

Dear AH&LA members:

As you may know, the U.S. Department of Justice late Monday issued the Final Rule revising the ADA Title III regulations which apply to lodging facilities. On behalf of its members, AH&LA participated in every stage of this rulemaking process starting with the Advanced Notice of Proposed Rulemaking in 2004 and ending with a meeting with the Office of Management and Budget most recently at the beginning of this month. Many of you and other members of your organizations actively participated in this process to provide much needed information to comment on the proposed rule (“NPRM”), and we want to let you know that – while the Department did not agree with all of AH&LA’s positions – your efforts made a meaningful difference on some key issues. Although our ADA counsel who worked with you on this effort is still analyzing the substance and implications of the Final Rule, she has given us some preliminary feedback on the Department’s position on the issues on which AH&LA commented. AH&LA is also working with Seyfarth Shaw to present a webinar on the impact of the Final Rule on the lodging industry which is tentatively scheduled for September.

Compliance Date for 2010 Standards – The NPRM originally proposed that all alterations and construction projects that started 6 months from the date of the Final Rule’s publication would have to comply with the 2010 Standards. AH&LA opposed this timeframe which would disrupt a number of renovation and new construction projects, and proposed a compliance period of 1 year for alterations and 2 years for new construction. The Department adopted an 18-month compliance period which is a much more reasonable timeframe. In addition, AH&LA pointed out that the start of construction is not an appropriate event for defining the application of the 2010 Standards because that date is affected by factors out of the owner’s control, including delays caused by local permitting authorities. The Department accepted AH&LA’s proposal, providing that alterations and new construction projects for which the last permit application is submitted prior to the 18-month Compliance Date can either comply with the 1991 Standards or the 2010 Standards. If no permits are involved in the project, then the date of the start of construction would be the defining event.

Safe Harbor for Elements that Comply with the 1991 Standards as of the Compliance Date. The Final Rule retains the safe harbor in the NPRM under which elements that comply with the 1991 Standards as of the Compliance date (18 months from the publication of the Final Rule in the Federal Register) will not have to comply with the 2010 Standards until they are next altered. AH&LA strongly supported this safe harbor.

Newly-covered elements in the 2010 Standards - The 2010 Standards cover, for the first time, a number of recreational facilities often found at lodging facilities, including exercise facilities, swimming pools, wading pools and spas, steam rooms and saunas, golf and mini-golf courses, fishing piers, and shooting ranges.

*Time to comply.* The NPRM did not specify a timeframe to come into compliance with the new rules for these existing elements, which meant that AH&LA’s members could be exposed to lawsuits as soon as the Final Rule became effective. At AH&LA’s urging, the Department has given public accommodations an 18-month period in which to comply with

these new requirements, if compliance is readily achievable (easily accomplishable without much difficulty or expense, taking into account the financial resources of the business).

*Swimming Pools.* Most owners and operators that have swimming pools will likely have to provide a pool lift or some other means of accessible entry within 18 months, unless they lack the financial resources to do so.

*Exercise Rooms.* AH&LA had expressed the concern that providing a clear floor space adjacent to one of each type of exercise equipment would reduce the number of items that can be included in small exercise rooms. AH&LA obtained a very helpful clarification from the Department on this issue. The Department stated that, for equipment that must be used in a standing position, clear floor space adjacent to the equipment for a side transfer is not required because the person must be able to stand up and walk to use the equipment. Accordingly, the Department stated that the clear floor space can be at the end of the equipment and can overlap with the 36" accessible route through the exercise facility. This commentary is extremely helpful to the lodging industry and will substantially mitigate the effect of this new requirement.

*Steam rooms, saunas, and wading pools.* These existing facilities will have to be retrofitted to comply with the 2010 Standards if doing so is readily achievable. Because the readily achievable standard is the least demanding of all the standards from an owner/operator's standpoint, many facilities may not have to perform substantial work in order to be in compliance with the ADA. No work would be required in small wading pools where creating a sloped entry would neither be readily achievable nor technically feasible.

*Employee Work Area Common Circulation Paths.* The 2010 Standards require, for the first time, that common circulation paths in employee work areas be accessible. In response to comments by AH&LA and others, the Department clarified in its commentary to the Final Rule that the requirement will not apply to existing facilities unless they are altered, and even then, only one common circulation path in each area would have to be accessible. The Department further noted that it may not be technically feasible to provide one accessible common circulation path in some areas if walls have to be moved or if providing such a path results in a loss of space for inventory. The commentary thus appears to provide some flexibility in applying this new requirement in existing facilities.

Expanded toilet clear floor space and vanity requirements. This is one area where the Department did not provide relief to AH&LA's members. The 2010 Standards require a 5' wide space around the toilet, and does not allow anything to be placed in that area. The 1991 Standards allow a vanity to be placed in the area provided that there is still at least 36" of space around the toilet. AH&LA explained that having to comply with the 2010 Standards for these elements in a future alteration would require a reconfiguration of existing guest room baths involving the relocation of plumbing and electrical fixtures, in addition to the possible moving of walls and loss of room count. AH&LA urged the Department to create an exemption for existing hotel guest rooms in the future alterations of these elements. While the Department did not grant this request, other changes in the Final Rule and the Department's commentary

may mitigate the impact of this rule in future alterations. For example, the Final Rule eliminates the existing rule that if enough elements are altered in any given space, then the entire space has to be made fully accessible. Thus, assuming that their bathrooms comply with the 1991 Standards, hotels may be able to make soft-goods renovations in their guest rooms and even make changes in the bathroom without triggering an obligation to comply with the new toilet clear floor space or vanity requirements, provided that these specific elements are left intact. In addition, some of the Department's commentary suggests that compliance with the 2010 Standards may be considered technically infeasible if plumbing stacks, mechanical equipment, and walls cannot be moved.

Reservations Systems. On this subject, the Department was, for the most part, not responsive to AH&LA's comments. The Final Rule requires reservations systems to identify the accessible features of the hotel and guest room. AH&LA requested greater specificity about the information that should be included. In response, the Department declined to identify the specific information that must be provided in the regulation itself. However, its discussion in the accompanying commentary does provide some guidance about what that information might be. One disturbing aspect of the commentary is the Department's suggestion that hotel reservations systems must include *aspects of the hotel that are not accessible*.

The new regulations also require hotel reservations services to hold back the accessible rooms in each room type for use by a person with a disability until they are the last to sell. AH&LA did not oppose this concept generally, but insisted that if the accessible room is the last room of its type, or the only room of its type, that it can be sold to a non-disabled guest. The Department did make this clarification in its commentary.

Third, the new regulations require that, once reserved, accessible rooms be blocked and removed from all reservations systems to eliminate the possibility of double booking. This requirement was not in the NPRM so AH&LA did not have an opportunity to comment on it.

Finally, the Final Rule exempts from the "last sell" and blocking requirements stated above guest rooms that are owned and controlled by individual owners and only rented out for some portion of the time to the public. This is a meaningful benefit for the hotel industry and the individual owners of guest room units.

Condo-Hotels and Timeshares. The NPRM posed a series of questions regarding facilities that consist of individually owned guest room units but have hotel-like common amenities and services. The key question was whether operators of existing facilities would be required to provide a certain number of accessible rooms and how that number would be calculated. AH&LA submitted extensive comments on this issue, explaining that the operators of these facilities have no control over which owners choose to place their units in the rental program; they do not have authority to compel owners to make changes to their units; nor can they purchase accessible units to be rented to the public due to various laws and regulations. The Department accepted these arguments, finding that the owners of the units do not have an obligation to make any changes in their units to make them accessible or to make alterations

that are consistent with ADA requirements. Although this issue requires further analysis, it would seem to follow that operators of these facilities would not be liable for not having a certain number of accessible rooms in the rental pool if the owners cannot be compelled to make their units accessible. The AH&LA did not oppose the notion that public and common areas of existing facilities would have to comply with the ADA or that newly constructed facilities, when constructed, would have to have the number of accessible guest rooms required by the 2010 Standards. The Department adopted this approach.

In sum, AH&LA's comments can be seen throughout the Final Rule's section by section Analysis, and they had a meaningful impact on the Final Rule for the benefit of the lodging industry.