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Department of Justice
P.O. Box 1032
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**Re: Advance Notice of Proposed Rulemaking
Adoption of Revised Americans With Disabilities
Act Accessibility Guidelines
CRT Docket No. 2004-DRS01
69 *Federal Register* 58768 (30 September 2005)**

The American Bankers Association (“ABA”) is pleased to submit our comments to the Department of Justice’s (“Department”) request for comment on its advance notice of proposed rulemaking regarding adoption of Parts I and III of the revised Americans With Disabilities Act Accessibility Guidelines (“ADAAG”), published by the Architectural and Transportation Barriers Compliance Board (“Access Board”) on 23 July 2004. The Americans With Disabilities Act (“ADA”) requires the Department to adopt enforceable accessibility standards that are “consistent with the minimum guidelines and requirements issued” by the Access Board. As the Department notes, the revised ADAAG has no legal effect on the public until the Department issues a final rule adopting them.

In addition to its responsibility to promulgate standards and to interpret and enforce those standards, the Department must develop regulations with respect to existing facilities subject to Title II and Title III. The Department has discretion in determining how and to what extent ADAAG is used with respect to the readily achievable barrier removal requirement applicable to existing facilities under Title III of the ADA.

The American Bankers Association, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks--makes ABA the largest banking trade association in the country.

BACKGROUND.

The Department is requesting comment on a number of issues, including the appropriate effective date and how to apply the revised ADAAG to existing facilities. ABA is most concerned about both of these issues, particularly with regard to their application to automated teller machines (“ATMs”).

Under the revised ADAAG, ATMs must comply with height and reach requirements and must be speech-enabled. Operating instructions, visible transaction prompts, user input verification, error messages, and displayed information (with exclusions for labels, bank name, etc.) must be audible. Where receipts are provided, balance inquiry information, error messages, and other information on the receipt necessary to complete or verify the transaction must be presented orally. The revised ADAAG also includes requirements for function keys and display screens.

ABA supports making public facilities, including ATMs, accessible to all disabled people. We have worked with blind representatives and submitted comments to the Access Board in the effort to develop a workable, practical standard that ensures that ATMS are accessible to blind people. Generally, we support the revised ADAAG. Our comments focus on the effective date and the application of the revised ADDAG to existing facilities.

EFFECTIVE DATE (Question 1)

The Department has asked for comment on an appropriate effective date, one of ABA’s primary concerns. Sufficient time to digest and implement the new requirements, especially those that require technological and systems changes, such as those for ATMs, is critical. We recommend that for ATMs, the Department allow two years from the publication of final rules to the date of mandatory compliance, especially if the revised ADAAG applies to existing ATMs.

The nature of ATMs and ATM systems is unique among other facilities covered by ADA.

ATMs are unique among the types of facilities ADA covers. ATMs are not “bricks and mortar” facilities, based on architectural specifications that are adjusted by moving an element a certain distance in a particular direction. Nor are they free standing machines like vending machines. Rather, they are machines that rely on technology and electronics, including the hardware and software not only of the ATM itself, but also of the ATM host or third party provider used by most small institutions, and those of the ATM network. In addition, the ATM system relies on multiple, independent parties and parts, often developed independently and over time, and the ability of these various parties and parts to communicate and

understand each other. Adding new elements is not usually simple. Change, in this environment, cannot be immediate.

For ATMs, it is not simply a question of “plug and play,” that is purchasing and installing accessible ATMs. There are literally hundreds of ATM models and supporting systems and multiple ATMs networks involved.

The evolution of ATMs helps explains why. When ATMs were first deployed in the late 1960s, only the customers of the ATM owner could use the ATM. In the seventies, consumer access was enhanced when thousands of banks began sharing ATMs access so that noncustomers could use ATMs. The inherent nature of a shared ATM environment requires interface standards so that each of the varied components can communicate with each other, but variations remain. Thus, enhanced services, including for example, speech capability as envisioned by the revised ADAAG, are limited, and where feasible, difficult to add given the number of parties and potential variations in the facilities involved.

To the user, the ATM system may appear standardized and uniform. In fact, as described above, it is anything but standardized and uniform, making the communication and presentation of additional data, e.g. the conversion and presentation of information into an audible format, challenging. It also ensures that a single solution will not fit all situations. In some cases, it simply will not be feasible.

To conduct a basic transaction such as a cash withdrawal means ensuring that each party in the chain is able to “translate” and communicate the request or approval, even though the systems and equipment vary. Adding a new type of transaction or information for display means altering all parts of the system – the ATM, the ATM network, the processor host and the customers’ bank – a significant challenge and investment.

Because of these variations and limitations, there is no silver bullet that will work for all situations to provide audio capability. What is feasible for one ATM model or one ATM may not be feasible for others. Successful application of a particular solution will depend on the age and sophistication of the individual ATM, the network involved, the software of the ATM network and the ATM owners, and whether the institution uses a third-party processor. This is true whether a new ATM is being installed or an existing one is being retrofitted.

This means that there will be challenges for installing new ATMs that comply with the revised ADAAG as well as retrofitting existing ones where it is feasible to do so. Given these inherent challenges described above that ATM owners face in complying with the ATM provisions of the revised ADAAG, allowing at least two years to comply is necessary.

Time is needed to comply with the ATM provisions of the revised ADAAG because they require technological changes that must be coordinated and scheduled with other information technology (“IT”) projects.

Additional time to bring ATMs into compliance with the revised ADAAG is necessary because they involve technological changes that must be coordinated with other IT projects. IT projects and changes are often scheduled years in advance and inserting new projects into the schedule delays and makes more expensive all projects, as employees are diverted, support and vendors rescheduled, purchases set aside or rescheduled, etc. Moreover, financial institutions, like many other institutions often prohibit commencement of any new IT projects in the last quarter of the year in order to focus on important, required year-end reports and to complete existing IT projects. The effective date of those ADAAG provisions that require IT, should take this important “lock-down” or “black-out” practice into account.

Smaller institutions will especially need sufficient time to comply.

Smaller financial institutions will encounter the greatest challenges in complying with the ATM requirements as they typically lack the resource, including staff, sophisticated systems, and sales volume to command the first attention of the vendors, third party processors, and other parties involved. They are the most likely to be hurt in a “rush” to comply as they compete for the attention of the critical parties involved. Moreover, smaller institutions lack the economies of scale from which larger institutions may benefit.

APPLICATION OF REVISED ADAAG ON EXISTING FACILITIES

The Department has noted that one of the most important issues it must address is the effect that new 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 degree that it is readily achievable. The Department offers three approaches to reduce the regulatory burden in applying the revised ADAAG to existing facilities.

One is to establish a safe harbor. This option would give a compliance safe harbor under the revised ADAAG to any elements of existing facilities that are in compliance with the current ADAAG. The second approach is to reduce the scoping requirements for some of the

new or changed requirements as they are applied to existing facilities. Finally, a third approach is to determine that certain new or revised technical requirements are inappropriate for barrier removal and thus would not be required in satisfaction of a barrier removal obligation. The Department notes that the approaches can be used alone or in combination.

Option one: Safe harbor. (Question 3)

The Department asks whether a safe harbor is an appropriate approach. We strongly urge the Department to provide a safe harbor. As the Department observes, requiring public accommodations to retrofit, renovate, and remodel each time ADAAG is revised provides a strong incentive not to comply voluntarily with the requirement to remove barriers where readily achievable. Public accommodations, knowing that they will have to retrofit, renovate, and remodel with each new version of ADAAG, will be tempted to stall until the next revision. Moreover, a retroactive application for revised ADAAG will attract resistance to revising ADAAG, to the detriment of improved accessibility.

Any potential negative impact of a safe harbor for ATMs on disabled groups is mitigated by the fact that ATMs have a limited useful life. While a few ATMs may be used for longer periods, the typical useful life of an ATM is seven to nine years. Thus, over a fairly short period, existing ATMs that do not comply with the revised ADAAG will be phased out and replaced with ATMs compliant with the revised ADAAG.

The Department also notes, “Elements that are addressed for the first time in the revised ADA Standards, however, would not be subject to the safe harbor.” It is not clear how this approach limiting the safe harbor to “elements” works with some of the ATM requirements, given that the provisions to ensure accessibility to blind users moves from a general requirement in the current ADAAG to more specific requirements in the revised version. The current ADAAG requires that all ATM “[l]instructions and all information for use shall be made accessible to and independently usable by persons with vision impairments.” (Section 4.34.4) The revised ADAAG provides more specific instructions on how ATMs must be accessible to those with vision impairments: e.g. machines must be speech-enabled. Speech must be delivered through a mechanism readily available to all users.

We strongly recommend that the Department adopt the safe harbor approach and make clear that these new specific requirements to provide audio to ensure accessibility by blind users are affecting the same “elements” covered by the existing requirement that ATM instructions and information be accessible to and independently usable by those with vision impairment. In effect, they are the same “elements” in that they are the means for providing access to a particular group. Otherwise, the safe

harbor is meaningless for ATMs, and those who comply with the existing ADAAG in a way different from the revised version will have to repeat efforts and duplicate costs, which the Department has suggested is the argument for adopting a safe harbor approach.

***Option III: Exemption from specified requirements.
(Question 4b)***

The Department is also considering whether to identify particular elements in the scoping and technical requirements in the revised ADAAG that will not be required for barrier removal. It asks that if so, which specific requirements or elements should be addressed.

We strongly endorse this approach and recommend it be adopted in conjunction with the safe harbor approach. Excluding certain requirements or elements, where appropriate, will help create clarity to aid compliance and avoid unnecessary and expensive debate and litigation over application of the revised ADAAG to existing facilities and over interpretation of its provisions.

Specifically, we ask that the Department exempt existing ATMs from Section 707.5 (Speech output) and Section 707.6.3 (Input: Function keys.)

We suggest that the Department exempt existing ATMs from the barrier removal requirement with respect to the provisions related to speech output for a number of reasons. First, the impact of any exception for ATMs is minimized by the fact, noted earlier, that ATMs have a limited useful life of seven to nine years. Thus, over a fairly short period, the vast majority will be replaced with ATMs that comply with the revised ADAAG.

Second, as discussed earlier, retrofitting ATMs to provide speech capability poses significant challenges and potential costs. The number of types of solutions and the cost of solutions will vary depending on a host of factors, including the sophistication and capabilities of various systems, components, and parties involved in the ATM system. Debate with plaintiffs' attorneys will rage about what is readily achievable. In cases where it is not technically feasible to upgrade the existing ATM, we can expect plaintiffs to argue that those ATMs should be replaced. However, even where the cost of adding the audio component is arguably "readily achievable," based on current experience with speech-enabled ATMs today, the cost of each individual audio-based transaction will invariably be very expensive. Banks that have deployed speech-enabled ATMs report limited usage of the audio element. One bank reported that, on a monthly basis, only .0017, or less than 1/5 of 1%, of ATM transactions used the audio element. That percentage of course will shrink as more ATMs become speech-enabled. Thus, the cost of each audio-based

transaction could be very high even in cases where adding the audio component may arguably be “readily achievable.”

Finally, we are concerned that if compelled to retrofit at too great a cost, some ATM owners will either 1) increase ATM usage fees, or 2) remove ATMs, eliminating consumer convenience.

We also recommend that the Department exempt from the requirement to remove barriers where readily achievable the provision related to the function keys. While not a problem for new ATMs, it will pose a problem for institutions replacing keyboards on some existing ATMs. Keys are positioned to hook up to the appropriate connection on the machine. The keys of a new keyboard with a different configuration will not be in the appropriate position to be connected without extensive and expensive reconfiguration. Thus, a simple task becomes very expensive. To avoid unnecessary debate and litigation, we suggest the Department create an exception for keyboards.

Clarification of barrier removal.

If the Department does not exempt the speech output provisions from the barrier removal requirement, it should clarify that “removal of communications barriers” includes providing speech output on ATMs as required in the revised ADAAG. This will add clarity and thereby aid compliance and help to avoid unnecessary litigation. Because of the nature of communication devices, removal of communications barriers must entail, in most cases, addition of some communications devices.

Conclusion

ABA appreciates the opportunity to submit our comments on the Department’s advance notice of proposed rulemaking on this important matter. We strongly recommend that the Department allow sufficient time for compliance with the revised ADAAG, particularly with regard to ATMs. In addition, we support the approaches outlined by the Department to reduce the burdens associated with the requirement to remove barriers where readily achievable. We believe that the safe harbor approach and the exemption of some provisions from the barrier removal requirement will help avoid unnecessary debate and litigation with minimal impact on accessibility.

Sincerely,

Nessa Eileen Feddis