net revenue, an annual barrier removal cost in excess of 5% of its annual net revenue is presumptively not readily achievable.

2. If a business spends more than 5% of its annual net revenue in any given year on barrier removal, it shall be given a credit for the remaining amount in the following year(s) in determining what barrier removal is readily achievable in those subsequent year(s).

3. If a small business is operating at a loss and has done so for at least one year, barrier removal is presumptively not readily achievable for the current year to the extent that removal entails more than a *de minimis* cost.

These provisions would provide certainty and direction to small-business owners about how much they must spend on barrier removal in order to comply with the ADA and reduce litigation costs by making summary judgment more likely for small businesses that have spent 5% of annual net revenue on barrier removal.

B. Certain Revisions Should Be Exempt from Barrier Removal Requirements

To date, DOJ and plaintiffs' attorneys have taken the position that any element that does not comply with the ADA Guidelines is a barrier. This is a questionable position as Congress made clear that

the ADA Guidelines only apply to new construction and alterations. In the Advanced Notice of Proposed Rulemaking, DOJ stated that it is considering excluding certain new Revised ADA Guideline provisions from the barrier removal analysis. NFIB not only concurs with this approach but also urges DOJ to go further and exclude a number of current ADA Standards from this analysis for small businesses, as many such provisions do not materially affect a disabled person's ability to access a facility and the goods and services it has to offer. While we have discussed some of the standards that we believe should be subject to exemption, this list is not inclusive, and we ask DOJ to carefully consider recommendations from other industry and business representatives.

We also seek confirmation that DOJ will continue to exclude the employee work areas from the barrier removal requirement. This is particularly significant in light of the Revised ADA Guideline 203.9 concerning employee work areas, which added three new accessibility requirements: (1) accessible circulation paths throughout employee work areas (206.2.8); (2) means of egress (207.1); and, (3) wiring for visual alarms (215.2). This is a significant departure from the current ADA Standards[1] and would apply to businesses regardless of whether they have an employee that uses a wheelchair. The impact of these new requirements will be exponential. DOJ must continue to exempt employee work areas from any obligation to retrofit.

In addition, NFIB believes that the following provisions should be exempt from barrier removal requirements:

Public Entrances (206.4.1). The increased scoping requirement for public entrances should be exempt from the barrier removal analysis. This requirement means that in the case of a facility with two entrances, both entrances must be accessible.

Handrails (210). NFIB supports DOJ's proposal to exempt the requirement that handrails on stairs must meet accessibility requirements even in buildings that have elevator access.

Reach Ranges (308). Thousands of businesses, in response to the "readily achievable barrier removal" requirement have lowered elements like light switches, fire alarms and thermostats from traditional heights of 60" to the 54" height provided for in the current ADA Standards. To require a subsequent retrofit would make the initial alterations moot and waste resources.

Walking Surfaces (403). The maximum slope has been changed from 1/50 to 1/48. While that is negligible change when it comes to new construction, it would impose substantial costs if a business were required to retrofit a walk surface currently constructed at the 1/50 slope. A 1/50 slope has been deemed accessible for more than 15 years. There is no reason why it should all of a sudden become a "barrier."
Water Closets and Toilet Compartments (604). Existing (i.e., pre-January 26, 1993) facilities must be exempted from the revised standard that precludes an overlap of the lavatory into the space required for the water closet as permitted in the current ADA Standards when engaging in barrier removal.

Knee and Toe Clearance (904.4.2). The Revised ADA Guidelines would require sales counters to provide toe clearance if the approach for wheelchairs is from the front, as opposed to a parallel approach. This requirement would seriously impact small retailers by eliminating high-value selling space located in front of sales counters.

Recreation and Play Areas (234-243). These brand new requirements will substantially impact owners of fitness centers and gyms, golf facilities, mini-golf facilities, play areas, saunas and swimming pools. These

[1] We believe this Title III intrusion into employee work areas is a significant departure from the congressional intent of the ADA itself, which clearly assigned employment related issues to the Equal Employment Opportunity Commission under Title I. Support for this opinion is found in the history of the ADA: "the legislation clearly states that employers are obligated to make reasonable accommodations only to the 'known' physical or mental limitations of an otherwise qualified individual with a disability. Thus, the duty to accommodate is generally triggered by a request from an applicant for employment or an employee . . .In the absence of a request, it would be inappropriate to provide an accommodation. . . ." Legislative History of the Americans with Disabilities Act, H.R. Doc. No. 101-485(II) at 65 (1990).

establishments would incur significant costs if the Revised ADA Guidelines were adopted as the new barrier removal standard because barrier removal is an ongoing obligation. Thus, small business owners would be required to comply immediately with the Revised ADA Guidelines under the theory of barrier removal even if they were not making any alterations to these elements.

C. Safe Harbor Should Be Provided to Facilities in Compliance With Current ADA Rules

NFIB recommends that the NPRM exempt elements in existing places of public accommodation that either have been constructed, altered or undergone barrier removal in accordance with existing ADA Standards, even if such elements are altered in the future. For example, in connection with a substantial renovation, a restaurant owner created an accessible unisex bathroom which has a vanity placed within the toilet clear floor space as allowed under the current ADA Guidelines. Five years after the new regulations take effect, the fixtures and finishes in the bathroom are renovated, but the restaurant owner cannot comply with the new ADA Guidelines without changing the footprint of the bathroom since the vanity can no longer intrude into the toilet clear floor space and a larger bathroom is required. The restaurant owner should not be required to comply with the new requirements at this time. Without such a safe harbor provision, the economic impact of the Revised ADA Standards could be devastating for thousands of small businesses.

D. Effective date should be 18 months following final publication

NFIB believes that DOJ should not apply any Revised ADA Standards to facilities until eighteen months after publication. The current ADA Standards had the same implementation period. Moreover, although this is not a new law, implementation of the Revised ADA Standards will nevertheless be a time-consuming and potentially expensive undertaking for many facilities.

III. DOJ Must Perform a Legally Sufficient Regulatory Flexibilty Analysis

NFIB submits that there is no doubt that the Revised ADA Standards will have a significant economic impact on a substantial number of small entities and, therefore, DOJ is required to complete an initial regulatory flexibility analysis.

One of the NFIB Legal Foundation's primary concerns is agency compliance with the RFA, 5 *U.S.C.* § 601 *et seq.* (2006), the federal law charged with protecting small businesses from onerous regulations. The NFIB Legal Foundation has filed over 20 comments with various federal agencies on RFA compliance matters. The D.C. Court of Appeals has acknowledged the RFA's importance in federal rulemaking when it held that an agency's failure to undertake required regulatory flexibility analysis is not an error that can be considered "harmless." *U.S. Telecomm. Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005). In addition to the submission of comments to agencies, the NFIB Legal Foundation has vindicated its members' interests in RFA compliance in court. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers,* 417 F.3d 1272 (D.C. Cir. 2005) (finding RFA applied to Army Corps' Clean Water Act nationwide permit rulemaking).

Unfortunately, the Access Board promulgated the revised guidelines without adherence to the requirements of the RFA. Specifically, the Access Board refused to adequately consider the effects of the revised guidelines and possible exemptions or less stringent standards for compliance by small businesses.

Prior to issuing the Revised ADA Guidelines, the RFA required that the Access Board conduct a regulatory flexibility analysis that would have, inter alia, considered the impact of the Revised ADAAG on small entities as well as regulatory alternatives that could minimize the impact of the Revised ADAAG on small entities. Instead of conducting this analysis, the Board issued an arbitrary and capricious certification that the Revised ADAAG is not expected to have a significant economic impact on the new construction and alteration of covered facilities of a substantial number of small entities. The Access Board's certification was also flawed for the following reasons:

- The Access Board only studied costs on office buildings; hotels; hospitals and nursing homes; and government housing. In doing so, the Access Board neglected many retailers, restaurants, small manufacturers, and service providers.

- The Access Board certified that the revised guidelines would only add .5 percent to the total cost for projects over $100,000. The Board never considered alterations for projects less than that amount, which are precisely the type of alterations a small business is likely to make.

- The Access Board did not use data on significant changes like the size of the employee work area and the number of accessible entrances in its certification.

NFIB challenged the Access Board's baseless certification and failure to conduct the required regulatory flexibility in a lawsuit on behalf of its small business members who own and/or operate public accommodations and/or commercial facilities. *See National Federation of Independent Business v. Architectural Architectural and Transportation Barriers Compliance Board*, 461 F. Supp. 2d 19 (D.D.C. 2006).[2] NFIB is now concerned that DOJ, instead of conducting a proper RFA review, will adopt the faulty RFA analysis utilized by the Access Board in preparing the Revised ADA Guidelines. NFIB encourages DOJ to perform a meaningful analysis that takes into consideration cost data on the types of alterations small entities will have to make as well as the types of facilities that will be affected.

Conclusion

NFIB and its members strongly support an accessible environment. Nevertheless, NFIB members will be significantly affected by the revised ADA Standards and we hope that the NPRM will provide regulatory alternatives that will minimize the cost burdens on small business. NFIB also believes that the current ADA rulemaking provides DOJ with a great opportunity to address issues that have surfaced through the 17-year history of the ADA. We look forward to meeting with you and your staff to further discuss these issues.

Best regards,

Karen R. Harned

Karen R. Harned, Esq.
Executive Director

[2] The federal district court dismissed NFIB's lawsuit against the Access Board, after concluding that the case was not ripe for a decision because the Revised ADA Guidelines are not enforceable until DOJ has adopted and promulgated. *Id.*