

Advocacy Recommends Additional Small Business Flexibilities for Americans with Disabilities Act Regulations

On August 6, 2008, the Office of Advocacy (Advocacy) filed a comment letter with the Department of Justice (DOJ) on their Notice of Proposed Rulemaking (NPRM), *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*. A complete copy of Advocacy's letter to DOJ may be accessed at <http://www.sba.gov/advo/laws/comments/>.

- In June 2008, DOJ published a NPRM proposing revisions to the Department's 1991 regulations implementing Title III of the Americans with Disabilities Act (ADA). Title III sets standards for making buildings accessible for people with disabilities and requires existing facilities to remove barriers that conflict with these standards when such modifications are "readily achievable." The NPRM adopts the 2004 ADA accessibility guidelines (2004 ADAAG) recommended by the Architectural and Transportation Barriers Compliance Board (the Access Board).
- When DOJ released its Advance Notice of Proposed Rulemaking on this rule, Advocacy commented that applying the 2004 ADAAG retroactively would unfairly punish those small businesses that were trying to comply with the 1991 regulations. Small businesses were also concerned that the "readily achievable" standard was still too vague to protect ADA-compliant businesses from lawsuits.
- DOJ's NPRM proposes two safe harbors to address these concerns. Under the "general" safe harbor, existing facilities' compliance with the current 1991 ADA standards may be sufficient to meet the new requirements. The "small business" safe harbor gives credit to small businesses that spend one percent of revenue on ADA modifications.
- At a recent Advocacy roundtable held on this NPRM, small business representatives were supportive of the general safe harbor. However, they were concerned that the small business safe harbor could be interpreted as a minimum spending requirement. Advocacy urges the DOJ to clarify both safe harbor provisions and to publish a Small Business Compliance Guide in conjunction with finalizing the rule. Advocacy also recommends that DOJ include further cost estimates in its Initial Regulatory Flexibility Analysis.

For more information, visit Advocacy's Web page at <http://www.sba.gov/advo>, or contact Assistant Chief Counsel Janis Reyes by email at Janis.Reyes@sba.gov or by phone at 202-205-6533.