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

Submitted by

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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.

In Buckley v. Valeo, 424 U.S. 1, 140-142 (1976), the Supreme Court held that the acts of "rulemaking" and rendering of "advisory opinions" are "functions [that] represent[] the performance of a significant governmental duty exercised pursuant to a public law . . . . These administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'" Id. 692-93. The Court then held that the newly created Federal Election Commission could not engage in these administrative functions – authorized by Congress in the 1974 Amendments to the Federal Election Campaign Act – because the members of the Commission were not appointed in the manner required by the Constitution for "Officers of the United States." The Appointments Clause requires that Officers of the United States be appointed by Presidential nomination and "by and with the advice of the Senate." Constitution, Art. II, § 2, cl. 2.

The Access Board has 25 voting members, 13 of whom are members of the public appointed by the President without the advice and consent of the Senate. See 29 U.S.C. § 792 (a). Thus, the Board is dominated by persons who are not "Officers of the United States." As a result, the Board cannot set minimum standards that the Department must follow, as that activity would constitute de facto rulemaking reserved only for "Officers of the United States." Accordingly, the Department retains the full authority to modify the 2004 ADAAG as it sees fit to ensure that its regulations are fair and balanced.

C. Trigger Date For Alterations To Existing Facilities And New Construction

Proposed Section 36.406(a)(1) specifies that new construction and alterations shall comply with the 1991 Standards if physical construction of the property commences less than 6 months after the effective date of the Final Rule. Proposed Section 36.406(a)(2) specifies that new construction and alterations shall comply with the 2004 ADAAG if physical construction of the property commences 6 months or more after the effective date. AH&LA's members strongly

object to the proposed trigger dates which, if adopted, would require the redesign of virtually all renovation and new construction projects that will be underway at the time the Final Rule is issued. As explained below, 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.

At the outset, it is important to note that in 1991 when the Department considered how long a transition period to give for compliance with the 1991 ADAAG, the Department chose an alterative that provided for the longest period. In so doing, the Department explained that the longer transition period

> appears to be superior on economic grounds because it allows time for those subject to the requirements to anticipate those requirements, to review the standards in final form, and to receive technical assistance pursuant to the ADA. This greater notice will minimize the need for costly redesign or reconstruction of facilities under design or construction as of the date of the adoption of the ADA, and thus appears to be the most cost-effective regulatory alternative.

Final Regulatory Impact Analysis of the Department of Justice Regulation Implementing Title III of the Americans with Disabilities Act of 1990 (December 18, 1991, Revised April 8, 1992) at 38 (Excerpts at Attachment 2). As explained below, the very same considerations previously embraced by the Department support the transition periods proposed by AH&LA here. Moreover, the fact that the 2004 ADAAG was issued by the Access Board several years ago does not change this analysis because it was only advisory in nature and may change before being issued as regulations by the Department. The Department recognizes this possibility in the NPRM where it states that it may send certain 2004 ADAAG requirements back to the Access Board for reconsideration. See NPRM at 34513. In light of the uncertainty about what the Final

Rule will say, the lodging industry cannot be expected to have designed multi-million dollar projects based on a set of non-binding guidelines.

In the lodging industry, the renovation or new construction of any facility begins with the design process. At the end of the design process, plans are generated and the project costs must be determined through a bidding process. Once a construction contract has been awarded and reduced to writing, an application for a building permit is submitted to the local authorities. Many things can happen once the building permit application is submitted that could delay the start of construction. Local building authorities may take a substantial amount of time to review the application. Even for small projects, revisions to plans may be requested. Zoning variances may be necessary. Third parties may object to the project, resulting in further delay. The owner of the facility has no control over these issues which can delay the issuance of a building permit. Ultimately, the local building authorities issue a building permit and construction begins sometime thereafter.

The process described above assumes that there are no other events that have delayed the start of construction after the design process is complete. However, such events are not uncommon. Developers may place already designed projects on hold because of an economic downturn, problems with financing, and other reasons. An owner may also delay the start date of a construction project to take advantage of non-peak times when the facility is not as busy to minimize the loss of revenue associated with taking rooms out of inventory.

Attachment 3 shows actual project milestone dates for 10 recent actual hotel renovation projects done by a company that owns a substantial number of hotels in the United States. For the eight projects that did not involve an increase in the square footage of the building, the time elapsed between the start of design and the permit application date was 7 to 12 months. The time

elapsed between the start of design and the start of construction for these projects was anywhere from 7 to 24 months. For the one renovation project that also involved an increase of square footage (the addition of a ballroom), the time elapsed between the start of design date and the permit application date was 20 months.

The timeline for new construction is even longer. One company that operates hundreds of hotels throughout the U.S. reviewed a pipeline of 300 new hotel construction projects for five limited service brands and determined that the average design and permitting phase is 16 months. The timeline from the start of design to permitting is similar for full-service brand hotels. Attachment 4 contains actual timelines for the construction of two hotel/spa properties where the time elapsed from the start of building design to the start of building construction was 16 to 17 months. This data is consistent with industry research. According to a recent article authored by the Vice President of Smith Travel Research, the entire development process for a typical luxury property is 62.8 months. For a typical upper-upscale project, the entire development process is 54.2 months. See Attachment 5.

The facts set forth above make clear that a six-month transition period to comply with the 2004 ADAAG in alterations and new construction of lodging facilities is unacceptable because the design phase of such projects – the point at which the 2004 ADAAG requirements must be taken into consideration – will have already taken place. For example, under the proposed Sections 36.406(a)(1) and (2), if the Final Rule is issued on January 1, 2009, any alteration or new construction that begins on July 1, 2009 would have to comply with the 2004 ADAAG. To comply with this rule, however, all projects would have to have been designed after January 1, 2009. As shown by the real milestones discussed above, however, the design process for virtually all projects for which construction would begin on July 1, 2009 would have been

completed well in advance of January 1, 2009. The effect of the Department's proposed rule would be to send virtually every lodging renovation and new construction project in the U.S. back to the drawing board. This outcome would cause the industry to spend hundreds of millions of dollars in redesign costs, carrying costs, and lost revenues, and jeopardize construction financing due to delays. In addition, lodging facilities often pre-book their facilities that are undergoing construction based on expected project completion dates. If construction is delayed by a need to redesign plans to comply with the 2004 ADAAG, the facilities will not be ready to be used by the groups that have reserved these facilities. The RIA has not taken into account any of these costs as required by OMB Circular A-4.

The construction start date is not an appropriate trigger event for applying the 2004 ADAAG because that date is not within the control of the lodging owner and, as discussed above, can be delayed by a host of factors that are entirely beyond the owner's control. Under the hypothetical discussed above, an owner may plan to start construction on its project on May 1, 2009, and assume that its 1991 ADAAG-compliant plans can be used for the project. However, notwithstanding a timely submission of the permit application, the permitting authorities do not issue the permit until after July 1, 2009, and construction cannot begin until after this date. This owner would have to revise his plans substantially to comply with the 2004 ADAAG and would have to go through the permitting process again. Such substantial revisions would be required because, as discussed in these comments, there are very significant changes between the 1991 ADAAG and 2004 ADAAG that would change the entire configuration of the building. Those include the new toilet clear floor space and comparable vanity requirements which, contrary to the Department's suggestion, will in fact increase the square footage of accessible rooms, change their footprint, and impact the location of plumbing risers and in both

alterations and new construction. This very unjust and expensive outcome can be avoided by adopting an appropriate trigger event and grace period. The appropriate trigger event should be the submission of the building permit application if a permit is required, and the start of construction if no permit is required.

D. Trigger Date For Barrier Removal

AH&LA has been unable to locate in the NPRM a proposed date by which the 2004 ADAAG would apply to the ADA's barrier removal obligation which applies to all public accommodations facilities in existence when the Final Rule is issued. Given the complexity and substantial cost associated with the new barrier removal requirements, AH&LA submits that public accommodations should have two years from the date of the Final Rule to complete any readily achievable barrier removal in existing facilities that is required by new or changed requirements in 2004 ADAAG that do not fall within the Element by Element Safe Harbor.

Although a longer transition period for barrier removal than for alterations seems counterintuitive, the compliance process is actually more complex. That process would include the following steps:

1. Review of Final Rule and determination of legal obligations. This will be no simple task even for sophisticated businesses with legal resources, and a nearly impossible task for small business owners. Businesses will have to review their facilities – most likely with the assistance of an ADA consultant or attorney– to determine what elements already comply with the 1991 ADAAG and are therefore covered under the Element by Element Safe Harbor. Given the highly specialized knowledge required to conduct this review, there may be a shortage of such consultants given the need for virtually immediate compliance. As to those items that are not compliant with the 1991 ADAAG, or which were never covered by the 1991 ADAAG but are covered by the 2004 ADAAG, the businesses will have to proceed to the next step.

2. Finding a retrofit solution. Businesses will have to engage professionals to design an acceptable retrofit solution. Take, for example, the new requirement for accessible steam rooms and saunas. The Department has stated that barrier removal must meet the 2004 ADAAG requirements unless the work is not readily

achievable. There is no way that these spaces can be retrofitted without hiring a design professional to draw plans for the retrofits.

3. Obtain pricing from contractors for retrofit solutions. Once a retrofit solution has been designed, the business owner must obtain cost estimates for the solutions.

4. Determining whether the barrier removal is "readily achievable". Since "readily achievable" is a legal multi-factor test that many lawyers would have trouble interpreting, the business will likely have to obtain a legal opinion about whether bringing each of those items into compliance is "readily achievable."

5. Obtaining approval for the barrier removal from the owners who must pay for the structural changes. Many barrier removal actions require modifications to the structure of a hotel that would be considered a capital improvement. Hotel management companies usually cannot pay for such improvements out of their operating budgets. Such improvements and their costs must be identified and included in capital budgets for the following year, and usually those budgets must be approved by the owners before the money can be spent. One hotel company reported that its capital budgeting process for a November 2009 construction project started in March 2008.

6. Obtain permits. Once there is budgetary authorization to do the work, the hotel must obtain permits to perform most barrier removal work.

7. Barrier removal construction work. Once permits are obtained, the actual work must be performed.

In short, while there may be some barrier removal actions that require little planning (e.g. hardware replacement), other actions cost significantly more and require more budgeting, planning and construction time. Creating accessible entries to wading pools, spas, and swimming pools, and retrofitting sales and service counters, saunas and steam rooms, fitting rooms, and playgrounds, are all significant endeavors. The effort will be monumental if the Department does not take a more reasonable position on accessible room dispersion, as discussed in Section III.B. Indeed, if the Department will not acknowledge that it has changed the rules for accessible room dispersion in Pre-1993 Facilities and grant a safe harbor for those Pre-1993 Facilities that have not dispersed their accessible rooms, virtually every lodging facility in the country could be deemed out of compliance and arguably be under an immediate obligation to

create new accessible rooms under the barrier removal obligation. That would clearly be a major undertaking that cannot be done in fewer than two years.

E. Definitions Of "Barrier" And "Readily Achievable"

AH&LA's members strongly object to the Department's new requirement that barrier removal in existing facilities be done in accordance with the high accessibility standards for alterations and new construction set forth in the 2004 ADAAG. Although existing facilities need not remove barriers if the removal is not "readily achievable," the Department's enforcement interpretation of what is "readily achievable" – whatever the hotel can pay regardless of the amount -- has strayed so far from its statutory definition that this limitation has been eviscerated for businesses with resources. The result is a proposed standard for barrier removal for existing facilities that is essentially the same as the standard for alterations and new construction. As explained below, AH&LA believes that this new compliance standard for barrier removal is contrary to the language and intent of the ADA.

Proposed Section 36.304(d)(3) states:

> Sec. 36.304 Removal of barriers.
>
> * * * * *
> (d)(3) Reduced scoping for public accommodations. For measures taken to comply with the barrier removal requirements of this section, existing facilities shall comply with the applicable requirements for alterations in Sec. 36.402 and Sec. Sec. 36.404 through 36.406 of this part for the element being altered. . . .

The Department explains in the NPRM:

> The Department's current regulation implementing title III of the ADA establishes the requirements for barrier removal by public accommodations. 28 CFR 36.304. Under this requirement, the Department uses the 1991 Standards as a guide to identify what constitutes an architectural barrier, as well as the specifications that covered entities must follow in making architectural changes to the extent that it is readily achievable. 28 CFR part 36, App. B. Once adopted, therefore, the 2004 ADAAG will present a new reference point for title III's requirement to remove architectural barriers in existing places of public accommodation.

NPRM at 34515 (emphasis added).

The proposition that any element in an existing facility that does not comply with the 2004 ADAAG is a barrier that must be removed in accordance with 2004 ADAAG standards unless doing so is not readily achievable is problematic because the Department and litigants have taken very unreasonable positions about what is "readily achievable". The prevailing view among plaintiffs and the Department seems to be that any retrofit is readily achievable if the owner or operator has the money to pay for it. This position is fundamentally at odds with the statutory definition of "readily achievable" which is "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C § 12181(5) (emphasis added).

Indeed, in its Final Regulatory Impact Analysis for the 1991 ADA Title III regulations, the Department stated that "[s]ince [barrier] 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." Final Regulatory Impact Analysis of the Department of Justice Regulation Implementing Title III of the Americans with Disabilities Act of 1990 (December 18, 1991, Revised April 8, 1992) at 37 (Excerpts at Attachment 2).

Owners and operators who wish to challenge the new interpretation of "readily achievable" can look forward to spending hundreds of thousands, if not millions, of dollars defending enforcement lawsuits by private litigants and/or the Department. For example, in its recent investigations of hotels in the New York City Theater District, Department officials in the U.S. Attorneys' Office in the Southern District of New York took the position that Pre-1993 Facilities should have made their Facilities compliant with the alterations/new construction standards of the 1991 ADAAG. These officials advised AH&LA that in assessing whether a

barrier removal was "readily achievable," the only relevant consideration was the hotel's ability to pay, not the cost of the barrier removal itself.

A recent litigation further underscores the unreasonable interpretations of the phrase "readily achievable" embraced by some ADA plaintiffs. In Californians for Disability Rights v. Mervyn's, No. A106199, slip. op. (Cal. Ct. App, July 29, 2008) the disability rights group sued a national retailer for not leaving adequate clear width between its moveable fixtures. The retailer had to spend more than a million dollars to conduct a study demonstrating that it would lose $70 million in revenues per year if it complied with the aisle width demanded by the plaintiff, and that the barrier removal was therefore, not "readily achievable". Remarkably, the plaintiff argued that the barrier removal was "readily achievable" because Mervyn's could afford the loss. Fortunately, both the trial and appellate courts disagreed with the plaintiff, holding that barrier removal that would result in a loss of $70 million was not "readily achievable" and noting that Congress defined "readily achievable" as "easily accomplishable and without much difficulty or expense." In short, the proposed requirement that barrier removal comply with the 2004 ADAAG, subject to only the "readily achievable" defense that neither the Department nor the disability rights advocates seem to recognize, would put an extreme burden on all businesses across the United States.

The Department's conflation of the accessibility standards for existing facilities versus altered facilities and new construction contradicts both the intent of the ADA and its prior official positions on this issue.

The ADA itself contains two distinct standards for regulating building accessibility: one that applies to facilities existing before January 26, 1993, and another that applies to facilities newly constructed or altered on or after January 26, 1993. See 42 U.S.C.10 §§

12182(b)(2)(A)(iv), 12183(a). Furthermore, a congressional committee observed that the distinction between existing and new facilities "reflects the balance between the need to provide access for persons with disabilities and the desire to impose limited cost on businesses. Because retrofitting existing structures to make them fully accessible is costly, a far lower standard of accessibility has been adopted for existing structures." See H.R.Rep. No. 101-485(III), 2d Sess., p. 60 (1990).

In the Preamble to the current Title III regulations, the Department stated the following about § 36.304 (Removal of Barriers):

> In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction. In existing facilities [pre 1/26/93], which are the subject of § 36.304, where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new construction and alterations (see §§ 36.401-36.406) where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction.

28 C.F.R. Part 36, App. B at 716 (2007).

The Department's Preamble discussion regarding § 36.406 (New Construction and Alterations) also supports this distinction. It states:

> The guidelines [ADAAG] are not to be "minimal" in the sense they would provide a low level of access. ADAAG contains requirements for new construction and alterations of buildings and facilities".

Id. at 740. This discussion neither indicates, nor implies, that the ADAAG is to be utilized for the purpose of barrier identification.

The Department's Title III Technical Assistance Manual published in November 1993 likewise states:

> "How does the "readily achievable" standard relate to other standards in the ADA? The ADA establishes different standards for existing facilities and new construction. In existing facilities, where retrofitting may be expensive, the

> requirement to provide access is less stringent than it is in new construction and alterations, where accessibility can be incorporated in the initial stages of design and construction without a significant increase in cost.
>
> This standard also requires a lesser degree of effort on the part of a public accommodation than the "undue burden" limitation on the auxiliary aids requirements of the ADA. In that sense, it can be characterized as a lower standard. The readily achievable standard is also less demanding than the "undue hardship" standard in title I, which limits the obligation to make reasonable accommodation in employment."

See ADA Title III Technical Assistance Manual, Section III.4.4200.

The Department's own list of "readily achievable" barrier removal examples also shows that the Department had a much lower standard of accessibility in mind for Pre-1993 Facilities. See 28 C.F.R. section 36.304(b)(1)-(21). The Department's RIA from 1991 makes clear that these examples of relatively inexpensive measures is what Congress intended, not compliance with new construction and alterations standards. The 1991 RIA stated: "The legislative history of the ADA indicates the kind of measure that are contemplated by [the barrier removal] provision: installation of ramps, curb cuts, lowering shelves and telephones, rearranging furniture, marking elevator controls, widening doors, installing flashing alarm lights, toilet stall modifications, accessible parking spaces, vehicle hand controls, elimination of turnstiles, and the like." See 1991 RIA at 36 (Attachment 9).

In short, instead of shifting its position to require Pre-1993 altered and new facilities to achieve the same high level of accessibility, the Department should, in the Final Rule, make clear that (1) an element's non-compliance with 1991 and 2004 ADAAG does not necessarily mean that the element presents a barrier to accessibility because this determination must consider the circumstances surrounding the element (including the availability of alternate means to obtain the same or equivalent service or benefit); and (2) barrier removal is not "readily achievable"

even if the entity with the obligation can afford it if the cost of the barrier removal is inconsistent with the statutory phrase "without much difficulty or expense."

F. Element By Element Safe Harbor And Path Of Travel Safe Harbor

AH&LA and its members appreciate and support the Department's proposed Element by Element Safe Harbor and Path of Travel Safe Harbor. Considering the billions of dollars that have been spent on making lodging facilities built before and after the enactment of the ADA comply with the 1991 ADAAG, a failure by the Department to grant a safe harbor for those elements that comply with the current law would not likely withstand a judicial challenge. The Department has appropriately recognized that lodging owners and operators that have complied with the 1991 ADAAG should not be made worse off than those who chose to not comply at all. Without this safe harbor, those who voluntarily complied with the 1991 ADAAG would essentially have to make and pay for compliance twice, as compared to the group that made no effort to comply and will only have to comply once after the Final Rule takes effect. Indeed, if the Department embraces a policy whereby it will require all covered facilities to redo their retrofits every time it decides that there is a new standard for accessibility, many covered facilities — particularly those with fewer resources — may adopt a wait and see attitude.

Some disability rights advocates have objected to the Department's safe harbors for 1991 ADAAG compliant elements, arguing that compliance with current law should merely be one of the factors in the "readily achievable" analysis. This proposal is unworkable and incomprehensible. The definition of "readily achievable" as well as the factors to be considered in that definition have already been set by Congress in the ADA itself. See 42 U.S.C. § 12181(9). The Department has no authority to add factors to the analysis. On the other hand, it is clear that an element that has been considered accessible under the ADA for the last 16 years cannot, by definition, be considered a "barrier" under the ADA. For this reason, the

Department's decision <u>not</u> to consider such elements to be barriers and to include them under two safe harbors is correct and consistent with the statute.

G. Qualified Small Business Safe Harbor

In response to requests by small business advocates for greater certainty about when a small business has met its barrier removal obligations, the Department has proposed the following Section 36.204(d)(5):

> Qualified small business. A qualified small business has met its obligation to remove architectural barriers where readily achievable 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 measures undertaken in compliance with the barrier removal requirements of this section.

AH&LA strongly objects to this safe harbor for several reasons.

First, this provision could be read to mean that a small business has an obligation to spend 1% of its gross revenue in the preceding tax year on barrier removal (assuming that there are barriers to remove). Under this interpretation, a hotel with a gross revenue of $6.5 million (the maximum revenue for a qualifying small business inn/hotel/motel) would have to spend $65,000 per year on barrier removal. As discussed above, this amount is fundamentally inconsistent with the statutory definition of "readily achievable," which is defined as "without much difficult or expense." 42 U.S.C. § 12181(9).

Second, basing what is "readily achievable" on gross revenue does not take into account the actual income that a business has to spend on barrier removal. Gross revenue is a figure that does not take into account expenses. Thus, a business' operating expenses could be higher than its gross revenue, resulting in a loss, but this gross revenue-based rule would still require the business to spend a substantial sum on barrier removal. A small business operating at a loss should not have to endure this hardship.

Third, AH&LA is concerned that courts and litigants will seek to apply this ill-advised 1% gross revenue concept to lodging owners and operators that are not small businesses. The application of this formula to businesses with substantially larger gross revenues would mean that even higher costs would be considered "readily achievable". Again, this outcome would be fundamentally inconsistent with the statutory definition of "readily achievable".

In sum, although AH&LA is open to proposals that would make it easier for small businesses to comply with the ADA and provide them with greater protection from frivolous lawsuits, AH&LA does not believe that the Qualified Small Business Safe Harbor, as drafted, accomplishes those goals. Furthermore, if any small business safe harbor involving a monetary amount is adopted, the Department should make clear that the small business safe harbor should not be used as guidance for what might constitute "readily achievable" barrier removal for non-small businesses.

III. 2004 ADAAG ISSUES

A. Accessible Guest Rooms Bathrooms And Single User Restrooms

Of all the changes in the 2004 ADAAG, the new toilet clear floor space and comparable vanity requirements are by far the most alarming, expensive, and unjustifiable as applied to existing facilities that already comply with the 1991 ADAAG. Accessible guest room bathrooms and single user bathrooms that comply with the 1991 ADAAG should not only be covered under the Element by Element Safe Harbor, but they also must not be required to meet the 2004 ADAAG in future alternations that involve only the replacement, not the relocation, of existing bath fixtures and elements. As discussed below, the Department's cost analysis made some key erroneous assumptions and failed to take into account undisputable cost components that resulted in a gross underestimation of the actual cost impact of the toilet clear floor space and comparable vanity requirements. AH&LA urges the Department to revise its assumptions based on the

information provided in this submission and recalculate the cost impact of these two requirements. AH&LA believes that a revised cost-benefit analysis based on more accurate assumptions and that takes into account all costs would support AH&LA's position that lodging facilities should not be required to comply with these two new requirements in future alterations if the alterations only involve the replacement, but not the relocation, of fixtures.

Under the 1991 and 2004 ADAAG, there must be clear floor space around the toilet to allow people using wheelchairs to transfer onto the toilet. See 1991 ADAAG § 4.16.2; 2004 ADAAG § 604.3.1. However, 1991 ADAAG is more flexible about the size of this clear floor space, allowing a space as narrow as 48" depending on the approach provided. The 2004 ADAAG is less flexible and mandates a 56"x60" clear floor space in all instances. The key difference between the two standards, however, is that the 1991 ADAAG allows a sink/vanity to be placed within the toilet clear floor space provided there is 36" of clear floor space from the wall to the edge of the sink/vanity. See 1991 ADAAG Fig. 28. The 2004 ADAAG does not. Thus, if a sink is on the same wall as the toilet (a typical configuration), the sink will have to be moved two feet from its prior position or to some other location in the bathroom outside of the clear floor space. This new toilet clear floor space requirement impacts single user restrooms and all accessible guest room bathrooms in lodging facilities.

To compound the problem, the 2004 ADAAG contains a new requirement that lodging facilities provide bathroom vanity space in accessible guest rooms that is comparable to vanity space in non-accessible rooms. See 2004 ADAAG § 806.2.4.1. AH&LA's members report that few, if any, existing accessible rooms have vanities that provide space comparable to that provided in non accessible rooms because more space must be allocated for the turning radius and toilet clear floor space requirements.

Design and construction professionals employed by AH&LA's members who have been involved with hundreds of hotel projects informed AH&LA that there are very few existing accessible guestroom bathrooms and single user restrooms that comply with the 2004 toilet clearance and comparable vanity requirements. This makes sense because there would have been no reason to comply with the 2004 requirements which require more space and are not yet law.

Attachment 7 contains 14 floor plans of real existing accessible rooms from two owner/operators of many hotels across the country that comply with 1991 ADAAG. They show that (1) the existing bathrooms do not comply with 2004 ADAAG, and (2) there is absolutely no room in any of these bathrooms to provide the required toilet clear floor space and comparable vanity without relocating the walls into the living area and rearranging the fixtures.

Designers from another national hotel company that owns and/or operates hundreds of hotels in the United States conducted a detailed review of 14 of their accessible room prototypes for one brand from the last ten years to determine (1) whether they comply with the 2004 ADAAG requirements, and (2) what would have to be done to the bathrooms in these prototypes to make them comply with the 2004 ADAAG. The findings, set forth in the detailed before and after diagrams at Attachment 8, are as follows:

- Only 3 of the 14 existing room prototypes comply with 2004 ADAAG assuming that the vanity space is comparable to the vanity space in non-accessible rooms See Attachment 8 at 1-3.

- For 4 of the 14 rooms, the entire bathroom would have to be demolished and the bathroom would have to be expanded into the bedroom area because there is no space for a comparable vanity. In addition, plumbing would have to be rerouted for the room in question and all rooms above and below, electrical fixtures and wires would have to be rerouted, all finishes in the room would have to be replaced. Due to the expansion of the bathroom into the bedroom area, the bedroom area will need new finish work and rerouting of electrical, sprinkler,

pipes, and smoke detectors for the newly constructed walls. See Attachment 8 at 11-14.

- For 1 of the 14 rooms, the vanity, tub and toilet would have to be relocated, two new walls would have to be constructed, plumbing would have to be rerouted for the room in question and all rooms above and below, electrical fixtures and wires would have to be rerouted, and all finishes in the room would have to be replaced. See Attachment 8 at 4.

- For 4 of the 14 rooms, the vanity and toilet would have to be relocated, 2 new walls inside the bathroom would have to be constructed, plumbing would have to be rerouted for the room in question and all rooms above and below, electrical fixtures and wires would have to be rerouted, and all finishes in the room would have to be replaced. See Attachment 8 at 5-8.

- For 2 rooms, the vanity and toilet would have to be relocated, plumbing would have to be rerouted for the room in question and all rooms above and below, electrical fixtures and wires would have to be rerouted, all finishes in the room would have to be replaced, and due to the toilet relocation, the wall would have to be deepened and moved into the bedroom area which would affect the door jamb and trim. See Attachment 8 at 9-10.

In the rooms identified in the last three bullets, the assumption is that a 4'6" long vanity would be comparable to vanities in non-accessible rooms. That may not be the case, as vanities are typically 5' long. Thus, the work described above, as extensive as it is, may not be sufficient to create 2004 ADAAG compliant bathrooms, and the accessible room footprint may have to extend into adjacent rooms. In most some, this action would result in a permanent loss of the adjacent room.

This study makes abundantly clear that retrofitting existing 1991 ADAAG compliant guestroom bathrooms to comply with the 2004 ADAAG requirements would be a major endeavor requiring the involvement of every trade: electrical, plumbing, carpentry, and mechanical.

In an effort to show that the 2004 ADAAG requirement can be met within a standard size room footprint, the Department created drawings of accessible room prototypes based on 12' and

13’ wide rooms. See NPRM App. A at 42-47. Design and construction employees employed by AH&LA’s members reviewed the Department’s prototype plans, and they all agreed that they have rarely, if ever, seen accessible rooms with bathrooms that are configured in the manner shown. This general consensus underscores the point that most existing accessible guest room baths would have to be extensively modified in the future to comply with the 2004 ADAAG toilet clear floor space and comparable vanity requirements.

The designers also raised the following issues relating to the Department’s drawings:

1. Every drawing presented by the Department shows an open closet which is generally unacceptable in full-service hotels. Providing an enclosed closet with a pair of swinging or sliding doors would reduce the entry vestibule by 16”. This begs the question which should be answered by the Department: Is it acceptable in existing facilities to have accessible rooms that do not have “comparable” closets, furniture pieces, and other amenities such as refrigerators and coffee service? If any of these items have to be comparable and added to the Department’s plans, the rooms would no longer be accessible.

2. Every drawing assumes that the mechanical chase in the bathroom is or can be condensed and/or located in the corner of the bathroom or split into two corners of the bathroom. The reality however, is that many existing chases occupy the entire length of the bathroom, as shown by the actual room plans at Attachment 7, and this chase decreases the room width by 1’. In all of the plans, moving the bathroom walls by 1’ to make up for the lost space would eliminate the pull side clearance required at the doorway. Splitting the chase is not a reasonable option because it would require a second waste stack for the entire the building in addition to re-routing water supply, waste/vent stack, and the ventilation shaft.

3. In Plans 1a, 1b, and 2a, the end of the vanity adjacent to the tub presents maintenance as well as accessibility problems. On full service hotels the vanities are typically millwork or furniture grade vanities that would be susceptible to water damage if configured as suggested. Creating a wing wall would decrease the vanity space and make it even less comparable. Also, having the vanity adjacent to the tub obstructs access to the tub/shower controls, particularly for individuals who use wheelchairs.

4. With the requirement to have the accessible vanity the same size as in non-accessible guestrooms, the proposed guest bathrooms with become larger than 55 sf in size. Under the NFPA this increase in size will require the installation of a sprinkler head and piping.

5. For both Plans 3a and 3b, the Department assumes that a “comparable” vanity is 4’6” wide, when, in most hotels, a vanity in an accessible room would have to be 5’ wide in order to be comparable. (Vanities are normally the same width as the tub, which is 5’ long.) In both of these plans, moving the bathroom walls by 6” would eliminate the pull side clearance required at the doorway.

6. In Both Plans 3 a and 3b, the short wall in the back of the toilet must be 2” wider to accommodate the flange/escutcheon on the grab bar which is usually close to 3” in diameter. This would reduce the vanity length to 4’4”.

7. The column at the wet wall of the tub in Plan 3a would conflict with the tub plumbing.

8. For Plans 3a and 3b, the Department assumes that the typical bathroom width is 7’, when in fact it is much closer to 5’. The layout provided by the Department would not be feasible in the bathroom space indicated if the bathroom were only 5’.

9. All of the plans assume that the fan coil units (FCU) are overhead style. The more typical FCU in existing facilities are vertical and they take up a 2’x2’ space from the floor to the ceiling somewhere in the room. If there is no FCU, then there is a Package Terminal Air Conditioner (PTAC) in the room. Although the Department’s drawings indicate some kind of fixture under the window which may be an intended PTAC, the structure shown does not protrude into the room like a typical PTAC which would protrude 18” into the room.

10. In Plans 1b, 2b, and 3b, the beds are placed so close to the walls that no person can access the other side of the bed. This renders the bed less functional for users with and without disabilities and makes it very difficult for the housekeepers to make the beds and vacuum this small open area. The Department has not factored into its cost analysis the cost associated with the additional time it would take for housekeepers to perform their tasks or the decreased utility of the bed resulting from less access.

11. In Plan 3b, the Department has conveniently shown the window next to the desk so that it can push the bed within 1’ of the window wall without obstructing the path to the window controls. However, the fact is that windows typically are wider than 5’ and either run the full width of the room, or are centered on an exterior wall. Because the bed is pushed so close to the wall, a person in a wheelchair could not reach the window wand adjacent to the bed.

With regard to the Department’s single user restroom diagrams (Plans – 1A, 1B, 2A, 2B, 3), AH&LA’s members pointed out that these plans establish that complying with the toilet clear floor space requirement would require a completely new bathroom footprint and fixture layout,

which means that numerous walls would have to be torn down and significant plumbing and electrical work would have to be performed in order to relocate all of the fixtures. The members also pointed out that the Department's Plan 1B – intended to be the "equivalent" of the 1991 ADAAG single use restroom (Plan 1A) – is really not equivalent. The turning radius in Plan 1B includes the space under the sink, which is not the case in Plan 1A. Thus, in Plan 1A, a hotel could chose to use a vanity in lieu of the wall hung sink. Plan 1B only allows for the use of a wall hung sink. If the hotel wanted to use a vanity (generally considered a more upscale option), it would have to increase the size of the room. In addition, the Department's claim that Plan 1B (2004 ADAAG compliant) results in a 3.5% reduction in the size of the single user restroom is a fallacy because it explicitly assumes that the door has no closer and latch. See NPRM App. A at 25 (Comments to Plan 1B). However, it is a standard practice in the industry to install a closer and latch on public restroom doors, which means that the space shown in 1B would have to be 5 square feet larger. In short, under no circumstances will single user restrooms under 2004 ADAAG be smaller than the accessible bathroom required under 1991 ADAAG.

Requiring lodging facilities to change the footprint and increase the size of their existing, currently compliant single user restrooms when such restrooms are altered in the future means that adjacent spaces and any built in elements in such spaces will be adversely affected as well. If the adjacent space is an income producing space such as a restaurant or meeting room, the stream of revenue from such operations will be decreased.

The point of the foregoing discussion is to show how difficult and expensive it would be to retrofit accessible guest room baths and single user restrooms in existing facilities to meet the new toilet clear floor space and comparable vanity requirements. Relocating plumbing and electrical fixtures and elements will absolutely be required in all instances. In most instances,

the bathroom walls with have to be moved into the bedroom area and the bathroom completely gutted. In some cases, the expansion of the bathroom into the bedroom area will not leave sufficient room for an accessible room with two beds and the adjacent room would have to be lost in order to create a single, larger, accessible room.

These new toilet clearance and comparable vanity requirements, if combined with the room dispersion requirements will make it impossible for designers to find existing rooms large enough to be made into accessible rooms. As discussed in Section III.B, infra, the 1991 ADAAG does not state that accessible rooms created through alterations in Pre-1993 Facilities must be dispersed. The Department must recognize this rule for safe harbor purposes and extend it in the 2004 ADAAG. The Department and the Access Board seem to have lost sight of the fact that Pre-1993 Facilities were built before the ADA was passed, and finding hotel rooms in them that are large enough to be made into accessible rooms is itself a challenge. Such lodging facilities have typically chosen the largest rooms to make into accessible rooms. Increasing the space needed through the toilet clear floor space and comparable vanity requirements and then imposing on top of that the requirement that accessible rooms must also be dispersed by every room type/category, view, amenity, type of plumbing fixture, and smoking/nonsmoking, will substantially restrict a hotel's ability to select the rooms that will require the least amount of demolition to make accessible (usually the largest). This limitation will result in increased construction costs and the possible loss of room count.

There simply is no reasonable basis for requiring lodging facilities that have collectively spent hundreds of millions, possibly billions, of dollars to create accessible rooms based on the 1991 ADAAG Standards to spend what is likely to be hundreds of millions more to provide comparable vanity space and expanded toilet clear floor space. This cost will ultimately result in

higher lodging prices which will harm travelers with and without disabilities already saddled with higher gas, load, and airfare prices.

AH&LA believes that the RIA's $71.2 million estimate of the cost impact of these two requirements on lodging facilities[4] is far too low due to a number of incorrect assumptions and the Department's failure to account for key costs as follows:

1. The Department assumes, incorrectly, that in the next 15 years, only 31.96% of existing accessible guestroom bathrooms and single user restrooms will incur costs in future alterations to comply with the new requirements. The RIA states and the Department has confirmed that this number was based on the assumption that toilets and vanities would only be replaced every 40 years. See RIA at 31.

   After this meeting, AH&LA conducted an informal survey of how often its members replace the toilets and sinks/vanities in their hotels. The response overwhelmingly supports the conclusion virtually all hotels will have replaced their toilets and sinks/vanities at least once in the 15 year period for which the Department is doing its cost assessment. AH&LA received a total of eight responses from national hotel/motel companies that own/or operate hundreds of lodging facilities nationwide. The results of the informal survey are summarized in Attachment 10. The frequency of toilet replacement among those surveyed ranged from once every four years to once every 20 years, with the average being once every 13.75 years among the eight respondents. A number of respondents also noted that toilet replacement is likely to occur sooner because of initiatives to install more water efficient units. The frequency of vanity/sink replacement among those surveyed ranged from once every four years to once every 18 years, with the average being once every 12.81 years among the eight respondents.

   The fact that virtually all hotels will have replaced their toilets and sinks/vanities at least once every fifteen years is further supported by a study conducted by the International Society of Hospitality Consultants entitled: "CapEx 2007 A Study Of Capital Expenditures In The Hotel Industry" (Attachment 11). Based on historical analysis of actual spending by 377 hotels in full service, luxury, select service, and extended stay categories for the time period 2000-2005, a team of architects, construction project managers, interior designers, and purchasing agents provided estimates for future capital requirements and set forth a recommended replacement cycle for toilets and vanities. The replacement cycle recommended for sink/vanities was 6-8 years for full service, select service, and extended stay categories, and 12 years for the luxury category. The replacement

[4] The RIA estimates that cost impact of the toilet clear floor space and comparable vanity requirements on hotels, motels and inns will be $48.96 million and $22.24 million, respectively. See RIA Supplemental Result, Requirements 28 and 45 (copies of pages at Attachment 9).

cycle recommended for toilets was 12-13 years for full service, select service, and extended stay categories, and 10-12 years for the luxury category. See Attachment 11 at 55, 61, 67, 74.

2. The Department has underestimated the construction cost for complying with the toilet clear floor space and comparable vanity requirements. The cost of relocating all plumbing and electrical fixtures, demolishing and reconstructing walls, and providing new finishes for areas that would not have been otherwise disturbed is – as a matter of common sense -- substantially more than $3,750. AH&LA members have been unable to develop a cost estimate for the various renovation scenarios discussed supra because of the short comment period. Such an estimate would require a fairly complex study in part because the costs could vary widely depending on how each building is constructed. However, all agreed that $3,750 was an absurdly low amount considering the amount of work at issue. It is the Department's burden under EO 12866 to properly estimate the costs at issue now that AH&LA has provided information about the impact that the requirements would have on their existing accessible guest room baths.

   In their meeting, AH&LA asked the Department how it arrived at the $3,000 per unit cost for the toilet clear floor space requirement. A Department representative stated that the two diagrams of single user restrooms (one showing a 1991 ADAAG-compliant restroom and the other showing a 2004 ADAAG-compliant restroom) at page 22 of Appendix A of the NPRM was provided to the cost estimator. The use of these diagrams was inappropriate for determining the cost impact of the toilet clear floor space requirement in an accessible guest room bathroom. The retrofits required to comply with 2004 ADAAG in a guest room bath are far more complicated due to the presence of an additional fixture (the tub or shower), as well as the impact to the adjacent bedroom area. Furthermore, the diagrams fail to take into account the impact of the comparable vanity requirement which does not apply to single user restrooms. The fact is that the toilet clearance and comparable vanity requirements together significantly increase the cost of making accessible guest room bathrooms compliant with 2004 ADAAG requirements. Any cost analysis of these requirements must utilize diagrams that consider both requirements in concert.

3. The Department has not accounted for the instances where two rooms would have to be joined to create one accessible room with a bathroom that complies with the 2004 ADAAG. This is a very real possibility in Pre-1993 Facilities where finding existing rooms to comply with 1991 ADAAG (and to provide two beds) has been a challenge. This would result in a permanent loss of revenue for the entire 15 year period considered by the RIA that must be included in the cost analysis. This situation is even more likely because the new dispersion requirements will limit the owners' ability to select the largest rooms to make accessible.

4. The Department has not accounted for the lost revenues associated with a longer renovation period resulting from the extensive work that would not have otherwise been done in a typical renovation where the fixtures would have merely

> been replaced with no change to the bathroom footprint. It would not be unreasonable to assume that the extensive work required to comply with the toilet clear floor space and comparable vanity requirements would add at least one week to the renovation process for each room. According to the 2008 Statistical Abstract compiled by the Census Bureau, the average nightly room rate in 2005 (the year for which the most recent data is available) was $90.88 and the average occupancy rate was 63.1 percent. See U.S. Statistical Abstract, Table 1254 (Lodging Industry Summary: 1990 to 2005). Based on the number of inns, hotels, and motels assumed by the RIA to be in existence (16,865, 14,941, and 21,047, respectively) and the number of accessible bathrooms per facility type assumed by the Department (1, 7, and 5, respectively), hundreds of thousands of rooms could be affected, and the lost revenue based on the increased renovation time would be enormous.

AH&LA was unable to calculate the cost impact of these two requirements using corrected assumptions because its economist was unable to replicate the cost estimates calculated in the RIA. As previously mentioned, AH&LA has a pending request for a sample calculation that would reveal the Department's methodology. In addition, the short comment period did not allow for any meaningful studies of the costs of making the significant retrofits discussed previously. Ultimately, it is the Department, not AH&LA, that has the burden of conducting a proper cost analysis that takes into account all of the costs. With this submission, AH&LA has provided the Department with enough information to require the Department's reexamination of its cost analysis for the toilet clear floor space and comparable vanity requirements.

AH&LA strenuously urges the Department to revise the comparable vanity and toilet clearance requirements. If the Department does not believe that it can modify the 2004 ADAAG, it should send these requirements back to the Access Board for revision. In the alternative, the Department could clarify in the Final Rule that the term "alteration" does not include the in-kind replacement of bathroom fixtures such as toilets, vanities, sinks, tubs and showers, and that such replacement does not trigger compliance with the 2004 ADAAG requirements. This clarification would be consistent with the current definition of "alterations" which excludes "normal maintenance." 28 C.F.R. Section 36.402(a)(1).

Although the new toilet clearance and comparable vanity requirements will be less of a problem in new construction, they will still increase the cost of constructing new lodging facilities by requiring larger accessible rooms. As previously discussed, the Department's attempt to show that the new requirements can be met without increasing the size of standard rooms is based on drawings that fail to take into account key elements in a typical room, and do not include the same length vanity that would be found in a non-accessible room. The drawings also do not include elements and amenities that would ordinarily be found in non-accessible rooms such as a closed closet. As AH&LA has pointed out in its prior submissions, requiring larger accessible rooms will cause the stacks containing such rooms to be larger as well because hotels are usually constructed with columns of rooms that have the same footprint. Remarkably, Appendix 8 of the RIA only assigned a $125 cost to the toilet clearance requirement in new construction, and even claims that there would be a space savings. See RIA App. 8, Requirement 28 at 330. Even more questionable is the RIA's assumption that the comparable vanity requirement will not increase the cost of new construction. RIA App. 8, Requirement 45 at 330. This is not credible because, even assuming no impact on the square footage of the room, requiring a comparable vanity will increase the cost of the material for the vanity itself because most vanities that have been installed in accessible rooms are smaller than those in non-accessible rooms due to space limitations.

B. Accessible Room Dispersion

AH&LA's members have three primary objections to the 2004 ADAAG's accessible room dispersion requirements: (1) Section 224.5 requires accessible room dispersion in Pre-1993 Facilities which is not required under the 1991 ADAAG; (2) The Department fails to acknowledge that 1991 ADAAG does not require accessible room dispersion in Pre-1993 Facilities, and has consequently provided no safe harbor for those Pre-1993 Facilities that have

created accessible rooms that are not dispersed in reliance on the 1991 ADAAG; and (3) the 2004 ADAAG dispersion requirements are far more onerous and difficult to implement because they add a number of additional factors to consider, resulting in uncertainty in compliance and greater litigation risk. For the reasons set forth below, AH&LA urges the Department to retain the 1991 ADAAG's rule that accessible rooms created in Pre-1993 Facilities not have to be dispersed. For all other lodging facilities, the Department must clarify the 2004 ADAAG to ensure that the dispersion requirements are interpreted in a reasonable and clear manner. AH&LA suggests some necessary clarifications in its discussion below.

1. Although the Department has, at various times, advocated a different position in its enforcement activities, the plain language of the 1991 ADAAG does not require the dispersion of mobility accessible rooms in Pre-1993 facilities that are created through the alterations process. Section 9.1.5 of 1991 ADAAG only requires that accessible rooms created in connection with alterations comply with Section 9.2. Section 9.2 does not contain the dispersion requirement. Dispersion is discussed in Section 9.1.4. This understanding of the regulation is consistent with the Department's statement in the Technical Assistance Manual that "[t]here are special less stringent requirements for alterations in many other areas, including . . . hotels (Section 9.1.5)." See ADA Title III Technical Assistance Manual, Section III-7.7000(3) (emphasis added).

As stated, the 2004 ADAAG changes the rule in the 1991 ADAAG by requiring dispersion of accessible rooms for Pre-1993 facilities. AH&LA strongly opposes this change. See 2004 ADAAG § 224.5. Facilities built prior to 1993 were designed before there were any federal accessibility requirements for public accommodations and the footprints for many guest rooms are in many instances not sufficiently large enough to meet accessibility requirements

(e.g. accessible bathrooms and 36" path of travel to all elements in the room). For this reason, owners and operators of Pre-1993 Facilities have typically chosen the largest rooms to make accessible so that the room footprints do not have to be changed. Requiring accessible rooms in Pre-1993 Facilities to be dispersed throughout the hotel so that all views, room configurations, and amenities are represented in the accessible room inventory would greatly limit an owner/operator's ability to choose the rooms that are best suited for conversion.

Requiring that different room types be proportionately represented in the accessible room pool, as opposed to having each type be represented, would make matters even worse. For example, if all existing rooms with ocean views are too small to create an accessible room with two beds, the 2004 ADAAG would require the owner/operator to combine two rooms into one in order to create an accessible room. This would result in a permanent loss of revenue. If proportional representation were required and such a calculation would result in two accessible ocean view rooms with two beds, two regular rooms would permanently be lost. AH&LA does not believe that the ADA requires such a drastic and costly measure resulting in a significant loss of lodging space just to achieve dispersion in a Pre-1993 facility.

Even though the application of dispersion principles to Pre-1993 Facilities is clearly a new requirement in the 2004 ADAAG, the Department has nowhere accounted for the enormous cost associated with this requirement which is required by OMB Circular A-4. AH&LA submits that this cost cannot be justified by the marginal benefit, and urges the Department to modify the 2004 ADAAG to retain the current no-dispersion rule.

If the Department is unwilling to modify the 2004 ADAAG to retain the 1991 ADAAG's no-dispersion rule for Pre-1993 Facilities, it should clarify those requirements in a manner that recognizes the difficulties associated with dispersing accessible rooms in a Pre-1993 Facility.

The dispersion requirements as applied to such facilities should be as follows:

(1) room (interior or exterior) footprints do not have to be changed in order to meet dispersion requirements;

(2) dispersion should only be required among the types of rooms affected by an alteration. Thus, a facility may have eight types of rooms, but if the renovations only affect two types of rooms, the accessible rooms should only have to be dispersed over those two types of rooms; and

(3) Subject to (1) and (2) above and technical infeasibility, a facility need only provide one room in each of the following types: single if provided, double if provided, and suites if provided.

2. Regardless of what rule the Department adopts in the Final Rule, <u>it is absolutely imperative that the Department recognize that the 1991 ADAAG does not require the dispersion of accessible rooms in Pre-1993 Facilities, and include such facilities that have already created accessible rooms that are not dispersed in the Element by Element Safe Harbor</u>. In other words, all accessible rooms that have been created in Pre-1993 Facilities in existence as of the date of the Final Rule should count towards the number of accessible rooms required and the facility must be considered in compliance with the ADA with regard to those rooms. Any other outcome would be unjust because the lodging industry relied in good faith on the Department's 1991 ADAAG to not disperse their accessible rooms in Pre-1993 Facilities.

3. Section 224.5 of the ADAAG 2004 should also be clarified so that the lodging industry has a clear understanding on how to apply this rule to alterations and new construction taking place after the Final Rule takes effect. Section 224.5 of the 2004 ADAAG states:

> Guest rooms required to provide mobility features complying with 806.2 and guest rooms required to provide communications features complying with 806.3 shall be dispersed among the various classes of guest rooms, and shall provide choices of types of guest rooms, number of beds, and other amenities comparable to the choices provided to other guests. Where the minimum number of guest rooms required to comply with 806 is not sufficient to allow for complete dispersion, guest rooms shall be dispersed in the following priority: guest room type, number of beds, and amenities.

Section 224.5 contains an advisory, as follows: "Factors to be considered in providing an equivalent range of options may include, but are not limited to, room size, bed size, cost, view, bathroom fixtures such as hot tubs and spas, smoking and non-smoking, and the number of rooms provided."

In its response to the ANPRM, AH&LA stated that the language in Section 224.5 was very confusing and proposed the following clarification:

A transient lodging facility constructed after the effective date of the 2004 ADAAG has met its obligation to disperse guest rooms under Section 224.5 if it complies with the following requirements:

- Dispersion should first be based on two room classes: Standard and premium (i.e., upgraded amenities and/or limited access floor). Exception: If the facility has a premium room class which totals not more than 2% of the total room count, no accessible room in this class is required.

- Within each of the two room classes if the following types of rooms are provided, at least one accessible room of that type must be provided: single bed, multiple beds, and suites.

- If view is a factor used by the facility in pricing and/or distinguishing rooms (e.g. in beachfront properties), then the facility shall provide at least one accessible room with a premium view[5] in each class of rooms (standard and premium) where such a view is provided in non-accessible rooms of that class.

- If the facility provides smoking rooms, at least one smoking room will be provided in each class of rooms (standard and premium).

The Department's response in the NPRM was disappointing as it was both internally contradictory and lacking in any meaningful guidance. The Department's discussion was as follows:

> Commenters have specifically asked the Department to clarify what is meant by various terms used in section 224.5 and its advisory: "class," "type," "options," and "amenities."

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[5] A premium view is one that results in a higher room charge.

> The Department envisions that all of these terms are not to be considered terms of art, but will be used as in their normal course. For example, "class" is defined by Webster's Dictionary as "a division by quality." "Type" is defined as "a group of . . . things that share common traits or characteristics distinguishing them as an identifiable group or class." Accordingly, these terms are not intended to convey different concepts, but are used as synonyms. Section 224.5 and its advisory require dispersion in such a varied range of hotels and lodging facilities that the Department believes that the chosen terms are appropriate to convey what is intended. Dispersion required by this section is not "one size fits all" and it is imperative upon each covered entity to consider its individual circumstance as it applies this requirement.
>
> Commenters have raised concern that the factors included in the advisory to section 224.5 have been expanded. The advisory provides: "[f]actors to be considered in providing an equivalent range of options may include, but are not limited to, room size, bed size, cost, view, bathroom fixtures such as hot tubs and spas, smoking and nonsmoking, and the number of rooms provided." As previously discussed, the advisory materials provided by the Access Board are meant to be illustrative and do not set out specific requirements. In this particular instance, the advisory materials for section 224.5 set out some of the common types of amenities found at transient lodging facilities, and include common sense concepts as view, bathroom fixtures and smoking status. The intention of these factors is to indicate to the hotel industry the sorts of considerations that the Department, in its enforcement efforts since the enactment of the ADA, has considered as amenities that should be made available to persons with disabilities, just as they are made available to hotel guests without disabilities.

NPRM at 37-38.

Several items in the Department's response are especially notable. The first highlighted section of the foregoing quote makes clear that the Department recognizes the difficulty of applying the dispersion rule, but says that it is "imperative" that the lodging facility apply these concepts to its unique circumstances. It is simply not acceptable for the Department to require lodging facilities to bear the burden and consequences of interpreting vague requirements which exposes them to challenge by litigants and the Department. The second and third sentences are notable because they contradict one another. The second sentence states that the many new factors in the advisory are not requirements. The third sentence, however, says that these non-requirements are "considerations" that the Department has taken into account in its enforcement activities, which really means that the Department does in fact view them as requirements.

It is neither fair nor lawful for the Department to issue vague regulations that are subject to multiple interpretations. EO 12866 says that "[t]he American people deserve . . . regulations that are . . . understandable." Fed. Reg. Vol. 58, No. 190 (Oct. 4, 1990) at 51735 (emphasis added). The following hypothetical demonstrates the Department's dispersion rule and does not comply with this mandate:

A hotel with 100 rooms has the following 8 types of rooms:

Type	Number of rooms
1 presidential suite with park view	1
hospitality suite no view	1
standard king park view	15
standard king park view (concierge fl.)	5
standard king no view	15
standard king no view (concierge fl.)	5
king suite with whirlpool park view	10
king suite with whirlpool no park view	10
two-queen no central park view	19
two-queen with park view	19

Section 224.2 requires a total of 5 accessible rooms. How should these rooms be allocated? Section 224.5 states that "[w]here the minimum number of guest rooms required to comply with 806 is not sufficient to allow for complete dispersion, guest rooms shall be dispersed in the following priority: guest room type, number of beds, and amenities." Does this mean that the accessible room inventory should consist of the presidential suite, the hospitality suite, one standard king, one two-queen room, and a king suite with a whirlpool? What about the

view? Which of these five types of rooms should have views, or should be located on the concierge floor? Which of these five should be the room with the one required roll-in shower? The fact that there is more than one answer to all these questions leaves hotels open to second guessing in litigation by private plaintiffs and the Department.

AH&LA also strongly objects to the suggestion that one-of-a-kind rooms such as the presidential suite must be made accessible. If the Department is correct in its claim that accessible rooms are hard to find, then accessible rooms should be created in the room types that are most likely to be sought by travelers, not one-of-a-kind suites that are too expensive for most. The Department should clarify that one-of-a-kind rooms do not have to be accessible.

Finally, because every room in a lodging facility has a different view, it is important for the Department to make clear that view should only be a dispersion factor if the hotel makes a rate distinction based on views. The most obvious example is a beachfront hotel where the hotel offers an ocean view room at a higher rate than a room with a mountain view. A hotel that has courtyard views street views, but does not distinguish such rooms by charging different rates for them, would not have to disperse its accessible rooms based on views.

C. Clarifying What Types Of Alterations Trigger The Obligation To Make A Hotel/Motel Room In A Pre-1993 Facility Fully Accessible

A question that has vexed the lodging industry since the passage of the ADA is what types of alterations to a non-accessible room in a Pre-1993 Facility result in an obligation to make the room fully accessible. This question arose primarily because Section 4.1.6(c) of the 1991 ADAAG states that "[i]f alterations of single elements, when considered together, amount to an alteration of a room or space in a building or facility, the entire space shall be made accessible." The 2004 ADAAG does not have this language. Instead, Section 202.3 states: "Where existing elements or spaces are altered, each altered element or space shall comply with

the applicable requirements of Chapter 2." (emphasis added) AH&LA would like the Department's confirmation that the 2004 ADAAG no longer looks at the total number of elements that are altered to determine if the room or space in question must be made fully accessible. Rather, only the specific element or space in that is altered must be made to comply with the 2004 ADAAG. For example, if a hotel completely gutted the sleeping area of a non-accessible hotel room but made no changes to the bathroom other than the flooring, only the sleeping area and the new bathroom flooring would have to comply with the 2004 ADAAG. In contrast, under the 1991 ADAAG, such a renovation might have resulted in a determination that the entire space had been altered (bathroom and sleeping area), and would have required the entire room to be made fully accessible. AH&LA requests confirmation of its understanding.

D. Sales And Service Counters

Every lodging facility in this country has at least one sales or service counter: The registration desk. In full service hotels, there can be as many as half a dozen service counters (e.g. concierge desk, bell desk, gift shop, restaurant, bar, spa/health club service desk). Sales and service counters are currently covered under 1991 ADAAG § 7.2. Section 7.2(1) requires that sales and service counters have a lowered section that is "at least 36 in (915mm) in length with a maximum height of 36 in (915 mm) above the finish floor." Section 7.2(1) does not specify that the lowered portion of the counter have a particular depth.

The 1991 ADAAG also provides for two other accessible options for "other counters that may not have a cash register but at which goods or services are sold or distributed." These options are:

> (ii) an auxiliary counter with a maximum height of 36 in (915 mm) in close proximity to the main counter shall be provided; or

> (iii) equivalent facilitation shall be provided (e.g., at a hotel registration counter, equivalent facilitation might consist of: (1) provision of a folding shelf attached to the main counter on which an individual with disabilities can write, and (2) use of the space on the side of the counter or at the concierge desk, for handing materials back and forth).

1991 ADAAG § 7.2(2).

The 2004 ADAAG eliminates alternative options (ii) and (iii), and adds a new depth requirement for sales and service counters that, under the 1991 ADAAG, need only be 36" wide and no higher than 36" from the finished floor. Section 904.4 states: "Sales counters and service counters shall comply with 904.4.1 or 904.4.2. The accessible portion of the counter top shall extend the same depth as the sales or service counter top." (emphasis added).

All sales and service counters that comply with any one of the options specified in Section 7.2 of the 1991 ADAAG should be covered by the Element by Element Safe Harbor specified in proposed Section 28 C.F.R. Section 36.304(d)(2). This Section states that "[e]lements in existing facilities that are not altered after [insert effective date of final rule], and that comply with the 1991 Standards, are not required to be modified in order to comply with the requirements set forth in the proposed standards." See Proposed 28 C.F.R. § 36.304(d)(2). Clearly, counters that are 36" wide and no higher than 36" high, but do not extend the same depth as the main counter, should fall within this Safe Harbor. Likewise, auxiliary counters specified in Section 7.2(2)(ii), and folding shelves referenced in Section 7.2(2)(iii), should be protected by the Element by Element Safe Harbor.

It appears, however, that the Department has not included these changes in the list of elements to be safe harbored in Appendix 8 of the RIA. In fact, the Department has nowhere acknowledged that auxiliary counters and folding shelves are no longer allowed. Although the Department acknowledges that there is a new depth requirement, it refers to it as a mere clarification (App. A at 49) and has not included this change in the safe harbor list. If this is not

corrected, all the counters that have been retrofitted or built to date that do not extend the full depth of the counter or that comply with the two alternative equivalent facilitation options will be considered noncompliant with and not subject to the safe harbor. This position is legally arbitrary and unacceptable. 1991 ADAAG did not specify counter depth as a requirement and it allowed for two equivalent facilitation options. Moreover, the Department has completely failed to account for the cost of these two very significant changes as required by OMB Circular A-4.

AH&LA hopes that the failure to reference the 1991 ADAAG compliant counter options in Appendix 8 was an oversight and requests that those options all be included in the safe harbor. Otherwise, the sales and service counters of many public accommodations will be deemed non-compliant as soon as the Final Rule is issued and be subject to an immediate barrier removal obligation. For example, one owner of many full-service hotels nationwide reported that approximately 95% of its hotels do not have counters that comply with the new depth requirement of the 2004 ADAAG.

E. Exercise Facilities

2004 ADAAG §§ 236 and 1004 impose two new requirements on exercise facilities. First, there must be an accessible route to each type of machine. Second, there must be a 30” x 48” clear floor space at each type of machine to allow transfer onto the machine. Exercise facilities that do not comply with these proposed requirements would not be protected by the Element by Element Safe Harbor. Because these requirements are new, it is a reasonable assumption that no exercise facilities comply with them at this time. Indeed, the prototype exercise room floor plans provided by national hotel owner/operator confirms this fact. See Attachment 12. Accordingly, all exercise rooms in lodging facilities will be required to immediately comply with these requirements under the barrier removal obligation unless doing so is not readily achievable.

To determine the impact of these two new requirements, AH&LA asked one of its members to provide its prototype exercise room floor plans for exercise rooms with 400 s.f., 900 s.f., and 1400 s.f. This member owns and/or operates hundreds of hotels nationwide. These actual prototype floor plans are at Attachment 12. The member asked the company that created these floor plans -- its national provider of exercise equipment -- to modify the three current prototypes in two ways. First, the three floor plans were redrawn to comply with the new requirements while maintaining the size of the existing room to see whether any equipment pieces would have to be removed. Second, the three floor plans were expanded to the extent necessary to maintain the same equipment shown on the original plan.

The before and after comparison of each plan prototype shows the obvious: the new requirements in every prototype (400 s.f., 900 s.f, and 1400 s.f.) require either (1) a reduction in the number of pieces of equipment in each exercise room, or (2) an increase in the size of the room to accommodate the same number of pieces of equipment. The impact to the smallest exercise room prototype (400 s.f.) was most dramatic. In that room, one piece of cardio equipment out of five had to be removed.[6] <u>For this reason, AH&LA asked the Department to exempt exercise rooms that have less than 500 s.f. from these two requirements in its prior submissions</u>. AH&LA renews this request in these comments.

AH&LA also believes that the Department did not appropriately account for the cost impact of these two requirements, and that a proper cost/benefit analysis would support AH&LA's request to exempt smaller exercise rooms.

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[6] The analysis answers the Department's 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?

First, the Department underestimated the number of affected properties by improperly assuming that there are no exercise facilities in motels or inns. See RIA Appendix 3.E (chart 3E1) at 159. However, AH&LA's 2008 Lodging Survey conducted by Smith Travel Research (STR) shows otherwise. See 2008 Lodging Survey, Question 60 (Attachment 6). The survey had more than 10,000 participants (id. at 3) from lodging establishments with more than 15 rooms.[7] Thus, the pool of respondents clearly encompassed all lodging facilities that the Department considered to be motels as well as some inns. See RIA at 146 (defining motels as establishments with 20-150 rooms and inns as establishments with 5 to 30 rooms). 7,629 of 9,596 survey respondents (79.5%) stated that their facilities had exercise facilities. Of the 885 lodging facilities that have fewer than 50 rooms, 26% reported having exercise facilities. Of the 984 lodging facilities with 50 to 64 rooms, 59% reported having exercise facilities. Of the 2097 lodging facilities with 65 to 94 rooms, 85% reported having exercise facilities. Of the 2,302 lodging facilities with 95 to 129 rooms, 84% reported having exercise facilities. Thus, by assuming that the 21,047 motels in existence have no exercise facilities, the Department has significantly underestimated the impact of these two new requirements.

Second, in determining the cost impact of the new clear floor space and accessible route requirements in barrier removal, the Department incorrectly assumed that only 50% of facilities would have to have to engage in barrier removal and incur the cost of relocating machines in the space. The reasoning behind the Department's assumption is not stated, but it defies common sense because it can be reasonably assumed that every hotel, motel, or inn with an exercise facility will immediately have to rearrange pieces of equipment to comply with this rule.

[7] Although the 2008 Lodging Survey does not specify the minimum size of the lodging facilities surveyed, AH&LA confirmed with STR that the survey included facilities with more than 15 rooms.

Third, the Department estimated the cost of relocating the equipment to be $700 and $500 for the two requirements, for a total of $1,200. See RIA App. 8 at 337 (Items 70 and 71). However, the $1,200 per facility cost does not actually reflect all the costs associated with these two new requirements because it does not account for the increased wait time that people using the exercise facilities will experience as a result of the reduction in the number of pieces of available equipment. The Department based its benefits calculation of the proposed rule largely on time savings; the cost of time wasted likewise must also be considered.

F. Employee Work Area Common Circulation Paths

Under the 1991 ADAAG, there are no accessibility requirements for the inside of "employee work areas." See (1991 ADAAG § 4.1.1(3)). The 1991 ADAAG specifically states that "[t]hese guidelines do not require that any areas used only as work areas[8] be constructed to permit maneuvering within the work area or be constructed or equipped (i.e., with racks or shelves) to be accessible." Id.

The 2004 ADAAG, as written, suggests a radical departure from the 1991 ADAAG. It states that "[c]ommon use circulation paths within employee work areas shall comply with 402. Id. at 2004 ADAAG §206.2.8. The phrase "circulation path" is defined as "[a]n exterior or interior way of passage provided for pedestrian travel, including but not limited to, walks, hallways, courtyards, elevators, platform lifts, ramps, stairways, and landings. Id. at § 106.5. The phrase "common use" is defined as "[i]nterior or exterior circulation paths, rooms, spaces, or elements that are not for public use and are made available for the shared use of two or more people. Thus, the language of the 2004 ADAAG suggests that all exterior or interior ways of

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[8] 2004 ADAAG defines "employee work areas" as "[a]ll or any portion of a space used only by employees and used only for work. Corridors, toilet rooms, kitchenettes and break rooms are not employee work areas." 2004 ADAAG Section 106.5.

passage that can be used by more than one person in an employee work area must meet the stringent requirements for accessible routes set forth in 2004 ADAAG §402.

Many public accommodations objected to this new requirement in response to the Department's Advance Notice of Proposed Rulemaking. Instead of revising the 2004 ADAAG language or sending it back to the Access Board for revision, the Department has provided the following explanation in Appendix A to the NPRM:

> Nothing in the rule requires all circulation paths in non-exempt areas to be accessible. The Department recognizes 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. Accessible routes also are at least 36 inches wide, therefore, the Department anticipates that covered entities will be able to satisfy the requirement to provide accessible circulation paths by ensuring that their required primary circulation paths are accessible.

NPRM at 5-6.

While somewhat reassuring, AH&LA's members have two concerns with this language. First, the statement is unclear. Is the Department saying that, in any alterations or new construction, businesses need only comply with any fire and life safety codes applicable to the employee work areas in question in order to also comply with the ADA? To provide greater clarity, the Department should make clear that compliance with accessible route requirements of local fire and life safety codes, or the National Fire Protection Code constitutes compliance with ADAAG § 206.2.8.

It is equally important for the Department to clarify this rule either by revising Section 206.2.8 of the 2004 ADAAG or by including the clarification in the body of the ADA Title III regulation itself. Businesses are under constant threat of ADA litigation, and there must be no question about what the law is on this critical question. A clarification located in an Appendix to

the NPRM may not be adequate to deter litigants or provide the courts with the clear direction required to implement the Department's stated intent.

G. Increase In Accessible Room Scoping In Alterations

Current 1991 ADAAG section 9.1.5 (Alternations to Accessible Units, Sleeping Rooms, and Suites), states:

> When sleeping rooms are being altered in an existing facility, or portion thereof, subject to the requirements of this section, <u>at least one sleeping room or suite that complies with the requirements of 9.2 (Requirements for Accessible Units, Sleeping Rooms, and Suites) shall be provided for each 25 sleeping rooms, or fraction thereof, of rooms being altered until the number of such rooms provided equals the number required to be accessible with 9.1.2.</u>

Thus, under current law, if a Pre-1993 hotel renovates 100 rooms, 4 of those rooms (1 in 25) must be made both mobility and communications accessible under 9.1.2, and 4 additional rooms (1 in 25) must be made communications accessible under 9.3.

The 2004 ADAAG eliminates the 1 in 25 rule completely, replacing it with the following language in Section 224.1.1 (Alterations):

> Where guest rooms are *altered* or *added*, the requirements of 224 shall apply only to the guest rooms being *altered* or *added* until the number of guest rooms complies with the minimum number required for new construction.

Thus, under 2004 ADAAG Section 224.1, when a hotel undertakes to alter a certain number of rooms, the hotel must reference Tables 224.2 (Guest Rooms with Mobility Features) to determine how many accessible rooms must be provided as a result of the renovation. Assuming the number of rooms is 100 (as in the prior example), Table 224.2 would require that five rooms be made mobility accessible, as compared to four under the current 1 in 25 rule of Section 9.1.5. The 2004 ADAAG also explicitly requires that one of the five new accessible rooms has a roll-in shower. <u>See</u> Section 224.1.1 (referencing Table 224.2 which requires one roll-in shower for

facilities with 100 guest rooms). The current law on alterations (1991 ADAAG Section 9.1.5) does not explicitly require roll-in showers.

The chart below shows the difference between the 1991 ADAAG rule on alterations and the new 2004 ADAAG proposed rule:

COMPARISON OF MOBILITY ACCESSIBLE ROOM REQUIREMENTS FOR ALTERATIONS UNDER CURRENT LAW VERSUS NEW ADA/ABA-AG		
Number of rooms renovated	**Current ADA Standards for mobility accessible rooms in alterations (i.e. 1 in 25)**	**New ADA/ABA-AG requirement for mobility accessible rooms in alterations (based on Table 224.2)**
75	3	4 (including 1 with roll-in shower)
100	4	5 (including 1 with roll-in shower)
125	5	7 (including 2 with roll-in shower)
150	6	7 (including 2 with roll-in shower)
175	7	8 (including 2 with roll-in shower)

The table above makes clear that the 2004 ADAAG makes significant, substantive changes in the scoping requirements for hotel guest room alterations, with no discussion or justification. AH&LA pointed this fact out in its ANPRM submissions, but the Department ignored its comments and has not mentioned this change anywhere in its NPRM. More importantly, the Department has completely failed to take into account the substantial cost that increasing the scoping of accessible rooms will have on its RIA. The current room scoping for alterations should be maintained.

H. Swimming Pools, Wading Pools and Spas

1. Swimming Pools.

AH&LA supports the Department's proposal to provide reduced scoping for barrier removal at existing swimming pools. Under the proposed rule, existing swimming pools with fewer than 300 l.f. of wall would not have to provide an accessible means of access, and larger pools would have to provide one means of access, until such time that they are altered. The

Department estimated that the cost of providing a pool lift would be $15,000 in the barrier removal and alteration contexts (App. 8, Requirement 79) and that there are 35,988 hotels and motels in the United States (RIA, Table 3, p. 34). According to AH&LA's 2008 Lodging Survey of over 10,000 properties, 58% (or 4,490) of the 7,742 responding lodging facilities have outdoor swimming pools. Forty-seven percent (or 3,469) of the 7,381 responding lodging facilities have indoor swimming pools. Thus, as many as 20,873 outdoor pools and 16,914 indoor pools would be affected by this new requirement. Considering the large number of pools at lodging facilities, the cost of requiring those facilities to immediately purchase one pool lift for each of those indoor and outdoor pools would be very significant.

AH&LA requests that the Department clarify what would be an "alteration" to a pool that would trigger the obligation to comply with 2004 ADAAG's requirements for providing accessible entries.

2. Spas.

Section 242 of the 2004 ADAAG requires all spas to have an accessible means of entry for the first time. The entry must either be a sloped entry, a transfer system, or a pool lift. For existing spas, the only viable option is a pool lift because a sloped entry or transfer system could not be retrofitted into an existing spa. AH&LA urges the Department to exempt existing spas from the requirement for an accessible entry. Spas tend to be much smaller than swimming pools and are often placed in locations that are difficult to reach, making the addition of pool lift very cumbersome, difficult, and unattractive. In addition, some spas are elevated, which would necessitate the addition of a lift with standby power to elevate the person up to the spa level. Given the high cost of providing a pool lift for a spa ($6,000) (RIA at 221) and the other technical challenges that may be posed by making this amenity accessible, lodging facilities may

simply choose to close their spa to everyone if compliance with the 2004 ADAAG is required. The possible closure of spas as a result of the 2004 ADAAG requirements is a side effect and cost that must be taken into account under OMB Circular A-4. See OMB Circular A-4 at 3, 26.

3. Wading Pools.

The 2004 ADAAG contains new requirements for wading pools. Because these requirements are new, lodging facilities would have to make their wading pools comply with the 2004 ADAAG under the barrier removal obligation unless doing so is not readily achievable. As explained below, making existing wading pools comply with the new requirements would be a ridiculous exercise that would turn the wading pool into a "wading slope."

Section 242.3 and 1009.3 require a sloped entry into the deepest part of the wading pool. Section 405.2 mandates a 36" wide ramp with a 1:12 slope with a level landing at the bottom. AH&LA's members estimate that a typical wading pool in a hotel is approximately 15' to 20' in diameter. Thus, for a wading pool that is 2' deep, the ramp would have to be 24' long (i.e., longer than the diameter of the pool). If the wading pool is only 1.5' deep, the ramp would have to be 18' long. This analysis demonstrates that it is impossible to retrofit most existing wading pools with a compliant ramp. Indeed, the discussion of wading pools in Appendix 8 of the RIA recognizes that the sloped entry cannot be created in a wading pool smaller than 33' in diameter. The RIA estimates that the cost of creating a compliant sloped entry would cost a staggering $142,500 per wading pool even in new construction. Interestingly, the Department erroneously assumed in the RIA that no hotels, motels, or inns have wading pools at all and would incur no costs relating to this requirement. See RIA, Appendix 3, p. 160. This is clearly an incorrect assumption because our members report that wading pools do exist. However, given this incredibly expensive requirement for a relatively unimportant amenity, it is likely that most

hotels will simply eliminate such wading pools altogether rather than spend $142,500 to retrofit the wading pools that are large enough to be retrofitted. Given the near impossibility of retrofitting most wading pools to comply with the 2004 ADAAG and the ridiculously high cost associated with such a retrofit, AH&LA urges the Department to include an additional exception to the barrier removal requirement for all existing wading pools. In addition, given the incredibly high cost of creating accessible wading pools, the Department should consider sending this requirement back to the Access Board for revision to exclude the smaller wading pools that would be found in a lodging facility. Otherwise, it is unlikely that lodging facilities will build wading pools in the future, and this will harm the 98% of the U.S. population that does not need a sloped entry to use the wading pool.

I. Steam Rooms And Saunas

The 2004 ADAAG has new requirements for steam rooms and saunas which include an accessible doorway, turning radius inside the room, and an accessible bench. <u>See</u> 2004 ADAAG §§ 241, 612. The Department estimated that the cost of retrofitting existing saunas and steam room is $10,000 per room (RIA, App. 8, Item 111) and incorrectly <u>assumed that there are no steam rooms or saunas in inns, hotels, or motels</u>. <u>See</u> RIA Appendix 3, p. 159. The Department proposes to exempt saunas and steam rooms that only fit two people from the barrier removal requirements of the ADA. All other existing saunas and steam rooms would have to be retrofitted if readily achievable.

<u>AH&LA's members urge the Department to exempt all existing saunas and steam rooms from the 2004 ADAAG requirements and to eliminate the turning radius requirement in new construction.</u>

As a threshold matter, AH&LA would like to point out that the Department's cost analysis incorrectly assumed that there are no saunas and steam rooms in any hotels in the United

States. To the contrary, our members report that a number of their hotels have steam rooms and saunas. Although AH&LA does not have specific numbers to present, the existence of steam rooms and saunas in many hotels should be fairly self-evident and can be verified through Internet research of the guest amenities available at upscale hotels. Indeed, any hotel that has a spa will likely also have a steam room or sauna, and there are many such hotels. Furthermore, it appears that the Department also assumed that there are no saunas and steam rooms in spas. Table 3E1 of the RIA documents the Department's erroneous assumption that there are no saunas or steam rooms in any "indoor service establishments" – the only facility category that would seem to encompass spas. See RIA at 164.

The Department's complete failure to consider the cost impact of the new steam room and sauna requirements in existing lodging facilities has resulted in a significant underestimation of the cost of this new barrier removal requirement to society. Moreover, the proposed exemption for two-person steam rooms and saunas will in no way mitigate this impact because AH&LA's members are not aware of any steam rooms or saunas in their facilities that would only fit two people. Representatives from the largest sauna and steam room equipment manufacturer in North America also stated that commercial two-person saunas and steam rooms are quite rare.

Some AH&LA members stated that they would more likely close their steam rooms or saunas before spending the money to retrofit it. The closure of these steam rooms is a negative "side effect" of a regulation that the Department must consider in the RIA pursuant to OMB Circular A-4 but appears to have not. See OMB Circular A-4 at 3, 26.[9]

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[9] OMB Circular A-4 states that "[t]o evaluate properly the benefits and costs of regulations and their alternatives, [the Department] will need to do the following: . . . Identify the expected

The Department cannot responsibly require existing hotels to retrofit their saunas and steam rooms to comply with the 2004 ADAAG when the Department has not considered the cost of this new requirement on existing or new hotels.

Furthermore, AH&LA's members and the sauna/steam room equipment manufacturer have also pointed out that the turning radius requirement inside of the spa makes little sense because a wheelchair cannot be kept inside of the room with its owner. The sauna and steam room equipment manufacturer interviewed by AH&LA stated that the average temperature in a commercial sauna is 160 to 180 degrees Fahrenheit. The average temperature in a steam room is 110 to 125 degrees Fahrenheit, with 100% humidity. The metal in wheelchairs, if left in the saunas/steam rooms, would heat up become extremely dangerous. For this reason, the chair would have to be removed by a companion after the person with a disability is transferred to the bench. This necessary process makes the 60" turning radius completely unnecessary.

J. Accessible Rooms With Communications Features.

Section 224 of 2004 ADAAG radically changes the rule governing the location of rooms with communications features for the hearing impaired. Under 1991 ADAAG, all mobility accessible rooms must also be communications accessible. See 1991 ADAAG § 9.2.2(8). The balance of the rooms that must be communications accessible must be dispersed among the other rooms. Under 2004 ADAAG, only up to 10 percent of mobility accessible rooms can also be communications accessible rooms, with a minimum of one room being both mobility and communications accessible. Because many hotels constructed after January 26, 1993, have hard wired visual alarms and other communications features built in to their mobility accessible

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undesirable side-effects and ancillary benefits of the proposed regulatory action and the alternatives. These should be added to the direct benefits and costs as appropriate." Id. at 3.

rooms, the question is whether and when new communications accessible rooms must be created in order to comply with the new requirement prohibiting more than a 10 percent overlap.

Section 215.4 of 2004 ADAAG requires communications accessible guest rooms to provide permanently installed visible alarms. However, 215.1 provides an exception which states: "In existing facilities, visible alarms shall not be required except where an existing fire alarm system is upgraded or replaced, or a new fire alarm system is installed." The Department's commentary to the NPRM restates this exception and explains:

> The Department believes that the language adopted by the Access Board strikes a reasonable balance between the interests of individuals with disabilities and those of the business community. If undertaken at the time a system is installed whether in a new facility or in a planned system upgrade, the cost of adding visible alarms is reasonable. Over time, existing facilities will become fully accessible to individuals who are deaf or hard of hearing, and will add minimal costs to owners and operators.

AH&LA interprets these sections to mean that if a lodging facility does not have permanently installed visible alarms in its communications accessible guestrooms, it will not have to provide such permanently installed alarms until such time that its fire alarm is upgraded or replaced, or a new fire alarm system is installed. In addition, AH&LA also assumes that if a hotel already has permanently installed visible alarms in all of its mobility accessible guest rooms, that it would not have to relocate such permanently installed visible alarms and the other communications features in those rooms to other guest rooms to comply with the 10% minimum overlap requirement until the alarm system is upgraded or replaced. Clarification of these points in the Final Rule's preamble would be very helpful to our members and hopefully reduce the risk of litigation that uncertainty will surely create.

K. Valet Parking

The 1991 Standards contain an exception that exempts valet parking facilities from providing accessible parking spaces. <u>See</u> 1991 ADAAG Section 4.1.2(5)(e). The 2004 AAAG

will eliminate this exception on the theory that "valet parkers may not have the skills necessary to drive a vehicle that is equipped to be accessible, including use of hand controls, or when a seat is not present to accommodate a driver using a wheelchair. In that case, permitting the individual with a disability to self-park may be a required reasonable modification of policy for a covered entity." NRPM App. A at 18.

As an initial matter, allowing individuals with disabilities to self-park their cars in valet-only garages are unsafe because the spaces are not intended to serve guests. The risk of injury would be increased. Furthermore, giving guests access to valet-only garages would also likely increase insurance premiums – yet another cost that the Department has not considered in the RIA.

AH&LA seeks confirmation that existing valet parking garages that do not contain accessible parking or accessible routes from the area where the cars are valet parked to the building served by the valet parking are covered by the Element by Element Safe Harbor. It appears that the Department intended for the safe harbor to apply because this item is listed in Appendix 8 of the RIA as a revised requirement.

AH&LA urges the Department to include an equivalent facilitation alternative to making valet parking garages accessible. The proposed alternative is one that some hotels already have in place: namely, providing an accessible space in front of the hotel. OMB Circular A-4 requires the consideration of alternative options that impose a lesser cost, and this equivalent facilitation option would certainly qualify.

In addition, the Department must clarify that if an existing valet parking garage is altered, the only action that must be taken with regard to the parking lot is the re-striping of the parking lot to create accessible spaces. AH&LA's members are concerned that they will also

have to retrofit the garage to create an accessible route from the accessible spaces to the ground level. There is no such route in many valet parking garages, and the cost of creating such an accessible route would be very high. The Department's RIA does not contemplate the creation of such an accessible route because it only identifies a cost of $250 in alterations for re-striping one space. See RIA App. 8, Requirement 20 at 328. This amount also does not take into account the reduction of parking spaces that will result from the creation of an access aisle and its cost impact. The Department should clarify that lodging facilities that alter their valet parking garages are not required to create an accessible route from the accessible parking space in the valet parking garage to the first floor lobby.

L. Equipment

AH&LA believes that there is a need for clearer regulatory guidance with regard to a lodging facility's obligation to provide accessible equipment for which the 2004 ADAAG does not have scoping requirements. For example, some hotels have installed self-check-in machines in their guest registration desk areas that may not comply with the 2004 ADAAG's technical specifications for operable parts (e.g. reach range). Guests who cannot use these machines always have the option of checking in at the front desk which is located the same area.

The Department's discussion about "equipment" in the NPRM was very confusing and failed to state what is required under the ADA. The NPRM states:

> Equipment has been covered under the Department's ADA regulation, including under the provision requiring modifications in policies, practices, and procedures and the provision requiring barrier removal, even though there is no provision specifically addressing equipment. See 28 CFR 36.302, 36.304. If a person with a disability does not have full and equal access to a covered entity's services because of the lack of accessible equipment, the entity must provide that equipment, unless doing so would be a fundamental alteration or would not be readily achievable.
>
> The Department has decided to continue with this approach, and not to add any specific regulatory guidance addressing equipment at this time. It intends to

> analyze the economic impact of future regulations governing specific types of free-standing equipment. The 2004 ADAAG includes revised requirements for some types of fixed equipment that are specifically addressed in the 1991 Standards, such as ATMs and vending machines, as well as detailed requirements for fixed equipment that is not addressed by name in the current Standards, such as depositories, change machines, and fuel dispensers. Because the 2004 ADAAG provides detailed requirements for many types of fixed equipment, covered entities may apply those requirements to analogous free-standing equipment to ensure that they are accessible, and to avoid potential liability for discrimination. The Department also believes that when federal guidance for accessibility exists for equipment required to be accessible to individuals who are blind or have low vision, entities should consult such guidance (e.g., federal standards implementing section 508 of the Rehabilitation Act, 36 CFR part 1194, or the guidelines that specify communication accessibility for ATMs and fare card machines in the 2004 ADAAG, 36 CFR part 1191, App. D).

NPRM at 34517.

At a minimum, we urge the Department to make clear that its "full and equal" language does not necessarily require that all equipment located in a public accommodation meet the technical specifications of the ADAAG, so long as the service being provided by the equipment is provided in some other manner such as personal assistance by an employee or some alternative means of obtaining the service that offers a comparable level of convenience. Thus, in the hotel check-in context, the Department should make clear that a hotel may have a self-service check-in kiosk that does not comply with the technical specifications of the 2004 ADAAG so long as a guest can check in at the front desk nearby, or so long as a hotel employee is available to help the guest check-in at the kiosk.

IV. OPERATIONAL ISSUES

A. New Hotel Reservations Rules[10]

The Department has proposed the following addition to 28 C.F.R. § 36.302 (modifications in policies, practices, or procedures):

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[10] AH&LA's comments on hotel reservations do not cover reservations of timeshares which are substantially more complicated and are addressed in ARDA's submission.

> (e) Hotel reservations. A public accommodation that owns, leases (or leases to), or operates a place of lodging shall:
>
> (1) Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations, including reservations made by telephone, in-person, or through a third party, for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms;
>
> (2) Identify and describe accessible features in the hotels and guest rooms offered through the reservations service; and
>
> (3) Guarantee that an accessible guest room reserved through the reservations service will be held for the reserving customer during the reservation period to the same extent that it guarantees reservations made by others.

1. How Hotel Reservation Systems Work

A brief explanation of how hotel reservations systems typically work is important for purposes of understanding AH&LA's comments concerning proposed Section 36.302(e). Hotel guests generally reserve rooms in the following ways:

a. Directly, with an individual hotel, either through the hotel's local phone number or in-person;

b. Directly, through an "800" number operated either by the hotel company or a management company;

c. Directly, through a hotel's branded website, using interactive reservations tools;

d. Indirectly, through a traditional travel agent; or

e. Indirectly, through a third-party internet travel or hotel service.

Reservations made "directly" (i.e., via methods a, b and c above) are typically executed by direct input into a hotel's reservations database. The database input is prompt, if not immediate, and, as a consequence, reservations made by these means are quite reliable in terms of room availability and room features, including accessibility features. As a general matter, therefore, the best way for any person to assure a room reservation of any kind is directly

through the hotel's phone or internet reservation system. Again, in most cases, a direct reservation links the customer directly via phone or internet to the particular hotel's reservations database, assuring the customer of the most current and most detailed information on room availability and room type.

Traditional travel agents provide an alternative, indirect means of obtaining hotel reservations. Travel agents do not, however, have the same direct access to hotel reservations databases as the hotels have. Hotels and travel agents interact through one of four different "Global Distribution Systems" ("GDS") by which hotels provide information to the agents and through which the agents can reserve rooms at hotels. The GDS's currently in use in the travel industry were originally developed for airline reservations in the 1960's and are antiquated. By today's standards, the GDS's have modest informational capacities, carrying no more than three data elements for hotel rooms and in the case of one GDS system, only one data element. The depth of information about the features of a hotel room available to a travel agent will therefore vary depending on the GDS used by the agent, but it will generally be limited.

In the hotel industry's experience, however, travel agents will call a hotel directly to learn more, whatever their client's particular request, when faced with only limited information about a room type or amenities. This practice tends to occur when clients seek accessible rooms. If limitations in the GDS result in incomplete information about accessible or any other types of features, an agent can and will obtain information directly from the hotel. Today, therefore, the travel agent reservations "experience" for an individual seeking an accessible room is generally the same as it is for any other person.

Third-party on-line reservations services ("Third Party Services") and resellers provide another means by which hotel reservations are made. These sites (e.g. Expedia, Travelocity,

Orbitz, Priceline, to name a few) provide a service by which individuals can reserve limited types of rooms. Usually, these Third Party Services work on a commission or "markup" basis, earning a percentage of the rent for hotel rooms rented through their site. The resellers, in contrast, re-sell blocks of rooms provided to them by a hotel. Hotels typically provide reservations-related data to the Third Party Services via a direct database interface or through another interface program called Pegasus. While in theory, hotels could share all of the information in their "direct" reservations database with Third Party Services through either means, they do not do so for reasons described below.

First, primarily due to limitations in Third Party Services' data handling and storage capabilities (i.e., they take room information from dozens of hotel companies) as well as those services' essential business model (i.e., providing customers with an "apples to apples" means of comparing hotel rooms to one another) the amount of information Third Party Services provide to a prospective guest will be limited. These limitations apply across-the-board to all room types, often tending to be nothing more than the number and type of beds in a room. As a consequence, Third Party Services typically do not offer unique (e.g., "Presidential" suites) or accessible hotel rooms for rent.

There is another key reason why Third Party Services only offer the most common room types. The rooms offered by hotels for reservations by third-party services simultaneously remain available for rent on a hotel's "direct" reservations channel. Thus, the same room could be offered for rent in two, three, or more places simultaneously. Accordingly, this third party sales channel makes sense only for widely-available room types in sufficient quantities such that the problems that occur when unique rooms are double-booked can be avoided. Especially for those guests requiring a particular type of accessible room, hotels have learned that meeting their

guests' needs requires close management of room inventory. Hotels do not wish subject their guests to the uncertainty that would result if certain types of rooms were to be rented in a relatively unmanaged third-party environment.

2. Comments On Proposed Section 36.302(e)(1)

AH&LA proposes the following changes to Proposed Section 36.302(e)(1):

> (e) Hotel reservations. A public accommodation that owns, leases (or leases to), or operates a place of lodging shall:
>
> (1) Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations, including reservations made by telephone, or in-person, ~~or through a third party~~, for accessible guest rooms during the same hours and in ~~the same~~ a substantially similar manner as individuals who do not need accessible rooms;

* * *

AH&LA proposes to change the phrase "in the same manner as individuals who do not need accessible rooms" to "in substantially similar manner as individuals who do not need accessible rooms" to give its members the flexibility to ensure that (1) a guest receives the room that (s)he needs and (2) guests who do not need accessible rooms do not take up valuable accessible room inventory.

Some hotel operators do not automatically book accessible rooms when requested through their websites, instead relying on a more interactive process. In a typical example, a hotel's website allows the guest to select from a menu of accessibility and other room amenities or make a special request for an accessible room, and transmits that information to the hotel's reservations staff. A staff member will, relatively promptly, then call or email the guest in order to verify the guest's specific accessibility needs. Only upon verification will the accessible room be booked. This verification process can serve at least two important business purposes. First, by ensuring the most accurate match between a guest and scarce accessible rooms, the hotel

maximizes customer satisfaction while also allocating its inventory most efficiently. Second, this verification process tends to discourage individuals who do not require an accessible room from inadvertently, or intentionally booking one automatically, thereby reducing the inventory available for those who need one.

The AH&LA is also concerned that the DOJ has not considered at all the cost of reservations and website systems changes that would be required to implement this proposed regulation as written. As indicated, it is in theory technologically feasible to offer customers the "same" booking experience whether or not they are seeking an accessible room. As explained, some hotels do not currently offer the "same" booking experience, however, due to valid, indeed, laudatory, concerns over management of accessible room inventory and therefore have not designed their reservations databases to allow for that "same" experience. In many cases, to include the information necessary to allow all website users the "same" experience in accessing accessible and non-accessible rooms alike would require significant computer systems or database upgrades. The Department must take this cost in to account if it is going to require "sameness" in the reservations process, particularly where it is not self-evident that "sameness" will yield the desired positive result for the disabled community.

Thus, the AH&LA proposes that proposed Section 36.302(e)(1) be revised to allow more flexibility for hotels in booking accessible rooms, particularly in light of the fact that there is no industry consensus on the "best" way to book these rooms in the best interests of individuals needing them.

In if the Department does not adopt AH&LA's proposed changes to section 36.302(e), it should provide a transition period for compliance. As described above, many hotels will have to change their reservations systems and websites to provide the "same" reservations experience,

and this process takes both time and money. Accordingly, there should be a one year transition period to comply with Section 36.302(e).

AH&LA proposes to delete the "or through a third party" language because such providers do not typically provide reservations services for accessible rooms and lodging facilities have no control over the ADA compliance of such parties. As described above, Third Party Services typically do not offer accessible or other unique (e.g., one-of-a-kind suites) hotel rooms for rent. Although AH&LA does not speak for Third Party Services, it is AH&LA's understanding that limitations in the amount of data regarding hotel rooms that the Third Party Services can or choose to offer effectively excludes "accessible" as an available room type. In addition, because these third parties offer for rent the same rooms offered directly by hotels through call centers and branded websites, these third parties should not necessarily be offering accessible rooms due to the risk of double-booking. Because there is a lag between the time a booking made via a third-party service and the time that it is entered into the hotel's reservations database, a room could be double-booked because someone could book it through the hotel's "direct" systems while a third-party online booking is pending entry.

This multiple-booking risk is one of the reasons why hotels usually only provide access to high-volume room types to third party services. The multiple-booking risk is greatly diminished in the case of high volume, fungible room types (e.g., King, non-smoking) are involved. Where relatively scarce (i.e., only one or two of a room type) rooms are involved, however, the "convenience" of being able to reserve through third-party services may be outweighed by availability and certainty concerns. For example, a hotel may have 100 standard rooms with a king-sized bed, and may offer 50 of those for rent for a specific night through multiple third party services. Since these rooms are essentially identical substitutes for one

another, there is virtually no risk of multiple-booking since it is highly unlikely that all 50 would be booked at the same time on multiple sites. That is not the case for accessible rooms.

Although this is a matter that would be best addressed by the Third Party Sites themselves, AH&LA believes that requiring such sites to include accessible room inventory may substantially increase their data storage and handling needs and result in substantial costs. The AH&LA does not know whether Third Party Services have the technological or financial resources to expand their database systems to accommodate a vastly increased number of room types from the dozens of hotels that they service. The additional costs that third-party on-line services would incur in connection with handling and storing the increased amounts of data associated with sharing vastly increased numbers of hotel room types may well jeopardize these services' economic viability.

Most importantly, lodging facilities cannot be held responsible for ensuring that Third Party Sites comply with the reservations regulations because the facilities have no control over the operation of these sites. As proposed, Section 36.302(e)(1) could be used as the basis for enforcement action against a lodging facility, and that should not be permitted.

3. Comments On Proposed Section 36.302(e)(2)

AH&LA proposes the following changes to Proposed Section 36.302(e)(2):

> (e) Hotel reservations. A public accommodation that owns, leases (or leases to), or operates a place of lodging shall:
>
> . . .
>
> (2) Identify and describe accessible features in the ~~hotels and~~ guest rooms (i.e., bathroom type (tub or roll-in shower), communications features) offered through the reservations service;

The term "hotels" should be stricken from Section 36.302(e)(2) because there are hundreds of elements in a hotel that are required to be accessible (e.g., signage, door hardware,

public doorway, restroom, service counters, parking, just to name a few). Identifying and describing all such features would be tantamount to requiring each hotel to provide a full accessibility report on its property like the Department's 34-page ADA Checklist for New Lodging Facilities survey. This requirement is not workable and the term "hotels" should thus be stricken.

The phrase "accessible features in . . . guest rooms" should be clarified to refer to bathroom type (tub or roll-in) and communications features, since the many other accessible features of an accessible room will likely be the same. Requiring the identification of every other accessible element in the room (e.g. the size of the vanity, presence of clear floor space amount, toilet, number of grab bars) would be highly burdensome and would exponentially increase the size and complexity of the hotel's reservations database. These changes would impose significant costs in terms of hardware upgrades, software programming changes, and commensurate labor costs.

4. Comments On Proposed Section 36.302(e)(3) And Response To Question 17

AH&LA proposes no change to the following new section:

> (e) Hotel reservations. A public accommodation that owns, leases (or leases to), or operates a place of lodging shall:
>
> . . .
>
> (3) Guarantee that an accessible guest room reserved through the reservations service will be held for the reserving customer during the reservation period to the same extent that it guarantees reservations made by others.

The Department has posed the following related question:

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?

Generally, the current practice of hotels is to "guarantee" the reservations of accessible rooms to the same extent that they "guarantee" the reservations or ordinary rooms. AH&LA wishes to point out, however, that there may be a perception that hotels do not assure the same level of "guarantee" with respect to accessible rooms due their uniqueness, or scarcity. That perception is generally inaccurate.

A "guarantee" of a hotel reservation is a function of hotel contract law, and is not absolute. A "guarantee" that a particular room has been reserved and will inevitably be available to the guest upon arrival, particularly with respect to unique or accessible rooms, would be an impossibility. For example, guests may stay in rooms longer than they had initially represented, thus making the room unavailable for the next guest. Because the overstaying guests cannot readily be evicted, a room "guaranteed" to the next guest might not be available. Instead, a "guarantee" in this context usually means that the guest is guaranteed that a room of the type requested will likely be available and, if not, a suitable substitute (whether in the same or nearby hotel) will be obtained for the guest. Hotels typically include accessible rooms as ones that are "guaranteed" and subject to the individual hotel's guarantee policy.[11]

Despite the general applicability of room "guarantees," however, to the extent that hotels use "guarantees," the scarcity of particular accessible room types does not allow for as great an ability to find suitable substitute rooms in those instances where the "guaranteed" room is unavailable. Unlike the case with the majority of hotel rooms, there tend to be few adequate substitute rooms available when an accessible "guarantee" room proves unavailable. Thus, the unavailability of a "guaranteed" accessible room may be relatively more disruptive to the guest than would be the case with ordinary rooms that had close substitutes.

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[11] These policies may include additional things like payment for transportation to another hotel, a free upgrade, a complimentary meal.

5. Hold And Release Of Accessible Rooms

The Department has asked the following question:

> 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?

Any rule requiring lodging facilities to hold accessible rooms for individuals requesting accessible rooms until they are the last ones for sale must make clear that the lodging facilities can sell the room to anyone once the accessible rooms are the last available of their type. For example, if there are 25 king standard rooms of which two are accessible, the hotel would have to sell all 23 non-accessible rooms first before the two accessible king standard rooms are offered to a non-disabled person. However, if there is a one-of-a-kind room that also happens to be accessible, a hotel should not have to hold that room for a guest requesting an accessible room because it is the only and, therefore, last one of its type. Otherwise, the hotel would be giving an unfair priority to the person with a disability. Many hotels already employ this holding practice, primarily to ensure that their guests with disabilities have the maximum opportunity to rent an appropriate accessible room.

The alternative, putting all accessible rooms (regardless of type) into a pool that can only be booked by persons not requesting accessible rooms until after all of the non-accessible rooms sell out would not be acceptable because it denies non-disabled travelers the right to book room types that may have already sold out in the non-accessible room pool but are still available in the accessible room pool. This alternative would also harm hotels by requiring them to forgo opportunities to rent room types that are in the accessible room pool but that may have sold out or are not available in the non-accessible room pool.

AH&LA members wish to emphasize, however, that any requirements to hold accessible rooms until they are the last to be sold should not apply to units that are individually owned such as units in a condo-hotel. The owners of such units are only paid if their units are rented. Requiring accessible units to be held until they are rented to persons who request accessible units or until they are the last to be sold would unfairly prejudice owners of accessible units who are more likely to be individuals with disabilities. Disadvantaging owners of accessible units with this type of policy could result in those owners removing their units from the rental program and renting them through other channels. This action would clearly be counterproductive to the larger objective of increasing the accessible room inventory.

If the Department were to adopt a requirement where accessible rooms in each class can only be sold to people requesting accessible rooms until the rooms are the last in their class, whereupon they can be released to people who do not request accessible rooms, the need to give lodging facilities greater flexibility in how to handle reservations for such rooms becomes even greater. As explained supra, many hotels elect to withhold accessible rooms from their direct reservations systems so that they can better manage their accessible room inventory. Some of those facilities will accept a request for an accessible room and then follow up with a call to make sure the room meets the guest's requirements and to make sure an accessible room is needed. This procedure (i.e., an additional phone call) may be marginally less convenient but may be an appropriate by-product of a system that more efficiently ensures that accessible rooms are available. AH&LA believes that this tradeoff is appropriate and that the modification it has proposed to the "same" reservations requirement will provide hotels with flexibility to better implement a hold policy.

B. Wheelchairs And "Other Power-Driven Mobility Devices"

AH&LA's members have very serious concerns about proposed 28 C.F.R. §§ 36.104 and 36.311 concerning "other power-driven mobility devices" ("OPMDs"). As written, these regulations would (1) require lodging facilities presumptively to accommodate all manner of fast, powerful, or noxious vehicles that a person with disabilities might choose to use for locomotion; (2) put their employees and guests at risk of bodily injury caused by these vehicles; (3) require lodging facilities to pay higher insurance premiums resulting from the increased liability exposure resulting from the use of these OPMDs; and (4) provide lodging facilities no meaningful way to verify that users of OPMDs actually need them because of their disability. As explained below, the proposed regulations should be revised to address these concerns.

1. Suggested Revisions To Proposed 28 C.F.R. §§ 36.104 And 36.311

AH&LA's proposed changes are indicated with double underlining (new text) and strikeout text (deleted text):

Sec. 36.104 Definitions.

. . .

Other power-driven mobility device means any of a large range of devices powered by batteries, fuel, or other engines – whether or not designed solely for use by individuals with mobility impairments – that are used by individuals with mobility impairments for the purpose of locomotion, including scooters, golf carts, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes.

. . .

Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven.

Sec. 36.311 Mobility devices.

(a) Use of wheelchairs and manually powered mobility aids. A public accommodation shall permit individuals with mobility impairments to use wheelchairs, ~~scooters~~, walkers, crutches, canes, braces, or similar devices in any areas open to pedestrian use.

(b) Other power-driven mobility devices.

1. Except as provided in subsection (2) below, a public accommodation shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation's goods, services, facilities, privileges, advantages, or accommodations.

2. A public accommodation shall not be required to permit the use of other power-driven mobility devices by individuals with disabilities that (a) are gasoline powered or have combustion engines; (b) can travel faster than 6 mph; (c) have a footprint greater than 30" x 48"; (d) cause the head of the person in the device to be higher than 7 ft; or (e) can accommodate more than one person.

(c) Development of policies permitting the use of other power-driven mobility devices. A public accommodation shall establish policies to permit the use of other power-driven mobility devices by individuals with disabilities when it is reasonable to afford a public accommodation's goods, services, facilities, or accommodations to an individual with a disability. However, a public accommodation is not required to establish a policy in order to limit the use of the power-driven mobility devices identified in Section 36.311(b)(2).

Whether a modification is reasonable to allow the use of a class of power-driven mobility device by an individual with a disability in specific venues (e.g., doctors' offices, parks, commercial buildings, etc.) shall be determined based on:

1. The dimensions, weight, noise, and operating speed of the mobility device in relation to a wheelchair;

2. The potential risk of harm to others by the operation of the mobility device;

3. The risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and

4. The ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

d) Inquiry into use of mobility device. If the disability is not obvious, a ~~A~~ public accommodation may require ~~ask~~ a person using a power-driven mobility device to provide a certification from a medical professional stating that the individual's use of the ~~if the~~ mobility device is required because of the person's disability and may refuse to allow the individual to use the device if no certification is produced. A public accommodation shall not ask a person using a mobility device questions about the nature and extent of the person's disability.

e) A public accommodation is not required to provide any auxiliary aids or services, modify any policies, practices or procedures, or provide any other accommodations that may be necessitated by the use of a power mobility device by an individual with a disability. Examples of accommodations that would not be required include providing storage or parking space for the power mobility devices, providing other mobility devices for use on its facility, relocating movable elements such as furniture or display fixtures, or making any modifications to built-in elements.

2. Explanation Of Proposed Changes

AH&LA has moved the reference to "scooter[s]" from the wheelchair and manual mobility device section (28 C.F.R. § 36.311(a)) to the OPMDs section (28 C.F.R. § 36.11(b)) because a scooter is more properly characterized as an OPMD. Neither the current nor proposed regulations contains a definition of the term "scooter," but it is a well known fact that there are a wide variety of mobility devices called "scooters" such kick-powered two-wheeled children's "Razor" scooters, to three or four-wheeled electric powered "mobility" scooters, and to powerful two-wheeled, motorcycle-like electric and gas scooters used for commuting purposes. As such, they seem to fall within the proposed definition of an OPMD, which is "any of a large range of devices powered by batteries, fuel, or other engines — whether or not designed solely for use by individuals with mobility impairments — that are used by individuals with mobility impairments for the purpose of locomotion." If "scooters" were left in Section 36.311(a) as proposed, a lodging facility would have no ability to limit the use of such devices and would, for example, be required to allow the use of commuter "scooters" to the same extent that they must allow wheelchairs and crutches in their facilities. AH&LA assumes that the Department did not intend such a result.

The AH&LA recognizes that there is a category of wheelchair-like "mobility scooters" that legitimately serve as assistive devices for persons with disabilities and that can likely be accommodated in many circumstances in the same manner as wheelchairs. This type of scooter

does not raise safety concerns due to size and speed any more significant than those raised by power-driven wheelchairs. The AH&LA's proposed changes to the proposed regulations account for legitimate "mobility scooters" by listing "scooters" as an example of "other power-driven mobility device" that would have to be accommodated by a public accommodation under 28 C.F.R. § 36.311(b)(1), but that would also be subject to the engine type, speed, and size limitations of AH&LA's proposed Section 36.311(b)(2). The AH&LA believes that most legitimate "mobility scooters" would not implicate the criteria of this section; therefore, public accommodations would be required to allow this limited category of "scooter" under the language of Section 36.311(b)(1), as proposed by both the Department and the AH&LA.

Due to the safety and liability risks associated with the Department's very broad proposed definition of OPMDs, the AH&LA has proposed the addition of a new Section 36.311(b)(2), which allows public accommodations to forbid the use of OPMDs that create, essentially, *per se* safety and liability risks due to their exhaust type, size, and speed.[12] Additionally, in order to control what could be extensive abuse of an OPMDs accommodation policy, the AH&LA proposes that public accommodations be allowed to require that a person using an OPMDs present certification from a medical professional stating that the person's disability requires use of the particular type of OPMD at issue.

As the Department recognizes, the types of vehicles that might be used by individuals with disabilities for assistance (and recreation) is limited only by the bounds of human ingenuity.

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[12] The discussion that follows focuses on the inherent safety and liability risks attendant to AH&LA's typical member company, a hotel. AH&LA's suggested change to the regulation, allowing all public accommodations to prevent the use of OPMD's, might be overbroad in the sense that it applies to all public accommodations, which might include parks or the like. There might be room for additional categorization of the type of public accommodation (e.g., by whether or not the public accommodation comprises mostly exterior or mostly interior facilities) such that a public accommodation like a hotel would not have to allow the use of OPMDs while other types of public accommodation like a park might have to.

See NPRM at 34518 ("[I]ndividuals with mobility disabilities have utilized riding lawn mowers, golf cars [sic], large wheelchairs with rubber tracks, gasoline-powered two-wheeled scooters, and other devices for locomotion in pedestrian areas. . ."). Under the Department's expansive definition of OPMDs, all of these devices identified by the Department — as well as any other device that that anyone with mobility impairments chooses to use for mobility — could qualify as an OPDMD. See e.g., www. http://www.motorcyclemojo.com/articles/the-uno/ (last visited August 13, 2008) (describing prototype of new motorcycle that would appear to be a "Segway®" and to meet the Department's proposed definition of OPMD); www.aptera.com (last visited August 13, 2008) (introducing the Aptera Typ-1, a new three-wheeled electric car/motorcycle that would appear to meet the Department's proposed definition of OPMD).

AH&LA submits that there are certain types of OPMD that should never be allowed inside of a public accommodation. It is a matter of common sense that OPMDs discharging any type of exhaust (typically created by combustion engines) should never have to be accommodated in an indoor environment. Likewise, OPMDs that can operate at speeds any higher than that of a brisk human walk (6 mph), should not have to be accommodated on any pedestrian pathways because they present a serious risk of injury to other pedestrians. The fact that the proposed regulation allows a lodging facility to adopt a policy limiting how fast a user can operate an OPMDs under limited circumstances would not reduce this risk. A child can be run over by a golf cart in a matter of seconds by a guest who decides to ignore the policy, and the injury will have been inflicted. Plus, lodging facilities have no meaningful way to police how fast OPMDs users are going. Because the magnitude and probability of risk posed by OPDMDs is so great and the ability of a public accommodation to police violations of OPMDs policies is

so limited, public accommodations should have the right to exclude OPMDs that have the capability to travel faster than a brisk walk.

Lodging facilities also should not have to accommodate OPMDs that have a base that is larger than the dimensions of a wheelchair which is 30” x 48” or can hold more than one person. The accessibility standards contained in the 1991 ADAAG and the 2004 ADAAG are all designed to provide access to a mobility device with these dimensions. They are not designed to provide access for golf carts, oversized scooters, and other OPMDs. As a result, devices with a footprint larger than 30” x 48” would not be able to access many areas in a typical lodging facility. In addition, the larger size of the devices presents a safety problem as they will be harder to maneuver and are more likely to run into other people and objects.

AH&LA has proposed new subsection (e) to make clear that, to the extent that lodging facilities allow people to use OPMDs, that the use of such devices will not create additional burdens for the hotel to take steps that are necessary to facilitate the use of OPMDs. For example, lodging facilities should not have to move furniture or other objects to create accessible wider than required by 2004 ADAAG just because a guest has decided that (s)he wishes to use a golf cart for mobility. Likewise, a lodging facility should not have to provide places to store or park OPMDs, or to provide other mobility devices for use by people with disabilities in areas where their OPMDs cannot fit. The point to be made here is that, by sanctioning and encouraging the use of OPMDs instead of wheelchairs or comparably sized mobility scooters, the Department is heading down a slippery and unmanageable slope. Public accommodations cannot be asked to construct their buildings to accommodate one type of mobility device – the wheelchair – and then be required to make all manner of changes to accommodate every type of

mobility device that presents itself at the facility and that may have little in common with a wheelchair.

AH&LA has also proposed a revision to section (d) which would allow a public accommodation to require persons using a power-driven mobility device to provide documentation from a medical professional stating that the individual's use of the power-driven mobility device is required because of the person's disability and to disallow the use the device if no certification is produced. The reasoning behind this proposal is simple. If a person is using a wheelchair – a medical device specifically designed for people with mobility disabilities – it can reasonably assumed that the person has a mobility disability. The same assumption cannot be made about golf carts, Segways®, lawnmowers, or some types of scooters, just to name a few OPMDs because these devices were not made for the exclusive use of people with mobility disabilities. The limited right to ask whether the OPMDs is required because of a disability is not enough to ensure that the user has a disability because the person could simply say "yes," and the lodging facility would have to accept that answer even if it was false. On the other hand, AH&LA appreciates the fact that the user should not have to disclose the nature and extent of the disability. AH&LA's proposal to require the user to present documentation from a medical professional stating that the user needs the OPMDs because of a disability would serve both objectives with no additional intrusion into the user's privacy.

The proposed requirements regarding OPMDs would undoubtedly result in increased personal injury claims and insurance premiums. The Department has not conducted a cost/benefit of analysis of this requirement, as it appears that the RIA was limited to the 2004 ADAAG changes. AH&LA submits that such a cost/benefit analysis must be conducted before these requirements can be issued in the Final Rule.

3. Response To Question 13

The Department has posed the following question:

Question 13: Should the Department expand its definition of "wheelchair" to include Segways®?

No. Segways® are not wheelchairs. As the Department has recognized, Segways® are faster than wheelchairs, taller than wheelchairs, more intrusive than wheelchairs, require more stopping distance than wheelchairs, and are far more likely to be used by people for recreational purposes than for purposes of assisting persons with disabilities as are wheelchairs. See Nondiscrimination, 73 Fed. Reg. at 34518 ("EPAMDs can operate at much greater speeds than wheelchairs, and the average user is much taller than most wheelchair users."). Thus, in addition to the obvious problems in assessing whether a Segway® is being used for medical or disability-related purposes, the full-access-to-pedestrian-areas proposed regulation would create intractable safety, liability, and compliance issues.

The AH&LA presumes that the Department's Question 13 is designed to explore the effect of a revised regulation by which an expansion of the definition of "wheelchair," coupled with Proposed Section 36.311 would require a "public accommodation [to] permit individuals with mobility impairments to use [Segways®] . . . in any areas open to pedestrian use." Such an expansive regulation would be problematic for a variety of reasons, some of which are set forth below.

First, Segways® are not typically prescribed for medically-related conditions.[13] Whereas the medical necessity of wheelchair use is almost always self-evident — few people voluntarily

[13] For instance, private and governmental (Medicare and Medicaid) health care plans do not cover Segways. Such plans do, however, cover regular wheelchairs upon demonstrated medical necessity. Arguably, the scope of the federal government's ADA's regulatory requirements should coincide with, or least be informed by, the federal government's Medicare coverage requirements. If the Medicare program has elected not to cover Segways for purposes of

choose to use a wheelchair — the same cannot be said for Segways® since they are used predominantly for recreational purposes. See, e.g., www.segway.com/individual/models (last visited July 28, 2008) (describing Segway® x2 Golf model for use by recreational golfers, complete with side golf bag attachment and Segway® x2 Adventure, the "all-access pass to the great outdoors"); www.motorcyclemojo.com/articles/the-uno/ (describing the "Uno" prototype, a Segway®-like motorcycle). It would be quite difficult for the staff of a public accommodation (e.g., a hotel doorman), to ascertain whether a Segway® was being used for purposes of a disability or just recreationally. Indeed, the potential for non-conforming use of Segways® under these circumstances seems to be relatively high.

Second, Segways® move at speeds of up to 12.5 m.p.h., which greatly exceeds average human walking speed of 3 m.p.h. Typical wheelchairs, powered or otherwise, do not exceed 6 m.p.h.. As such, Segways® present a significant safety concern if used in confined pedestrian areas, like those in hotels, particularly those areas where the presence of speedy vehicles would not necessarily be expected or anticipated by the ordinary person. In this regard, Segway® riders more resemble skateboarders, bicyclists, and roller skaters than they do wheelchair users.[14] What might be safe on a dedicated recreation path or broad sidewalk is not necessarily (indeed,

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disbursing the government's fisc, concepts of consistency and fairness should seemingly preclude that same federal government from imposing the costs of Segway usage (e.g., additional costs of liability or accommodating structural changes) upon the private sector through the ADA.

[14] For example, under Virginia law, Segways are classified in a category with roller skates, skateboards, and bicycles. See, e.g., Va. Code Ann. § 46.2-904. (Providing that "[t] he governing body of any county, city, or town may by ordinance prohibit the use of roller skates and skateboards and/or the riding of bicycles, *electric personal assistive mobility devices,* or electric power-assisted bicycles on designated sidewalks or crosswalks, including those of any church, school, recreational facility, or any business property open to the public where such activity is prohibited. Signs indicating such prohibition shall be conspicuously posted in general areas where use of roller skates and skateboards, and/or bicycle, *electric personal assistive mobility devices* or electric power-assisted bicycle riding is prohibited (emphasis added).").

is probably never) so on a hotel's swimming pool deck or in a lobby. Relatedly, many states have passed laws specifically authorizing Segway® use, usually, however, limiting use to sidewalks and bike paths, areas where the use of faster modes of individual transport (e.g., bikes, rollerblades) would ordinarily be reasonable. www.ghsa.org/html/stateinfo/laws/segway_laws.html (last visited July 28, 2008) (Chart of state laws pertaining to Segways®).[15]

Third, Segways® do not share the dimensions of wheelchairs, toward which much ADA compliance has been dedicated. For instance, a person using a wheelchair presents a relatively short profile. Pursuant to ADA requirements, the hotel industry has spent hundreds of millions of dollars on accommodations for this relatively short profile by building lower-height service counters, vanities, etc. Segways® result in a dramatically taller user profile, for which accommodations have never been made. [16] It is not specious to ask whether Segway®-height countertops or bathroom vanities might be required under the proposed regulations. Any future law or regulation geared toward the dimensions of a wheelchair (e.g., the dimensions of a countertop or type of door) would require accommodation for Segways®.

Since Segways® are so significantly different than wheelchairs, the AH&LA recommends a different approach, namely that Segways® be considered OPDMDs, subject to the OPDMD-related regulations.

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[15] Notably, some of the state laws allow local authorities to impose stricter limitations on the use of Segways.

[16] Moreover, local and standardized national building codes such as the IBC establish doorway, guardrail and hand rail heights based on widely accepted anthropomorphic data of human beings standing at floor level. Standing on a Segway increases both the height and center of gravity of individuals by at least eight inches. Individuals within ordinary ranges of height may not appreciate the height and mass center differential while riding a Segway and experience head bumping at doorways and architectural features or even catastrophic "flips" over balcony rails.

V. CONDO-HOTELS

The Department has posed several questions about how the ADA's rules for traditional transient lodging facilities should apply in the condo-hotel and timeshare context. As explained below, unlike traditional transient lodging facilities in which all the overnight accommodations units are owned by a single entity, each unit in a condo-hotel or timeshare facility is owned by one or more individual owners. This very key distinction makes compliance with the ADA's traditional transient lodging rules literally impossible, and requires the development of special exemptions for these facilities.

At the outset, a discussion about some basic but key facts that are common to virtually all condo-hotels should be discussed.

All condo-hotels share several key characteristics. All condo-hotels facilities consist of condominium units that are each owned by individual owners. The sleeping/living accommodations can take the form of apartment units, townhouse units, or even separate cottages. These units are sometimes in a single building or they can be spread out in multiple buildings over many acres. Depending on when they were built, existing condo-hotel facilities may (or may not) have accessible units.

Key to this discussion is the fact that in virtually all condo-hotels, the owners of the units can chose to place their units in any rental program or in no program at all. The developer of a condo-hotel cannot materially restrict an owner's use of the property or require the owner to participate in a rental program. The SEC made clear in SEC Release No. 33-5347 as follows:

> [T]he offering of condominium units in conjunction with any one of the following will cause the offering to be viewed as an offering of securities in the form of investment contracts:
> . . .
> 3. The offering of a rental or similar arrangement whereby the purchaser must hold his unit available for any part of the year, must use an exclusive rental agent or is otherwise materially restricted in his occupancy or rental of his unit.

SEC Release No. 33-5347, Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development (Jan. 4, 1973) (Attachment 13). Consequently, most condominium developers do not impose such restrictions when the units are sold. If an owner decides to rent his or her unit as a short term vacation rental, that owner can select any rental agent/management company to lease and manage the unit. The facility may have an on-site management company that offers a rental program, but the unit owner has no obligation to place his or her unit into this onsite rental program. As a result, there usually are multiple rental/property management agents competing for the right to rent and manage units at a single facility, even though only one such rental agent may be located onsite and affiliated with the condo-hotel operator. AH&LA assumes that the Department is only considering requiring the operator of the "official" onsite rental program for the facility to comply with the ADA, not rental agents/management companies located offsite.

The facts stated above apply to the full spectrum of condo-hotels, and that spectrum is broad. On the one end are those facilities that are virtually indistinguishable from a hotel from the public's perspective. Many of these facilities operate under a national hotel brand. The units that are offered by the onsite rental program operator at these types of facilities are typically all furnished the same way and have the same amenities, just as in a traditional hotel. On the other end of the spectrum are facilities that are composed of units that have been modified and decorated to the owners' taste and that are each different from one another. The operator will not be a part of a national hotel chain. It will be obvious to the public that these units are in fact individually owned, and minimum stays of a week or more may be required. The common amenities may also be much more limited in these types of facilities, and there may be only a few people in a small office running the rental program.

Another point to consider is the fact that many condominium complexes that have units rented as transient lodging were not required to be constructed to comply with the ADA in the first place. Some of these complexes were designed without the intention that they would serve as transient lodging and were only made to comply with the Fair Housing Act. Thus, there may be no ADA accessible rooms in some of these complexes.

Some of our members reported that, even in facilities where the rental programs operate under national lodging brands and the units in the rental programs must comply with brand standards, the operator of the rental program has no right to make structural changes to any unit without the owner's permission. Thus, while the operator of an onsite rental program theoretically could demand that an owner make or allow the operator to make a unit accessible as a condition of being in the rental program, this demand would not necessarily result in the inclusion of an accessible unit. A unit owner confronted with such a demand could simply choose to not join the rental program offered by the facility operator and use a rental/management company that is not onsite.[17] Furthermore, there would be no way for an on-site operator to fairly decide which of the hundreds of unit owners should be required to make their units accessible in order to participate in its rental program.

Because the unit owners in a condo-hotel cannot be compelled to place their units in the on-site rental program or to make their units accessible, there is no way for an operator to ensure that any accessible units, let alone the number required by the 2004 ADAAG, are in its rental program. The requirement that an operator must also provide accessible rooms dispersed across different room categories, amenities, views, etc., would also be impossible to comply with. For

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[17] We presume that the Department is not seeking to cover under the ADA the many offsite rental managements agents not affiliated with the operator of the facility. Such coverage would be even more untenable because these entities each only rent a small number of units and are even less likely to have any accessible units under their management.

this reason, the answer to the Department's Questions 51, 53, and 55[18] is that the operators of condo-hotels cannot be required to offer any accessible rooms at the facilities that they operate. To do so would require the impossible, and we firmly believe that such a requirement would not survive a legal challenge.

The Department's Question 54 asks what actions operators of condo-hotels might take to ensure that a requisite number of accessible rooms are included in the onsite rental program. As discussed above, the rental program operator cannot compel any owners to be in the rental program or to effectively make any participating owners make accessibility changes to their units. Providing incentives for owners of accessible units to place their units in the rental program – presumably with better rental contract terms and conditions – is not meaningful option for several reasons. First, it still does not ensure that the requisite number of accessible rooms is in the rental program, let alone the requisite number dispersed across all the different room categories, amenities, and views. Second, for the incentives to have any effect, they would have to be economically significant. Because most of the rental income for any given unit is paid to the owner and a small percentage is retained by the operator of the rental program to the cover the expenses of the rental (housekeeping, linens, etc.) plus a small management fee, the

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[18] Question 51 asks: "The Department requests comments on determining the appropriate basis for scoping for a time-share or condominium-hotel. Is it the total number of units in the facility, or some smaller number, such as the number of units participating in the rental program, or the number of units expected to be available for rent on an average night the most appropriate measure?"

Question 53 asks: "The Department believes that the scoping and technical requirements for transient lodging, rather than those for residential dwelling units, should apply to these places of lodging. Is this the most appropriate choice?"

Question 55 asks: "How should the Department's regulation establish the scoping for a time-share or condominium-rental facility that decides, after the sale of units to individual owners, to begin a rental program that qualifies the facility as a place of lodging? How should the condominium association, operator, or developer determine which units to make accessible?"

Department would be essentially be requiring these onsite rental program operators to forgo these payments in order to provide accessible rooms.

Requiring on-site rental program operators to essentially pay for the cost of providing accessible rooms in perpetuity is a tax that is simply not fair and could result in such operators discontinuing their services altogether. It is important to keep in mind that not all on-site condominium rental programs are operated by large national hotel management companies. Requiring small operators to forgo their management fees on a substantial number of units to provide "incentives" will be a substantial burden on these businesses, many of which may decide that the profit margins not sufficient to continue doing business.

The onsite rental program operators would not be able to spread this cost by charging higher management fees for the non-accessible units because, if they do, they will not able to compete with the off-site rental agents/management companies that would not have to provide incentives. Owners would leave the on-site rental program and use other rental/management companies that can charge lower fees. It goes without saying that if the Department were to consider a rule that would impose such burdens on the operators of on-site rental programs, it must do a thorough cost benefit analysis of such a rule. AH&LA is confident that the cost of such a requirement, disproportionately imposed on a single entity that is not in a position to redistribute the cost, could not be justified.

Question 54 also poses the question of whether "the facility developer, the condominium association, or the hotel operator have an obligation to retain ownership or control over a certain number of accessible units" to ensure that a sufficient number of such units are in the inventory

of the onsite rental program.[19] This question presumably only applies to facilities constructed after the issuance of the Final Rule where the units have not already been sold.

There are a number of serious problems with withholding all accessible units from sale, not the least of which is that it deprives persons with disabilities the right to purchase such a unit, and may well constitute discrimination under the ADA. See 42 U.S.C. § 12182(a)-(b)(1)(A)(i)&(ii).[20]

Limiting a developer's ability to sell the accessible units poses other problems as well. First, it may constitute an unlawful taking. Second, if the developers seek to redistribute the cost of these units across all units, the prices of the non-accessible units will go up substantially. The effect could be quite dramatic in a smaller development, and could make the entire project untenable. For example, a facility of ten units costing $500,000 each would be required to have one accessible unit. If the developer could not sell one unit, the $500,000 cost of that unit would have to be redistributed over the other four units which would now cost $550,000, or 10% more. This may make smaller projects impossible to develop because the per unit price of units in

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[19] Question 54 states: "How should the Department's regulation provide for a situation in which a new or converted facility constructs the required number of accessible units, but the owners of those units choose not to participate in the rental program? Does the facility have an obligation to encourage or require owners of accessible units to participate in the rental program? Does the facility developer, the condominium association, or the hotel operator have an obligation to retain ownership or control over a certain number of accessible units to avoid this problem?"

[20] It is also worth noting that, so long as the ADA accessible units are built by the developer in the first instance, the benefit to people with disabilities already exists regardless of whether that unit becomes a part of the onsite rental program. Those units may well become rented through another channel or used by an owner with a disability and would be available to persons with disabilities that way.

smaller projects would be substantially higher than those in larger projects where the cost of the accessible units can be distributed over a greater number of units.[21]

Third, requiring developers to maintain ownership of the accessible units is tantamount to requiring them to change their business model and become property owners, as opposed to developers. This would be particularly problematic for smaller developers that may not have the resources to make such investments that can never be divested.

Requiring the units to be a part of the common elements which are owned by all of the individual unit owners is not a solution for at least two reasons.

First, the common ownership will result in the pooling of rental income that will transform the owners into participants of a rental pool. In SEC Release No. 33-5347, the SEC made clear that rental pools are "securities" under the Securities Act of 1933 and that the selling of condominiums that involves "the offering of participation in a rental pool arrangement" would be viewed as an offering of securities. See SEC Release No. 33-5347 at 2 (Attachment 13). Coverage by the federal securities laws would not only impose substantial burdens and costs on the developer but also on the individual owners when they go to sell their condominiums.

Second, if the accessible units are collectively retained by the individual owners as common element, the cost of those units will be reflected in an increase in the price of each individual unit. As explained above, prices of condominium units will go up substantially. In addition, this rule would disproportionately impact smaller developments because there will be fewer owners to bear the additional cost. Indeed, some smaller projects may become economically infeasible and not pursued at all.

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[21] A 100-unit facility with units costing $500,000 each would have to have 5 accessible units. If the cost of not selling those units was distributed over the remaining 95 non-accessible units, the price of such units would only go up by $26,316 or 5 percent per unit.

Requiring the operator of the on-site rental program to own the accessible units is also not feasible because the operator would have to make a very substantial investment to purchase all of the accessible units. The dispersion requirements would further drive up the price by requiring ownership of every type of unit, including the most expensive ones. It is unlikely that any on-site rental program operator would be willing to take on this burden, as it would not have any effective means of redistributing the cost.

The foregoing discussion makes clear that, while the definition of "place of lodging" can include condo-hotels, the private ownership of the sleeping accommodations in them sets them apart from traditional hotels, motels and inns. Applying the traditional transient lodging rules to such facilities would be trying to fit a square peg into a round hole – impossible. Special rules must be developed for these types of facilities. To that end, AH&LA proposes the following changes to Section 36.406(c) of the Proposed Rule:

> (c) Places of lodging. Except as provided in Section (d) below, places of lodging~~, including inns, hotels, motels, time-shares, condominium hotels, mixed-use, and corporate hotel facilities subject to the proposed standards~~ shall comply with the provisions of the proposed standards that apply to transient lodging, including, but not limited to the requirements for transient lodging guest rooms in sections 224 and 806.
>
> (d) Places of lodging consisting of overnight accommodation units that are separately owned by individual owners (e.g. condominiums) are not required to comply with the accessible transient lodging guest room requirements in sections 224 and 806 but they shall be designed and constructed in compliance with sections 224 and 806.

AH&LA proposes the following changes to the definition to the "place of lodging" definition:

Sec. 36.104 Definitions.

Place of lodging. For purposes of this part, a facility is a place of lodging if it—

(1) Provides ~~guestrooms~~ accommodations for sleeping for stays that are primarily short-term in nature (generally ~~two weeks~~ thirty consecutive days or less) ~~where the occupant~~

~~does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay~~;

(2) Under conditions and with amenities similar to a hotel, motel, or inn, including—

(i) An on-site proprietor and reservations desk,

(ii) Rooms available on a walk-up basis,

(iii) Linen service,

(iv) Accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit, and

(v) the in-room décor, furnishings and equipment being specified by the owner or operator of the lodging operation rather than generally being determined by the owner of the individual unit or room.

The term "accommodations" is more appropriate than "guestrooms" because in many facilities, the units in question can be apartments, townhouses, and even stand alone guest houses/cottages. Thirty days should be used because stays of fewer than thirty consecutive days are generally considered to be short-term, as opposed to residential, rentals.[22] Subsection (v) has been added to further distinguish between a place of lodging and a private residence that may provide short-term rentals.

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[22] Question 52: The Department's proposed definition of "place of lodging" includes facilities that are primarily short-term in nature, i.e., two weeks or less in duration. Is "two weeks or less" the appropriate dividing line between transient and residential use? Is thirty days a more appropriate dividing line?

VI. CONCLUSION

AH&LA thanks the Department for considering its comments. Our members stand ready to provide any additional information that may be useful to the Department in developing a Final Rule that is clear, reasonable, and fair.

Respectfully submitted,

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Kevin Maher, Senior Vice President
for Governmental Affairs

INDEX OF ATTACHMENTS

ATTACHMENT NUMBER	DESCRIPTION
1	Letter From M. Vu To Deputy Assistant Attorney General King Dated August 14, 2008.
2	Excerpts From Final Regulatory Impact Analysis Of The Department Of Justice Regulation Implementing Title III Of The Americans With Disabilities Act Of 1990 (December 18, 1991, Revised April 8, 1992)
3	Actual Project Milestones For Ten Renovation Projects By National Hotel Owner
4	Project Milestones For Two New Construction Hotel/Spa Projects By National Hotel Operator
5	Article Entitled “Industry Momentum Can Be Traced To Construction” Published In Hotel & Motel Management (June 2, 2008) by Jan Freitag, Vice President Of Smith Travel Research.
6	Excerpts From American Hotel & Lodging Association 2008 Lodging Survey
7	14 Floor Plans Of Real Existing Accessible Rooms From Two Companies That Own And/Or Operate Hundreds Of Hotels Nationwide
8	14 Prototype Floor Plans Of Accessible Rooms For One Brand From The Last Ten Years
9	Excerpts From Regulatory Impact Assessment Supplemental Results For Various Requirements
10	American Hotel & Lodging Association Informal Survey Results Relating To Frequency Of Toilet And Sink/Vanity Replacement, August 18, 2008.
11	Excerpts From “CapEx 2007 A Study Of Capital Expenditures In The Hotel Industry”
12	Existing Exercise Room Prototypes For 400 S.F., 900 S.F., And 1400 S.F. And Revisions To Such Prototypes In Compliance With 2004 ADAAG
13	SEC Release No. 33-5347, Guidelines As To The Applicability Of The Federal Securities Laws To Offers And Sales Of Condominiums Or Units In A Real Estate Development (Jan. 4, 1973)