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By Electronic Delivery

August 14, 2008

Department of Justice,
Civil Rights Division
ADA NPRM
P.O. Box 2846
Fairfax, VA 22031-0846

Re: Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, RIN 1190-AA44; **CRT Docket No. 106**

Ladies and Gentlemen:

The American Bankers Association (ABA)¹ is pleased to submit its comments to the Department of Justice's (the Department) notice of proposed rulemaking to adopt enforceable accessibility standards under the Americans with Disabilities Act of 1990 (ADA).²

Summary of Comment

ABA supports making public facilities, including Automated Teller Machines (ATMs), accessible to the disabled. Since 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) in an effort to develop workable, practical ATM accessibility standards.

ABA has consistently urged the adoption of a reasonable time frame for implementation of the revised ADA accessibility standards, including the establishment of a safe harbor for elements of existing facilities, such as ATMs, that are in compliance with current accessibility standards. ABA believes that the Department's decision to exclude existing ATMs from such a safe harbor is based on a misinterpretation of the regulation and a flawed factual premise which undermine the Department's regulatory

¹ The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.3 trillion in assets and employ more than two million men and women.

² 73 Fed.Reg.34508 (June 17, 2008); 73 Fed.Reg. 37009 (June 30, 2008) (correction).

burden analysis and impair the quality of the Department's ultimate decision.

In addition, ABA urges the Department to amend the proposed mandatory effective date of the revised standards. ABA asks the Department to clarify that the proposed effective date of six-months following the publication of the final rule applies only to the deployment of new machines. ABA asks the Department to adopt a two-year period following publication of the final rule before the revised standards for existing ATMs become effective in order to provide banks, ATM vendors, and ATM network processors with adequate time to implement the necessary technological and systems changes.

Background

The ADA broadly protects the rights of individuals with disabilities in employment and ensures their access to state and local government services, places of public accommodation, and transportation.³ The ADA requires the Department to adopt, interpret, and enforce accessibility standards (the ADA Standards) that are "consistent with the minimum guidelines and requirements" issued by the Access Board. Title III of the ADA prohibits discrimination on the basis of disability in the activities of places of public accommodation and requires newly constructed or altered facilities to comply with the ADA Standards.⁴

The Access Board was established to develop and maintain technical accessibility guidelines for federally funded facilities under the Architectural Barriers Act of 1968.⁵ The passage of the ADA expanded the Access Board's responsibilities "to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities."⁶ On July 26, 1991, the Access Board published accessibility guidelines, and the Department issued a final rule adopting those standards (the 1991 Standards); the 1991 Standards are the current legally enforceable ADA Standards.

In 1994, the Access Board began a ten-year process to revise the 1991 Standards. The result was the publication of the 2004 Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines (the 2004 ADAAG).⁷ Until the Department issues a final rule adopting the 2004 ADAAG as ADA Standards, however, the Access Board guidelines are not legally binding and enforceable. In addition, the extent to which

³ See 42 U.S.C. §12101 *et seq.*

⁴ 42 U.S.C. §12182.

⁵ 42 U.S.C. §4151 *et seq.*

⁶ 42 U.S.C. §12204.

⁷ 69 Fed.Reg. 44084 (July 23, 2004); 70 Fed.Reg. 45283 (Aug. 5, 2005) (editorial changes only).

the 2004 ADAAG requirements are applicable to existing facilities under Title III of the ADA falls within the sole discretion of the Department.

In September 2004, the Department published an advance notice of proposed rulemaking (ANPR) to solicit public comment on a variety of issues concerning its proposed adoption of the 2004 ADAAG as revised ADA standards for accessible design.⁸ On May 26, 2005, ABA filed comments to the ANPR, urging the adoption of a safe harbor excluding existing ATMs from compliance with the 2004 ADAAG and urging the adoption of a mandatory compliance date two years after publication of the final rule. In the current rulemaking, the Department presents the results of its Regulatory Impact Analysis (RIA); responds to comments filed in response to the ANPR; and proposes to adopt standards consistent with Parts I and III of the 2004 ADAAG as ADA Standards for accessible design. With respect to issues concerning ATM accessibility, the Department proposes to exclude existing ATMs that fail to comply with the specific speech output requirements of the 2004 ADAAG from safe harbor and proposes that compliance with the revised ADA Standards become binding six months after publication of the final rule.

The Department's action should not arbitrarily limit safe harbor to barrier removal.

As explained above, the extent to which the Access Board guidelines are applicable to existing facilities under Title III of the ADA falls within the sole discretion of the Department. As a preface to its safe harbor discussion, the Department acknowledges,

One of the most important issues that the Department must address is the effect that supplemental or changed ADA Standards will have on the continuing obligation of public accommodations to remove architectural, transportation, and communication barriers in existing facilities to the extent that it is readily achievable to do so.⁹

The Department also recognizes its obligation “to strike an appropriate balance between ensuring that people with disabilities are provided access to buildings and facilities and potential financial burdens on existing places of public accommodation.”¹⁰ Accordingly, one of the central issues of this extended regulatory process has been the establishment of an appropriate safe harbor for existing facilities, and ABA has consistently urged the adoption of a safe harbor for existing ATMs that comply with the 1991 Standards. As the Department acknowledges, considerations of fairness, cost, and efficiency all call for the

⁸ 69 Fed.Reg. 58768 (Sept. 30, 2004).

⁹ 73 Fed.Reg., *supra*. at 34514-34515.

¹⁰ *Id.* at 34515.

establishment of a safe harbor. ABA believes, however, that the decision to exclude existing ATMs from safe harbor is based on a mischaracterization of the nature of an ATM, a misinterpretation of the ADA regulation, and a flawed factual premise.

After stating its intention to adopt a safe harbor which excuses existing elements and facilities that comply with the 1991 Standards from compliance with the revised standards of the 2004 ADAAG, the Department makes a surprising announcement, “The safe harbor applies only to readily achievable *barrier* removal; the Department is not planning to apply a safe harbor to the requirement for auxiliary aids and services. ATMs that lack speech output are not eligible for a safe harbor” (emphasis added).¹¹

Although the Department does not elaborate further on the basis for its decision, ABA believes that the Department’s conclusion mischaracterizes the nature of an ATM. ATMs are unique among the kinds of facilities the ADA covers. They are a kind of hybrid facility that combines physical elements, governed by specific *structural* accessibility requirements, with technological and communicative elements. Moreover, the integration of the physical elements with the communicative and technological elements makes separation of one from the other impossible, making the “communication barriers structural in nature” as contemplated by section 36.304. Therefore, to relegate ATM accessibility issues only to ADA section 36.303, which applies to “auxiliary aids or services,” ignores the unique nature of an ATM and the integration of its communicative and structural elements.¹²

For example, under the Community Reinvestment Act (CRA) implementing regulations, an ATM is defined as “an automated, *unstaffed* banking facility...at which deposits are received, cash dispersed, or money lent.”(emphasis added) Unlike airport check-in kiosks that are an adjunct to a staffed check-in process, bank ATMs are independent physical facilities that are unstaffed, generally affording round-the-clock service without human intervention. For bank ATMs, their design as unstaffed facilities is a structural component of their existence that gives rise to the communication barriers that result.

Moreover, nothing in the ADA or its implementing regulation limits the application of a safe harbor to barrier removal. The concept of a safe harbor is entirely a creation of the Department as it discharges its responsibility to determine the applicability of revised accessibility guidelines to elements of *existing facilities*, and there is no reason that

¹¹ *Id.* at 34534.

¹² In addition, ABA believes that confusion will result if the Department intends to analyze speech output requirements under section 36.303 and the many other accessibility requirements under section 36.304. This will unnecessarily complicate compliance efforts and add a level of uncertainty as to which standard applies.

structural barriers should be distinguished from other barriers to accessibility. ABA urges the Department not to introduce this arbitrary distinction.

Finally, ABA believes that the Department misreads the regulation when it concludes that section 36.304(a), the provision governing barrier removal, is limited to physical barriers. Indeed, section 36.304(a) expressly includes communication barriers; it provides: “A public accommodation shall remove architectural barriers in existing facilities, *including communication barriers* that are structural in nature, where such removal is readily achievable.” (emphasis added) Notwithstanding the Department’s assertion that the section is limited to the removal of physical communication barriers, the plain language of this section clearly encompasses the removal of communication barriers. Although the removal of a communication barrier often requires structural changes to elements of a facility, by its very nature a communication barrier is not a physical object in and of itself. Therefore, ABA believes that neither the facts about the nature of an ATM nor the regulatory framework supports the Department’s decision to exclude existing ATMs from the proposed safe harbor.

The Department’s decision is based on an erroneous factual premise.

ABA believes that the Department’s willingness to exclude ATMs from safe harbor was based, in part, on an erroneous factual premise—the belief that ATMs have a relatively short useful “life” of between seven to nine years, and the ensuing assumption that ATMs are regularly replaced on that schedule. Thus, the Department concluded, “Because new ATMs are generally equipped with speech output, this is a limited-time issue that really affects a discrete group of stand-alone ATMs in rural areas or small retail locations, like gas stations or convenience stores.”¹³ Current facts about ATM replacement schedules, however, undermine this conclusion.

Although ATM vendors and ABA member banks anticipated a seven to nine year ATM depreciation and replacement schedule in 2004 when ABA filed its comments to the ANPR, the passage of time and technological advancements have rendered that information inaccurate. Banks now report the use of ten-year depreciation schedules for ATMs and an *average* ATM “age” of ten years,¹⁴ with many individual ATMs in service that are considerably older than ten years. In fact, only a few of the largest financial institutions replace their ATMs on a seven to nine year schedule. The vast majority of bank replacement cycles are considerably longer than anticipated at the time of the ANPR; they range between 10 and 15 years.

¹³ *Id.*

¹⁴ Note that the 10 year figure is an *average* that obviously includes the “younger” ATMs operated by the largest banks that replace ATMs on a seven to nine year schedule.

ATM vendors and ABA member banks attribute extended ATM “life spans” to the fact that ATMs are often manufactured from component parts that can be replaced as they wear out, obviating the need and expense of replacing the entire machine. ATM vendors also enter into service contracts with banks which permit banks to take full advantage of component replacement to extend a machine’s useful life. Today, only a few financial institutions pursue a business strategy that calls for an ever-expanding network of the most technologically sophisticated ATMs available. Most banks provide ATMs as a convenience to their customers who use them for routine transactions only. Because older ATMs are fully capable of completing these transactions, there is no need to replace a functioning ATM with a new one at a cost of between \$12,000 and \$50,000. Keeping the cost of ATMs low has facilitated expansion of their number and availability to customers.

ABA also notes that ATM vendors did not even begin to manufacture ATMs that complied fully with all of the speech output requirements of the 2004 ADAAG until 2004. ATMs that comply with all of the keyboard specifications—including the tactile specifications added by the Access Board in 2002—were not available until 2007. Thus, even assuming a seven to nine year replacement cycle, there has not been adequate time for the vast majority of non-compliant ATMs to be replaced, even on the assumed shorter replacement cycle.

These facts refute the Department’s postulation that the issue of ATM compliance is a “limited-time issue that really affects a discrete group of stand-alone ATMs in rural areas or small retail locations, like gas stations or convenience stores” and its suggestion that any ensuing compliance burdens might be lessened by drafting a “narrowly drawn exception for small stand-alone ATMs, in which entities would be allowed to purchase used ATMs without speech output in certain circumstances.”¹⁵ In fact, evidence suggests that a *majority* of financial institutions continue to operate machines that pre-date the speech and keyboard requirements of the 2004 ADAAG, and ABA urges the Department to reconsider its decision to exclude existing ATMs that comply with the 1991 Standards from safe harbor.

As mentioned above, the Department offers for comment the option of a “narrowly drawn exception for small stand-alone ATMs, in which entities would be allowed to purchase used ATMs without speech output in certain circumstances.” ABA believes that this proposed exemption is also a result of an unsubstantiated factual premise. The Department apparently assumed that as banks replace ATMs installed at branch locations, some may be sold or deployed to serve as stand-alone ATMs in “rural areas or small retail locations.” ABA member banks and ATM vendors, however,

¹⁵ *Id.*

report that this is not the practice. Instead, when a bank purchases a new ATM, the old ATM is returned to the vendor as part of the transaction. Depending on the age, condition, and operating system of the ATM, the vendor may choose to refurbish the machine and re-sell it, but individual banks do not sell or redeploy “old” ATMs to rural areas or to serve as stand-alone ATMs in retail establishments. Moreover, ATM vendors report that they only refurbish and re-sell ATMs that can be made to comply with the 2004 ADAAG; thus, the perceived need for the proposed exception does not exist.

ABA member banks object to the proposed limited exception. Banks that operate stand-alone ATMs in retail locations do not differentiate between installed branch ATMs and stand-alone ATMs. When purchasing new machines, both branch and stand-alone ATMs have the same hardware and software capabilities and tie into the bank’s network through the same network provider. Moreover, banks report that their schedules for ATM replacement and upgrades do not differentiate between branch and stand-alone ATMs; all will eventually be fully compliant with the ADA Standards. Bank operated stand-alone ATMs are to be distinguished from privately owned and operated ATMs located at retail establishments. ABA believes that to carve out an exception from accessibility standards for “small, stand-alone ATMs” is not only unnecessary, it would provide *retail* ATM vendors, owners and network operators with an unfair advantage while failing to promote the accessibility of a growing network of ATMs.

The Department underestimates the regulatory burdens imposed

In general, ABA commends the Department’s efforts to understand and measure the regulatory burdens imposed by the proposed adoption of the revised Standards. Considering the sheer breadth of facilities and elements affected by the proposed accessibility standards, undertaking a cost-benefit analysis was a formidable effort. Fully recognizing that challenge, ABA believes that the Department seriously underestimates the regulatory burdens imposed by the adoption of the 2004 ADAAG without a safe harbor for existing ATMs.

First, by characterizing the ATM speech requirements an “auxiliary aid or service,” the Department not only excludes existing ATMs from safe harbor, it imposes on financial institutions a higher compliance burden than is required for barrier removal. The standard for barrier removal requires banks to remove barriers that are “readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.”¹⁶ The standard for an auxiliary aid and service, in contrast, requires banks to provide the aid or service unless doing so would result in an “undue burden, i.e., significant difficulty or expense.”¹⁷ Thus, upon

¹⁶ See 28 C.F.R. §36.304(a).

¹⁷ See 28 C.F.R. §36.303(a).

adoption of the final rule, not only will banks be required to expend more resources to ensure ATM accessibility for the blind, they will be subject to lawsuits challenging the adequacy of their expenditures. ABA challenges the Department's regulatory burden analysis insofar as the Department's discussion of the ATM accessibility issue never mentions either the higher compliance burden or the potential litigation costs.

Second, the Department's Regulatory Impact Analysis (RIA) estimates the incremental cost of compliance for particular elements, including the expense of retrofitting existing ATMs to make them comply with the 2004 ADAAG. The RIA estimates the incremental expense to retrofit an ATM to be between \$1000 and \$3000 per machine. ABA member banks and ATM vendors, however, estimate that the cost of retrofitting each ATM to be considerably higher than the RIA estimate. Retrofitting ATMs to provide speech capability poses significant challenges and costs, depending on the age and operating system of the ATM, its software, and the capabilities of the network provider. For newer ATMs that run on a Windows-based operating system, the upgrade requires the installation of hardware permitting the text to speech function; the purchase and installation of software enabling text to speech capabilities; and the installation a head-phone jack. ATM vendors estimate the cost of this upgrade to *begin* at \$3000 per machine.

For older machines that run on an OS2 operating system, in contrast, the upgrade requires extensive hardware changes, including installation of an updated segment processor and replacement of the OS2 operating system with a Windows-based system in addition to the hardware and software changes noted above. The total cost for these upgrades is estimated to be as high as \$6000 to \$8000 per machine. Vendors report that satisfactory retrofit technology may not even be available for many machines that are 12 years or older. Therefore, these ATMs may have to be replaced at a minimum cost of \$12,000 for a very basic cash dispensing machine to \$50,000 for a fully-featured machine. Finally, these costs do not include the significant internal labor costs banks will incur as Information Technology (IT) employees must be reassigned from their usual duties to implement the necessary hardware and software upgrades.¹⁸

ABA believes that in today's economy in which financial institutions face narrowing profit margins and ever increasing compliance responsibilities, requiring banks to retrofit or replace each non-compliant ATM would in fact constitute an "undue burden." However, disability groups are sure to challenge this assertion, and debate will rage with plaintiffs' counsel about

¹⁸ ABA also points out that most existing ATMs will also require a hardware and software upgrade to make them comply with the 2004 ADAAG requirements for tactilely discernable function keys (see ADAAG Section 707.6.3.2). ATM vendors estimate the cost of this upgrade to be at least \$2000. It is unclear whether the RIA cost estimate includes the incremental cost of compliance with section 707.6.3.2's keyboard requirements.

what constitutes an “undue burden”—a fact issue that will likely await determination at trial, an expensive and time consuming proposition.

In light of the current facts about ATM replacement cycles and the true cost of retrofitting ATMs, the need for safe harbor is clear, and ABA urges the Department to reconsider its safe harbor decision. ATM accessibility cannot yet be dismissed as a limited-time issue that affects only a discrete group of ATMs. To exclude existing ATMs that comply with the 1991 Standards from safe harbor will have a huge financial impact on banks as they are forced to replace or retrofit ATMs on an accelerated schedule or face the threat of litigation.

ABA member banks also report that increased consumer use of debit cards—particularly, the increased use of debit cards for small dollar point of sale transactions—has resulted in a decrease in ATM use and fee income in recent years. Accordingly, if the Department does not provide a safe harbor for existing ATMs, an analysis of the costs and the 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 Department must clarify the proposed effective date and allow two years between the final rule and mandatory compliance for non-compliant ATMs.

The Department has asked for comment on the appropriate effective date of the revised ADA Standards, suggesting mandatory compliance for new construction and alteration projects that commence six months after publication of the final rule. The Department also offers for comment alternative “triggering events” to the start of construction for facilities or elements that do not require building permits. For example, for prefabricated elements or installed equipment, such as an ATM, the Department proposes that the start of construction means “the date on which site preparation begins.”¹⁹ ABA supports the Department’s proposal for new construction and alterations, but ABA urges the Department to make it clear that the ATM trigger will only apply to the installation of *new* ATMs at altered or newly constructed sites. For the reasons previously discussed, and for the purposes of the discussion of this element of the proposal, ABA renews its request that the Department apply a safe harbor to existing ATMs that comply with the 1991 Standards.

In addition, ABA requests that the Department add a provision establishing a mandatory compliance date for non-compliant *existing* ATMs no earlier than two years after publication of the final rule. Even assuming a safe harbor for ATMs, there will remain a class of ATMs not

¹⁹ 73 Fed.Reg., *supra* at 34543.

covered by the proposed effective date: existing ATMs that do not comply with either the 1991 Standards or the 2004 ADAAG. ABA urges the Department to allow banks sufficient time—at least two years following publication of the final rule—to replace or retrofit these machines.

Despite the Department’s assertion, that “The current situation is substantially different from the conditions that prevailed in 1990 when the ADA was first enacted. Covered entities are no longer dealing with a new statutory obligation”²⁰ ABA contends that attenuating circumstances distinguish the situation with respect to ATM accessibility requirements. It is true that banks have been aware of the revised accessibility standards since 2004, but there has been a reasonable assumption that the final rule will include either a safe harbor for existing ATMs that comply with the 1991 Standards or an exemption from particular standards. As a result, most banks have sought to move toward the goal of increased ATM accessibility gradually, deploying new, compliant machines to new locations and replacing “old” ATMs with new compliant models in a reasonable fashion and on a reasonable schedule. However, as previously discussed, the usable life of an ATM is considerably longer than originally anticipated, and the rate of ATM replacement has not been as fast as anticipated by the Department.

Even assuming that the Department reconsiders its decision and provides a safe harbor for ATMs that comply with the 1991 Standards, ABA member banks report that a significant number of non-compliant ATMs will remain in service. These ATMs will need to be replaced or retrofitted, a complicated process that requires the coordination of the ATM vendor’s sales and service teams, bank facilities and IT personnel, and third-party network processors. The purchasing power of large banks may very well command the first attention of third-party ATM vendors and network processors, but even large banks believe that anything less than a two year implementation period will strain their resources and will be almost impossible to meet.²¹ Small banks will encounter the greatest compliance challenges. Compliance will require the diversion of limited bank IT and facilities employees from other projects, and small banks will be forced to wait for the attention of critical third-parties. Small banks are also unlikely to benefit from the volume purchase and service discounts offered to larger institutions. To mitigate these negative effects of compliance, ABA urges the Department to allow two years between publication of the final rule and the mandatory compliance date.

A more reasonable period of time may also afford enough time for the injunctive relief to be ordered in *American Council of the Blind v. Paulson*, 525 F.3d 1256 (C.A.D.C. 2008), a decision that could have a significant

²⁰ *Id.* at 34542.

²¹ Compliance with a six-month effective date will also result in significant inconvenience to bank customers as banks attempt to replace or retrofit a large number of ATMs; a large number of ATMs will have to be taken out of service as the upgrades are made.

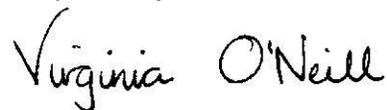
effect on ATMs. In *American Council of the Blind*, an advocacy group for the blind and two visually impaired individuals sued the Secretary of the Treasury alleging that the Treasury Department violated section 504 of the Rehabilitation Act by failing to issue paper currency that is readily distinguishable by the visually impaired. The United States District Court for the District of Columbia granted the plaintiff's motion for summary judgment, holding that accommodations to help the visually impaired were reasonable and that the Treasury's failure to design and issue readily distinguishable paper currency denied the visually impaired meaningful access to currency. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed and remanded the case so that the district court can address the plaintiff's request for injunctive relief. Although the exact form of injunctive relief that will be ordered is unknown, the end result may be a redesign of paper currency affecting the size of the currency or adding other tactile characteristics. This, in turn, could require a re-design of ATMs to accommodate the altered currency. Requiring the accelerated replacement or retrofitting of ATMs in the face of this significant uncertainty would be a mandate to invest in potentially obsolete equipment. This will adversely impact the business case for deployment of ATMs and threaten to reduce the availability of ATMs for all customers. ABA urges the Department to consider this case when deciding the appropriate effective date for ATM accessibility standards.

Conclusion

ABA appreciates the opportunity to comment on the notice of proposed rulemaking. ABA believes that the Department's decision to exclude existing ATMs from safe harbor is based on a misinterpretation of the regulation and a flawed factual premise which undermines the Department's regulatory burden analysis. Accordingly, we request that the Department reconsider its decision to exclude existing ATMs that comply with the 1991 Standards from safe harbor. ABA also urges the Department to clarify the proposed rule effective date of the regulation and to allow two years following publication of the final rule before the revised standards become effective for existing ATMs that do not comply with the 1991 Standards.

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

Respectfully submitted,



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