

January 24, 2011

By electronic delivery to:www.regulations.govDisability Rights Section
Civil Rights Division
U.S. Department of Justice
1425 New York Avenue, N.W.
Washington, D.C. 20005

Re: Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation, Equipment and Furniture, RIN 1190-AA64; Docket ID No. 113

Ladies and Gentlemen:

The American Bankers Association (ABA) welcomes the opportunity to comment on the advance notice of proposed rulemaking issued by the Department of Justice (the Department) to consider whether to revise the Americans with Disability Act Title III regulations to ensure that certain equipment and furniture used by public accommodations is accessible to individuals with disabilities (the ANPR).¹ The ABA represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$165 million in assets.

Since the enactment of the ADA, the banking industry has been committed to improving accessibility for the disabled to bank facilities, products, and services. Beginning in the late 1990s, ABA has worked with its members, representatives of the blind, ATM vendors, and the Architectural and Transportation Barriers Compliance Board (the Access Board) to develop workable, practical ATM accessibility standards and reasonable expectations for implementation of those standards. Since the Department's publication on September 15, 2010 of revised ADA Accessibility Standards (the 2010 Standards),² ABA has worked hard to ensure that the banking industry is aware of and understands the new communication-related requirements applicable to ATMs.³

¹ 75 Fed. Reg. 43452 (July 26, 2010).

² See 75 Fed. Reg. 56236 (Sept. 15, 2010).

³ ABA has prepared a Staff Analysis of the 2010 ADA Standards (see *ABA Staff Analysis: Americans with Disabilities Act DOJ Final Rule on ADA Standards for Accessible Design December 2010*, available at http://www.aba.com/NR/rdonlyres/CE8DC4FB-FBD4-4312-B499-9AE051507C8A/69980/SA_ADA_Oneill2010dec.pdf) and hosted a telephone briefing/webcast on the ADA (see *The New ADA Title III Regulations: What Do They Mean for your Bank?*, available at <http://www.aba.com/teleweb/tb120910b.htm>).

However, the Department's simultaneous announcement of an ANPR to consider whether to further revise the ADA Title III regulations to ensure the accessibility of equipment and furniture – and the discussion within that ANPR of questions about the application of the 2010 Standards to so-called “non-fixed” ATMs – has caused considerable confusion. Specifically, our members have questions about whether the Department intends for the 2010 Standards to apply to **all** ATMs as of the compliance date announced in the September 15, 2010 final rule,⁴ or whether at this time the Department intends for the 2010 Standards to apply only to “fixed” ATMs, leaving determinations of accessibility requirements for “non-fixed” ATMs for the current rulemaking. Thus, ABA requests clarification of the Department's intent as to which ATMs must comply with the 2010 Standards by March 15, 2012, and if the Department intends for the 2010 Standards only to apply to “fixed” ATMs, precise definition of what constitutes a “fixed” as opposed to a “non-fixed” ATM.⁵

In the ANPR, the Department notes:

Whether a type of equipment is fixed or not is generally not relevant from the perspective of the user. For example, an ATM or vending machine that is fixed is used for the same purpose and in the same manner as an equivalent ATM or vending machine that is not fixed. To the extent that ADA standards apply requirements for fixed equipment and furniture, the Department will look to those standards for guidance on accessibility standards for equipment and furniture that are not fixed.⁶

ABA agrees with the statement that whether equipment is fixed or not is irrelevant from the user's perspective. We also note that a significant number of “unfixed” ATMs are operated by non-bank, retail ATM operators, and as noted in ABA's comment to the Department's 2008 proposal, to adopt different accessibility standards for these ATMs would provide *retail* ATM

⁴ The compliance date applicable to ATMs is another issue that has caused considerable confusion within the banking industry. The compliance date applicable to “auxiliary aids and services” (i.e., the speech output requirements of the 2010 Standards) announced in the final rule was unclear, leaving banks and ATM vendors uncertain about whether the compliance date is March 15, 2011 or March 15, 2012. In an October 13, 2010 letter to Justice, ABA requested clarification of the compliance date, and at ABA's December 9, 2010 ADA telephone briefing, John Wodatch, Chief of the Disability Rights Section, Civil Rights Division of the Department of Justice, stated that the compliance date for upgrading ATMs to comply with the 2010 Standards is March 15, 2012. ABA would encourage the Department to state this clarification in writing so that all financial institutions, ATM vendors and retail ATM operators are aware of the compliance date.

⁵ Presumably, an ATM that is affixed or built into the wall of a public accommodation would be considered “fixed,” and an ATM that is merely plugged into an outlet would be considered an “unfixed” ATM. However, is a stand-alone ATM that is merely bolted to the floor and that may be – and often is – readily unbolted and moved to a different place within one location also considered to be “fixed?”

⁶ 75 Fed. Reg., *supra*, at 43455.

vendors, owners, and network operators with an unfair advantage over banks while failing to promote the accessibility of this growing network.⁷

ABA believes, however, that characteristics common to unfixed ATMs warrant special consideration with respect to the date for compliance with the 2010 accessibility standards. Banks report that many stand-alone, unfixed ATMs are deployed for relationship-building purposes; typically, they are operated for the convenience of a commercial customer's employees. As such, they have limited functionality, do not process large transaction volumes, and generate limited fee income. In addition, because these ATMs are intended to process limited transaction volumes, they are designed and manufactured to be less durable than the multi-function, large volume ATMs that are installed at many bank branch locations.

Our members report that some ATM vendors have announced that they will not support the necessary upgrades to make these stand-alone, unfixed ATMs comply with the speech output requirements of the 2010 Standards. As a result, these machines will need to be replaced or removed from service. While other vendors will support the upgrades, the limited usage of many of these machines means that many banks may decide to remove certain unfixed ATMs rather than incur the costs of the necessary upgrades. Finally, the Department should note that ATM vendors as well as bank operations and IT personnel face significant challenges to upgrade or replace their existing fleets of fixed ATMs that do not comply with the voice-output requirements of the 2010 Standards by the March 15, 2012 compliance date. Banks' limited financial and personnel resources will be deployed first to ensure the accessibility of these ATMs. For these reasons, ABA urges the Department to establish a mandatory compliance date for non-compliant, *unfixed* ATMs no earlier than two years after publication of a final rule on equipment and fixtures. If the Department adopts a more accelerated compliance date, an analysis of the costs and anticipated receipts may result in decisions to remove non-compliant machines rather than replace or retrofit them. Thus, an unintended effect of the Department's action may be a contraction of the number of ATMs available to the public.

The ANPR also invites comment on "events that should trigger the replacement or modification of inaccessible equipment or furniture with accessible equipment or furniture."⁸ Our member banks urge the Department to clarify that preventive maintenance would not constitute a triggering event requiring the modification or replacement of an unfixed ATM that would otherwise be subject to safe harbor.⁹ They explain that many banks enter preventive maintenance agreements with ATM vendors pursuant to which the ATM vendor periodically inspects and cleans the ATM exterior and keyboard and replaces any worn component parts.

⁷ See ABA comment to Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, RIN 1190-AA44; CRT Docket No. 106, August 14, 2008, pp. 5 – 7.

⁸ 75 Fed. Reg., *supra*, at 43455.

⁹ In the final rule published on September 15, 2010, the Department announced that it considers the communication-related requirements of the 2010 Standards to be "auxiliary aids and services" that are not subject to safe harbor. Accordingly, any triggering events resulting in the loss of safe harbor would only apply to the structural accessibility elements of the 2010 Standards.

ABA believes that this kind of preventive maintenance – even if it requires the ATM vendor to remove the ATM for a brief period of time, perhaps even replacing it with another similar model machine that has already been cleaned and serviced – should not constitute an “alteration” resulting in the loss of safe harbor.¹⁰ Rather, we believe that preventive maintenance is similar to the cosmetic improvements, i.e., re-painting a facility or replacing the carpet, which the Department does not consider to be an alteration triggering compliance with the requirements of revised accessibility standards.

Finally, ABA notes that our members operate a small number of ATMs that are affixed to vans that may be parked at public events to provide consumers with convenient access to cash. Banks operate these “mobile ATMs” primarily for customer convenience and relationship building purposes. Our members report that these mobile ATMs are typically older machines that would have to be replaced, rather than upgraded, to comply with the speech output requirements of the 2010 Standards. Considering the limited usage of these mobile ATMs and the cost of replacement, it is likely that the banks that operate them would discontinue this public service rather than replace the ATMs with models that comply with the 2010 Standards. Accordingly, ABA urges the Department to adopt a limited exclusion from the 2010 Standards mobile ATMs.

If you have any questions about these comments, please contact the undersigned at (202) 663-5073 or via e-mail at voneill@aba.com.

Sincerely,



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¹⁰ The removal and replacement of one machine with another is to ensure that no location is ever without an ATM.