

HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION

HEARING: THE DEPARTMENT OF JUSTICE'S GUIDANCE ON
ACCESS TO POOLS AND SPAS UNDER THE ADA

Written Testimony of
Minh N. Vu,
Counsel for American Hotel & Lodging Association

April 24, 2012

Mr. Chairman and Members of the Subcommittee, on behalf of the American Hotel & Lodging Association (“AH&LA”), I want to thank you for the opportunity to testify on the new pool lift requirements that were issued by the U.S. Department of Justice (DOJ) on January 31, 2012, without following any of the requirements of the Administrative Procedures Act (APA), the Small Business Regulatory Enforcement Fairness Act (SBREFA), or Executive Order 12866. This very important issue affects hundreds of thousands of businesses and all state and local governments that operate pools and spas, in addition to all Americans who use these facilities nationwide. The fact that a coalition of business groups that includes the U.S. Chamber of Commerce, the American Association of Pool & Spa Professionals, the Asian American Hotel Owner’s Association, the Real Estate Roundtable, the National Association of RV Parks and Campgrounds, and the World Waterpark Association has formed to object to DOJ’s circumvention of the APA in issuing these new requirements underscores the significance of this issue. Congress must act promptly in order to prevent the harm that will result from DOJ’s issuance of these arbitrary and unexplained new requirements without following the notice and comment rulemaking process mandated by the APA.

The AH&LA represents a wide variety of hotel owners and operators, many of whom are small businesses. I have served as the AH&LA’s outside counsel on issues relating to Title III of the Americans with Disabilities Act (ADA) since 2006. In that role, I have represented the lodging industry in the rulemaking process that led to DOJ’s ADA Title III regulations issued on September 15, 2010 (the “2010 Final Rule”). My practice focuses almost exclusively on federal and state statutes that prohibit discrimination against individuals with disabilities by public accommodations, state and local governments, and housing providers and developers. I represent and advise the owners and operators of hundreds of lodging facilities in matters involving Title III of the ADA.

The lodging industry has been and continues to be committed to ensuring that guests with disabilities have access to its pools and spas. However, it cannot stand by without objecting to DOJ’s last minute imposition of new pool lift requirements without following the APA’s public notice and comment process. This important process ensures that the final regulations are the product of a reasoned process that considered all relevant factors. DOJ dispensed with this process in issuing the new pool lift requirements. The result is new rules that are unexplained, facially arbitrary, and unnecessarily onerous. The new requirements also radically changed the compliance plans of the AH&LA’s members and sent them back to the drawing board only six weeks before the March 15, 2012 compliance deadline.

The obligation of public accommodations to make pools and spas accessible under Title III of the ADA arose under the 2010 Final Rule issued on September 15, 2012. (DOJ also issued on the same date a comparable rule for community pools and spas owned by state and local governments which are also affected by the unlawfully issued new requirements.) The 2010 Final Rule requires public accommodations to provide either a pool lift or a sloped entry for swimming pools, and a pool lift, transfer

wall, or transfer system for spas. The technical specifications for these means of entry are in Section 1009 of the 2010 Standards of Accessible Design (“2010 Standards”), which DOJ adopted as part of the 2010 Final Rule.

The 2010 Final Rule did not exempt existing pools and spas and instead required them to provide the specified means of entry unless a business can demonstrate that it is not “readily achievable” to provide them. For most existing pools and spas, the pool lift is the only feasible entry option due the configuration of these elements, their small size, and deck space limitations. Neither the 2010 Standards nor the 2010 Final Rule state that pool lifts have to be “fixed” or attached to the pool deck, nor do they state that the lifts must be out next to the pool or spa at all times when the facilities are open. Accordingly, the pool lift industry represented to the public that their portable lifts comply with the 2010 Final Rule (including the 2010 Standards) and the lodging industry had no reason to conclude otherwise. Most of the AH&LA’s members planned to purchase portable battery-powered pool lifts that could be brought out upon request and stored when not in use. These portable lifts weigh hundreds of pounds, but they have wheels which allow them to be put into position easily and locked into a stationary position during use.¹ These portable lifts meet all of the technical requirements of the 2010 Standards.

Much to the surprise and dismay of AH&LA’s members, DOJ announced on January 31, 2012 the following new requirements:

(1) Businesses must install “fixed” or “built-in” pool lifts unless the business can show that it is not readily achievable to install a fixed lift.

(2) Instead of being brought out upon request, pool lifts must be next to the pool or spa and ready for use at all times when the facility is open.

(3) A pool lift cannot serve more than one pool or spa even if the two are only a few feet away from one another.

DOJ made these positions clear in a document called “ADA 2010 Revised Requirements: Accessible Pools Means of Entry and Exit” (January 31, 2012) (the “Pool Lift Requirements Document”), a meeting with AH&LA on February 7, 2012, and two letters dated February 21, 2012 and March 9, 2012. DOJ never once mentioned these requirements in the rulemaking that resulted in the 2010 Final Rule, the 2010 Final Rule, or the 2010 Standards.

DOJ’s last-minute adoption of new requirements placed the AH&LA’s members in a very difficult situation. The installation of a fixed pool lift at an existing pool deck requires an assessment of whether the pool deck can safely anchor a fixed lift, partial demolition of the pool deck, an electrical permit, electrical bonding under the National Electrical Code, pool deck reconstruction, and installation of the actual lift itself. In short, compliance would be considerably more complicated and expensive than

¹ An example of a portable pool lift can be viewed at the following link: http://www.srsmith.com/_posted_resources/PAL0312.pdf.

purchasing a portable lift and immediately putting it into service upon its arrival. The new requirements also raised serious concerns among the AH&LA's members about the risk of injury to children who would play with the lift, particularly at unattended pools. The AH&LA's members were also concerned that individuals with disabilities using the lifts may have difficulty using an unfamiliar lift and injure themselves.

The AH&LA attempted to have a dialogue with DOJ to understand why a fixed lift is preferable to a portable lift that also meets the 2010 Standards and to express its members' concerns about the new requirements. It was apparent after these discussions that decision makers at DOJ did not know about and had never considered the work involved with the installation of a fixed lift before issuing the new requirements. Nonetheless, DOJ dismissed AH&LA's concerns and claimed that the industry's opportunity to comment had long passed, even though these new requirements cannot be found anywhere in the rulemaking record.

After informing the AH&LA in writing on March 9, 2012 that it would not grant any extensions to the March 15, 2012 compliance deadline or reconsider the new requirements, DOJ announced on March 15, 2012 that it would extend the deadline to May 21, 2012, and that it would issue a Notice of Proposed Rulemaking to consider a further extension to September 17, 2012 (the "Extension NPRM"). DOJ stated that it would not consider any substantive comments about its new pool lift requirements.

AH&LA submitted comments to the Extension NPRM on April 4, 2012. In its submission, AH&LA demonstrated how DOJ had violated the APA when it issued these substantive new pool lift requirements without public notice or comment and discussed all of the harmful consequences for businesses, state and local governments, and persons who utilize pools and spas at public accommodations or state and local facilities. AH&LA's comments further explained that an extension of the compliance deadline to September 17, 2012 would not be adequate because there are not enough pool lifts that can be made in this time frame to equip the number of pools and spas in the country that need these lifts. AH&LA incorporates its comments to the Extension NPRM (attached as Exhibit 1) into this written testimony.

As set forth in the attached comments, DOJ's failure to follow the rulemaking process for the new requirements has very serious consequences, including the following:

(1) There has been no analysis about the impact of these new requirements on small businesses as required under SBREFA, or a cost/benefit analysis as required under Executive Order 12866.

(2) DOJ did not consider the difficulty and cost associated with installing fixed lifts at existing pools and spas and whether they are outweighed by any benefits that only a fixed lift can provide. In fact, DOJ has never stated why a fixed lift is more desirable than a portable lift.

(3) DOJ did not consider the increased risk of injury to children who will play on and jump off the pool lift into the shallow end of the pool. DOJ dismisses these

concerns by claiming that there is no evidence of injury. But the Access Board's pool study does report injuries relating to the use of pool lifts and DOJ should not wait until a child is killed or seriously injured before looking into the issue. *The AH&LA included in its comments a report from a national aquatic safety expert who opined that an unattended pool lift left beside the pool raises serious safety concerns that must be studied.*

(4) DOJ did not consider the risk of individuals with disabilities being injured while using an unattended lift that they have not used before.

(5) DOJ did not consider the liability that businesses will face when children and other people injure themselves using unattended lifts.

(6) DOJ did not consider the very real possibility that businesses will close their pools and spas in order to avoid being sued for lift injuries or, if they do not install a fixed lift, for not having one.

(7) DOJ did not consider less burdensome alternatives to the new requirements that could accomplish the same goals.

DOJ's violation of the APA will cause substantial harm and there is no indication that DOJ will take corrective action. The AH&LA sees only two options for avoiding this harm:

Option 1: Retract the Pool Lift Requirements Document and replace it with a guidance that allows the use of portable lifts that can be brought out upon request and shared between two pools or a pool and a spa in the same area. An extension of the compliance deadline would be necessary to ensure that enough lifts can be manufactured to equip all of the pools and spas that need them.

Option 2: DOJ to stays the compliance deadline for all swimming pools and spas and goes through a proper rulemaking process for the new requirements so that interested parties may have an opportunity to comment on these issues *for the very first time*.

DOJ has rebuffed the business community's requests for DOJ to take self-corrective action. Congressional action is now required restore order to the regulation-making process and ensure that equal access to pools and spas is provided in a manner that takes into account legitimate concerns about safety, cost, and the availability of pools and spas to all Americans.

EXHIBIT 1

TO WRITTEN TESTIMONY OF MINH N. VU ON
BEHALF OF
THE AMERICAN HOTEL & LODGING ASSOCIATION



AMERICAN HOTEL & LODGING ASSOCIATION COMMENTS

28 C.F.R. Parts 35 and 36

CRT Docket No. 123; AG Order No. 3327-2012

RIN 1190-AA69

Notice of Proposed Rulemaking

**Delaying the Compliance Date for Certain Requirements of the Regulations Implementing
Titles II and III of the Americans with Disabilities Act**

April 4, 2012

Contacts:

Marlene Colucci, Esq.
Kevin Maher
American Hotel & Lodging Association
1201 New York Avenue, N.W.
Suite 600
Washington DC 20005-3931
202-289-3120

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RULEMAKING HISTORY AND RECORD	2
A. The Access Board Rulemaking Process for Swimming Pools and Spas	2
1. Access Board ANPRM	3
2. National Center on Accessibility Report on Swimming Pool Accessibility.....	3
3. Access Board Swimming Pool Accessibility Report.....	4
4. Access Board NPRM	5
5. 2002 Access Board Final Rule.....	5
6. 2004 Access Board Final Rule for ADA Accessibility Guidelines for Buildings and Facilities	6
B. DOJ Rulemaking.....	6
1. DOJ ANPRM.....	6
2. DOJ NPRM.....	6
3. AH&LA Comments on DOJ NPRM	7
4. DOJ Final Rule	7
5. January 31 Pool Lift Requirements Document	8
6. February 8, 2012 AH&LA Meeting with DOJ	9
7. February 21, 2012 DOJ Letter to AH&LA.....	9
8. February 28, 2012 Letter to DOJ from AH&LA	10
9. March 9, 2012 Letter to AH&LA from DOJ	10
III. DISCUSSION.....	11
A. The New Requirements Violate the APA and Must Either Be Rescinded or Proposed in an NPRM.	11
1. The New Requirements Were Not Issued in Accordance with the APA.....	11
2. The New Requirements Raise Serious Safety Concerns That Require Further Study by DOJ and Interested Parties.	12
3. Some Lodging Owners/Operators Are Considering Closing Their Pools and/or Spas Because of Increased Liability.	15
4. DOJ Has Never Considered the Difficulty and Additional Cost Associated with Installing a Fixed Lift in Existing Facilities.....	15
5. The New Requirements Will Have Other Negative Consequences.....	17
6. DOJ Has Never Considered Whether a Fixed Lift that Must Be Poolside Provides Greater Access for Individuals with Disabilities than a Portable Lift.....	18

B. An Extension of the Compliance Deadline for Swimming Pools, Spas, and Wading Pool to September 17, 2012 Does Not Provide Enough Time for All Covered Facilities To Install Fixed Pool Lifts.....18

IV. CONCLUSION.....19

I. INTRODUCTION

The American Hotel & Lodging Association (AH&LA) is the sole national association representing all sectors and stakeholders in the lodging industry, including individual hotel property members and hotel companies. Many of our members are small businesses that own and/or operate only one or a few hotels.

The AH&LA would like to state at the outset that its members fully support providing individuals with disabilities with access to swimming pools and spas at their lodging facilities. Our members did not take issue with the 2010 Standard's requirements for pool lifts and instead diligently began to move forward with their compliance plans after September 15, 2010. Those plans came to an abrupt halt on January 31, 2012 when the U.S. Department of Justice (DOJ) issued its guidance on pool lifts, which we believe fundamentally changed the regulatory requirements in ways that not only impact our members' ability to comply but also raise serious safety concerns.

The AH&LA appreciates DOJ's issuance of a temporary extension of the March 15, 2012 compliance deadline for swimming pools, spas, and wading pools, as well as its consideration of a longer extension to September 17, 2012. As we explain in Section III.B below, such an extension—and, indeed, a longer extension—is necessary because not enough lifts can be manufactured in the next five months to equip the more than 200,000 existing swimming pools and spas that must be retrofitted with pool lifts under both Titles II and III of the Americans with Disabilities Act (ADA). However, the proposed extension does not address a much more fundamental problem: DOJ's recently announced new pool lift requirements violate the notice and comment procedures of the Administrative Procedures Act (APA). These new requirements, as clarified in subsequent communications with the AH&LA, are that (1) pool lifts must be “fixed” or “built-in”; (2) pool lifts must be next to the pool or spa and ready for use at all times when that facility is open; and (3) a pool lift cannot serve more than one pool or spa. *See* “ADA 2010 Revised Requirements: Accessible Pools Means of Entry and Exit” (January 31, 2012) (the “Pool Lift Requirements Document”). These are substantive new requirements that were never raised for public comment by DOJ *at any point in the rulemaking process* that led to the Final Rule for pools, spas, and wading pools. *See* 73 Fed. Reg. 56,236 (Sept. 15, 2010) (the “Final Rule”). These new requirements also do not appear anywhere in the Final Rule. Accordingly, neither AH&LA's members nor other interested parties have ever been given proper notice of, or an opportunity to comment on, these new requirements.

The AH&LA urges DOJ to take one of two actions:

(1) retract the Pool Lift Requirements Document, replace it with one that allows the use of portable lifts that can be brought out upon guest request and shared between two pools or a pool and a spa in the same area, and set a new compliance deadline that takes into account both the number of lifts that can be manufactured and the number of pools and spas that must be equipped; or

(2) stay the compliance deadline for all swimming pools, spas, and wading pools, and issue an NPRM proposing the new requirements so that interested parties may have an opportunity to comment on these issues *for the very first time*.

DOJ's failure to follow the procedures mandated by the APA has serious consequences for AH&LA's members and the public. DOJ has imposed these new requirements without consideration of (1) the dangers that a fixed pool lift may pose, especially to children and users with disabilities, and the liability that can result from those dangers; (2) the difficulty and additional cost associated with the installation of a fixed pool lift as compared to a portable lift; (3) the wear and tear on a fixed lift that remains outside at all times during pool hours (or longer, depending on how the lift is installed); (4) the negative impact of having a fixed pool lift in place on the use of spas and on lifeguarding duties; and (5) whether a fixed pool lift has any advantages that would outweigh its numerous disadvantages, including the inability of businesses to use one portable lift to serve two pools, or a pool and a spa, at the same location.

In these challenging economic times, DOJ should be issuing regulations that result in equal access for people with disabilities with the least impact on businesses, especially small businesses. The new requirements do just the opposite. They unnecessarily (1) increase the risk of injury to the public—a fact confirmed by a national expert on aquatic safety whom AH&LA consulted and whose opinion is attached to this submission; (2) increase compliance costs on all businesses with pools and spas; (3) increase the exposure of lodging facilities and other businesses to either personal injury lawsuits (if a fixed lift is installed) or ADA Title III lawsuits (if no fixed lift is installed); (4) make most spas less usable by guests; (5) impose additional burdens on lifeguards; and (6) likely cause some hotel owners or operators to close their pools and spas.

II. RULEMAKING HISTORY AND RECORD

A. The Access Board Rulemaking Process for Swimming Pools and Spas

Title III of the ADA empowers the U.S. Access Board (the "Access Board") with the authority to develop non-binding accessibility guidelines for the new construction and alterations of public accommodations and commercial facilities. *See* 42 U.S.C. § 12134. Only DOJ has the authority to issue binding regulations under Title III of the ADA. The ADA requires DOJ to adopt accessibility standards that are "consistent with" the guidelines issued by the Access Board. *Id.*

The Access Board began its process of developing standards for recreational facilities, including swimming pools and spas, in 1993. After a 17-year rulemaking process, DOJ issued the Final Rule, which included a new set of accessibility standards containing new requirements for swimming pools and spas. The requirements were "new" because the prior accessibility standards issued in 1991 did not cover swimming pools or spas.

In July 1994, the Access Board's Recreational Access Advisory Committee (the "RAAC") issued recommendations for accessibility guidelines for recreational facilities and outdoor developed areas. *See* Recommendations for Accessibility Guidelines: Recreational Facilities and Outdoor Developed Areas (July 1994) (excerpts at Attachment A). The RAAC studied a number of accessible swimming pool entry options, including pool lifts. The RAAC noted that lifts could be "permanently installed, placed in a deck mounting *when needed, or rolled into place.*" *Id.* at 17 (emphasis added). The RAAC noted that many lifts are operated by someone other than the user. *Id.* The RAAC stated that "[f]urther research on these devices may

be warranted.” *Id.* The RAAC also recommended one means of accessible entry for smaller pools and two accessible means of entry for larger pools. RAAC did not address whether (1) a pool lift must be attached to the pool deck; or (2) a pool lift must be poolside whenever the pool is open.

1. Access Board ANPRM

On September 21, 1994, the Access Board issued an Advanced Notice of Proposed Rulemaking announcing its intent to develop accessibility requirements for recreational facilities, including swimming pools. *See* 59 Fed. Reg. 48,542 (Sept. 21, 1994) (the “AB ANPRM”). The AB ANPRM noted the RAAC’s work as well as a review by the sports facilities subcommittee. The AB ANPRM asked for public input concerning the types of accessible means of entry that should be required for entry into swimming pools. There was no specific discussion about pool lifts in the AB ANPRM.

2. National Center on Accessibility Report on Swimming Pool Accessibility

In 1995, the Access Board commissioned a study by the National Center on Accessibility (the “NCA”) on swimming pool accessibility. The NCA issued its Final Report on Swimming Pool Accessibility in September 1996 (the “NCA Pool Study”) (excerpts at Attachment B). This study appears to be the most comprehensive study that was conducted for the Access Board’s development of the rules for swimming pool and spa access.

The NCA reviewed the scholarly literature concerning the use of pool lifts. The NCA noted that one author favored manual lifts, which require assistance, because they would ensure that “someone other than a user will be nearby while a person is in the water. *You never want to place a disabled individual into a pool unchaperoned,*” he said. *Id.* at 11 (emphasis added).

The NCA interviewed 205 swimmers with disabilities for the study. The NCA reported the following findings based on these interviews:

- *Three users reported injuries from the lifts. Id.* at 41.
- Seventeen percent (17%) of power lift users could not operate the lift themselves because of physical limitations (as opposed to reasons relating to control locations, reach, or pool policies). *Id.*
- Twenty-three percent (23%) of lift users reported problems with lifts. The most commonly cited problems were difficulties with transfers, lack of control, and safety concerns. *Id.*
- Swimmers who used portable lifts that had to be set up had to wait an average of 6.12 minutes. The range of times was 1 to 20 minutes. *Id.* at 40.

The NCA interviewed 103 aquatic professionals in connection with the study and then reported the following findings:

- Portable or removable lifts were used by eighty-one percent (81%) of respondents. Seventy-three (73%) of respondents stated that they did not have the lifts in place at all times. The most common reasons given for not having the lifts in place were “[s]afety and liability, low demand for its use, interference with pool competition, and limited deck space.” *Id.* at 51.
- Aquatic professionals also cited a “number of disadvantages associated with lifts.” These disadvantages included: (1) program interference; (2) safety concerns that ranged from people exceeding the weight limitations (one respondent stated that the lift shaft had bent when used by a person); and (3) the lift being a hazard in the lowered position when no one is using the lift. *Id.*

The NCA conducted on-site pool testing of pool lifts with users with mobility disabilities. The NCA’s report did not indicate whether portable or fixed lifts were tested. The NCA did not report any differences between fixed versus portable lifts in connection with this user test. *Id.* at 67-70.

At the conclusion of this report, NCA made specific recommendations regarding pool lifts. It first defined the term “pool lift” as follows:

Pool lifts are mechanical devices that move a person into or out of the water. Some lifts are permanently installed [and] others are portable, placed in a deck mounting or rolled into place when needed. When provided, pool lifts should meet the following specifications:

Id. at 84 (emphasis added). The NCA went on to specify eleven (11) requirements for pool lifts. Not a single one of these eleven (11) requirements includes a requirement that the pool lift be “fixed,” attached to the deck, or permanent. *Id.* at 84-86. In addition, none of the eleven (11) requirements includes the need to leave the pool lift out next to the pool or spa, ready for use, at all times when the facility is open.

As further evidence that the NCA contemplated the use of portable lifts that would only be brought out upon request, the NCA said that further research was needed on what a “reasonable time” to put in place portable or removable devices would be, given that the reported wait by respondents was anywhere from 1 to 20 minutes, for an average of 6.12 minutes. *Id.* at 95, 40. We are not aware of any further research that was conducted.

3. Access Board Swimming Pool Accessibility Report

In September 1996, the Access Board adopted the NCA Pool Study as its own. *See* “Swimming Pool Accessibility—Executive Summary” (the “Access Board Swimming Pool Report”) (excerpts at Attachment C). *The Access Board adopted the NCA’s definition of the term “pool lift” to include “portable” lifts that are “placed in a deck mounting or rolled into place when needed.” See Attachment C, Appx. A at 1 (emphasis added).*

4. Access Board NPRM

On July 9, 1999, the Access Board issued a Notice of Proposed Rulemaking regarding accessible entries into pools and spas that addressed both the number of accessible entries required and the specific requirements for each type of entry, including pool lifts. *See* 64 Fed. Reg. 37,328 (July 19, 1999) (the “AB NPRM”). The AB NPRM:

- cites the NCA Report and adopts the eleven (11) requirements for pool lifts. None of these eleven (11) requirements mentions a need for the pool lift to be “fixed” or attached to the pool deck;
- does not state that pool lifts must be out at all times when a pool or spa is open;
- does not define the term “pool lift” and makes no attempt to change the Access Board’s prior definition of the term “pool lift” to include portable lifts that can be “rolled into place when needed”;
- does not mention, let alone make a distinction, between a permanent or fixed lift versus a portable lift;
- does not address any of the safety concerns or specific injuries cited in the NCA Pool Study.

5. 2002 Access Board Final Rule

On September 3, 2002, the Access Board issued its Final Rule for the ADA Accessibility Guidelines for Buildings and Facilities: Recreation Facilities. 67 Fed. Reg. 56,352 (Sept. 3, 2002) (the “AB Final Rule”). The AB Final Rule:

- adopts the eleven (11) requirements for pool lifts stated in the NPRM. None of these eleven (11) requirements includes a need for swimming pool lift to be “fixed” to the pool deck;
- does *not* state that pool lifts must be out at all times when the pool is open;
- does not define the term “pool lift,” and again makes no attempt to change the Access Board’s prior definition of the term “pool lift” to include “portable” lifts;
- does not make any distinction between a permanent or fixed lift versus a portable lift;
- “recognizes that inappropriate use of pool lifts may result in accident or injury,” but then inaccurately states that “the Board is not aware of any incidents of injury or accidents involving pool lifts.” AB Final Rule at 56,379. In fact, the Access Board’s own NCA Pool Study identified three

people who reported three injuries relating to pool lifts from a 200 person sample of pool lift users; and

- notes that “manufacturers are also incorporating features which are intended to discourage inappropriate use, such as fold-up seats and covers.” *Id.* at 56,379. This statement suggesting the acceptability of pool lift covers makes clear that the Access Board did not expect pool lifts to be ready for use at all times when the pool is open.

6. 2004 Access Board Final Rule for ADA Accessibility Guidelines for Buildings and Facilities

On July 23, 2004, the Access Board issued a comprehensive Final Rule containing all of its new ADA guidelines for buildings and facilities and incorporating within these guidelines the pool lift guidelines previously issued in 2002. *See* 69 Fed. Reg. 44,084 (July 23, 2004) (the “2004 ADAAG”). The pool lift guidelines were identical to those issued in 2002 and no additional issues were addressed in this notice.

B. DOJ Rulemaking

1. DOJ ANPRM

On September 30, 2004, DOJ issued an Advanced Notice of Proposed Rulemaking to begin the process of adopting the Access Board’s 2004 ADAAG as its own regulations. *See* 69 Fed. Reg. 58,768 (Sept. 30, 2004) (the “DOJ ANPRM”). Although DOJ asked a question about whether it should reduce the number of required accessible entries at *existing* swimming pools (*id.* at 58,772), *the DOJ ANPRM contained no discussion about (1) specific pool lift requirements; (2) any requirement that pool lifts be permanent, fixed, or portable, or that they be left out at all times when the pool is open; or (3) any safety considerations relating to the use of pool lifts.* AH&LA submitted comments on a number of issues in the ANPRM, but did not address the disadvantages of fixed pool lifts that must remain next to the pool or spa whenever that facility is open because the ANPRM did not propose or require fixed lifts.

2. DOJ NPRM

On June 17, 2008, DOJ issued a Notice of Proposed Rulemaking to adopt the 2004 ADAAG. *See* 73 Fed. Reg. 34,534 (June 17, 2008) (the “DOJ NPRM”). Again, the DOJ NPRM contained no discussion about (1) pool lift technical requirements; (2) whether pool lifts should be permanent, fixed, or portable; or (3) whether they should be left out at all times when the pool or spa is open. DOJ did not provide a definition of the term “pool lift” in the DOJ NPRM. There was no discussion about why a fixed lift should be required instead of portable lift, nor any evaluation of the cost and difficulty of installing a fixed lift versus a portable lift. DOJ also did not discuss any safety concerns posed by pool lifts, such as the injuries mentioned in the Access Board’s NCA Pool Study.

DOJ also did not state in the DOJ NPRM that, for barrier removal in existing facilities, a “fixed” lift would be required. There was no discussion about the difficulty and expense associated with the installation of a fixed lift *at an existing pool*, including the process of

obtaining the necessary state or local permits, the demolition of existing concrete, electrical bonding requirements, and reconstruction of a portion of the pool deck.

To the contrary, the DOJ NPRM proposed that *existing pools* with less than 300 lf of wall would not have to have an accessible entry at all, and that those with 300 lf or more of wall would only be required to have one accessible means of entry. *Id.* at 34,536. DOJ sought comments from the public about whether to adopt this reduced scoping for existing swimming pools.

The DOJ NPRM did not reference any studies of pool lifts conducted or commissioned by DOJ.

3. AH&LA Comments on DOJ NPRM

AH&LA submitted comments to the DOJ NPRM. AH&LA supported the exemption for small existing pools and reduced scoping for larger pools. AH&LA also urged DOJ not to require *existing spas* to be retrofitted with an accessible means of entry because the only viable option for an accessible entry for existing small spas would be a lift which would be difficult to install and intrusive given the minimal amount of deck space around a typical hotel spa. AH&LA noted that some places of lodging may decide to close their spas if requirements were imposed, and that this is a cost that must be taken into account.

The AH&LA did not comment on the use of fixed versus portable lifts or whether lifts must be next to the pool or spa at all times because there was no indication in the record that these requirements were under consideration. To the contrary, the Access Board in its study had defined pool lifts to include “portable” lifts that could be “rolled into place” (see discussion at Section II.A.2, 3), and DOJ never stated anything to the contrary in its ANPRM or NPRM. AH&LA was not the only interested party that held this view. All of the other key stakeholders, including the pool industry, the timeshare resort industry, and the Asian American Hotel Owners’ Association have stated that they had the same understanding as AH&LA.

4. DOJ Final Rule

On September 15, 2010, DOJ issued the Final Rule adopting the 2004 ADAAG and other rules relating to the operations of public accommodations. *See* 75 Fed. Reg. 56,236 (Sept. 15, 2010) (the “Final Rule”). DOJ adopted the requirements of the Access Board’s 2004 ADAAG as the 2010 Standards. Not all elements covered by the 2010 Standards are fixed or built-in. The 2010 Standards set requirements for washers and dryers (Section 611), ranges (Section 804.6.4), and vending machines (Section 228). These elements are rarely if ever “fixed” or attached to a building. In fact, the 2010 Standards explicitly call out elements that must be “fixed.” For example, Section 702.1 states, “Fire alarm systems shall have *permanently installed* audible and visible alarms.” Section 704.4 states, “TTYs required at a public pay telephone shall be *permanently affixed* within, or adjacent to, the telephone enclosure.” Section 232.22 requires “permanently installed” telephones in holding and housing cells for inmates. *Fixed* seating is discussed in Section 35.151(g)(3), 36.406(f)(3), 206.2.4, Exception 2, 221.2, 221.5. *Fixed* guideway stations are specifically noted as a requirement in Section 218.2. *Fixed* shower heads are discussed at Section 607.6 and 608.6 – differentiating “fixed” from

hand-held or “movable” but noting that they must deliver “substantially equivalent” water pressure. Back support for benches must be “*affixed* to the wall.” See 2010 Standards 903.4.

In stark contrast, nowhere in the Final Rule, including the 2010 Standards, did DOJ state that pool lifts had to be “fixed,” affixed, or permanently installed.

The Final Rule and accompanying commentary contain no discussion about (1) technical pool lift requirements; (2) whether pool lifts must be permanent, fixed, or portable; or (3) whether pool lifts must be left out at all times when the pool is open. DOJ also did not discuss any safety concerns posed by a fixed lift that is left in place at all times, or the injuries that were cited in the Access Board’s NCA Pool Study.

DOJ did not state in the DOJ Final Rule that, for barrier removal in existing facilities, a “fixed” lift would be required. DOJ did not discuss the difficulty and expense associated with the installation of a fixed lift at an existing pool, including obtaining the necessary state or local permits, demolition of existing concrete, electrical bonding requirements, and the reconstruction of a portion of the pool deck.

DOJ decided not to adopt its proposed exemption for small existing pools or reduced scoping for larger existing pools after receiving substantial opposition from the disability community. Likewise, DOJ did not exempt existing spas as suggested by the AH&LA. DOJ’s primary reason for taking this position was the disability community’s stated desire to use pools for therapeutic benefits. DOJ stated that the impact on businesses would be mitigated by the fact that they would only have to comply with the requirements if it was readily achievable to do so and that this defense would provide sufficient flexibility to address the concerns of small businesses. Unfortunately, DOJ failed to provide a clear understanding of what “readily achievable” means, which has resulted in the current situation where hotel owners are left without guidance as to whether and how they must comply with the new 2010 Standards for pools and spas.

5. January 31 Pool Lift Requirements Document

On January 31, 2012, DOJ issued the Pool Lift Requirements Document announcing the following requirements (collectively, the “New Requirements”):

- All pool lifts must be “fixed,” not portable, even when installed for the purpose of barrier removal in *existing* swimming pools. Portable lifts are only allowed if installing a fixed lift in an existing facility is not readily achievable (the “Fixed Lift Requirement”).
- Pool lifts must be at poolside and fully operational during all open pool hours (the “Poolside Requirement”).

- Each pool must have its own accessible entry. Sharing of accessible equipment (*i.e.*, pool lifts) between pools is not permitted (the “No Sharing Rule”).¹

6. February 8, 2012 AH&LA Meeting with DOJ

Concerned by the Pool Lift Requirements Document, AH&LA requested a meeting with DOJ representatives from the Civil Rights Division (the “CRT”). At a meeting on February 8, 2012, CRT representatives stated that a “fixed” lift is one that is attached to the pool deck so that if the deck were turned upside down, the lift would not fall off the deck. CRT representatives also stated that pool lifts could not be shared between swimming pools and spas located in public accommodations such as lodging facilities. CRT representatives dismissed AH&LA’s concern that a fixed lift at an unattended pool could pose a danger to children who could use it as a diving platform at the shallow end of the pool, claiming that the concerns were nothing more than unsubstantiated speculation.

7. February 21, 2012 DOJ Letter to AH&LA

DOJ followed up on the February 8, 2012 meeting with the AH&LA with a letter in which it reiterated its position concerning its new requirement for “built-in or ‘fixed’ pool lift[s]” at existing pools which can only be avoided upon a showing that the fixed lift is not “readily achievable.” (A copy of that letter is attached hereto as Attachment D.) The letter states:

The 2010 Standards apply to “fixed” or built-in elements. A “fixed” element is one that is attached to a covered building or facility. Therefore, for an existing pool with less than 300 linear feet of pool wall, for example, removing barriers will involve providing one accessible means of entry, meaning a built-in or “fixed” pool lift or a sloped entry that complies with the 2010 Standards to the extent that it is readily achievable to do so (larger pools with 300 or more linear feet of pool wall are required to have two accessible means of entry, with at least one being a pool lift or sloped entry). If, in our example, an entity chooses to use a lift complying with the 2010 Standards that is removable or otherwise designated as “portable,” it may do so, so long as while the lift is provided at the pool, it is affixed in some manner to the pool deck or apron.

If installation of a fixed lift or sloped entry is not readily achievable, then a public accommodation may consider alternatives such as use of a portable pool lift that is not affixed to the pool facility but incorporates features that in all other respects comply with the 2010 Standards, or the public accommodation may consider other readily

¹ The Pool Lift Requirements Document only stated this requirement in discussing the obligations of state and local entities covered under Title II of the ADA. DOJ stated that it intends to apply this principal to existing public accommodations facilities in a meeting with AH&LA on February 8, 2012.

achievable accessible means of entry, such as a transfer wall or pool stairs. . . .

Id. at 3.²

With regard to the “readily achievable” standard, DOJ reiterated that “the determination as to whether the removal of a specific barrier is readily achievable must be made on a case-by-case basis after a thorough consideration of the factors established in the statute. The decision should be made by each public accommodation *in consultation with its own legal advisors and others.*” *Id.* at 4 (emphasis added). DOJ also stated that the analysis “may vary from business to business and sometimes from one year to the next for the same business.” *Id.* at 5.

With regard to AH&LA’s concern about the risk of injury associated with the use and misuse of unattended fixed pool lifts that are poolside at all times when the pool is open, DOJ insisted that “speculation or unsubstantiated generalizations about safety concerns or risk cannot form the basis for a legitimate safety requirement” that would render the use of a fixed lift not readily achievable. *Id.* at 4. DOJ refused to acknowledge the fact that the Access Board’s NCA Pool Study actually found evidence of pool lift injuries and instead cited to the Access Board’s erroneous conclusion that it was not aware of “any incidents of injury or accidents involving pool lifts.” *Id.* at 5.

8. February 28, 2012 Letter to DOJ from AH&LA

On February 28, 2012, the AH&LA appealed to Attorney General Eric Holder and Assistant Attorney General Tom Perez to request that they rescind the New Requirements, issue a stay of the swimming pool and spa requirements, and engage in a lawful notice and comment rulemaking process that would allow it and other interested parties to provide their input on the New Requirements. *See* Letter from AH&LA to Attorney General Holder dated Feb. 28, 2012 (Attachment E). The letter explained in detail how DOJ had violated the APA’s procedural requirements in imposing the New Requirements, and how they were, even based on the limited record, arbitrary and capricious.

9. March 9, 2012 Letter to AH&LA from DOJ

On March 9, 2012, Assistant Attorney General Thomas Perez rejected the AH&LA’s request, citing again to the Access Board’s erroneous statement that it was not aware of “any incidents of injury or accidents involving pool lifts. *See* Attachment F at 2.

² Of note, sloped entry is not achievable in most hotels pools, which generally lack sufficient length to accomplish the permissible slope for the pool depth. DOJ has not researched nor considered this matter.

III. DISCUSSION

A. The New Requirements Violate the APA and Must Either Be Rescinded or Proposed in an NPRM.

1. The New Requirements Were Not Issued in Accordance with the APA.

The APA requires federal agencies to provide the public with notice of proposed substantive legal requirements and an opportunity to comment. *See* 5 U.S.C. § 704. This bedrock principle of rulemaking ensures that the agency in question makes an informed decision after considering all of the issues raised and information provided by interested parties. The D.C. Circuit has consistently held that “an agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule a mere legal interpretation. [A court] must still look to whether an interpretation itself carries the force and effect of law, or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-24 (D.C. Cir. 2000) (invalidating EPA guidance that changed and expanded the monitoring obligations of regulated entities without following notice and comment procedures); *see also Natural Res. Def. Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (invalidating a guidance issued by EPA interpreting a section of the Clean Air Act because the agency did not go through the notice and comment process).

The Fixed Lift, Poolside, and No Sharing Requirements do not spell out any duty fairly encompassed in the Final Rule. These New Requirements cannot be found anywhere in the Final Rule or the rulemaking record that produced it. The three sections of the Final Rule that address swimming pool entries are 28 C.F.R. § 36.304(d)(2)(iii)(J) and Sections 242 and 1009 of the 2010 Standards. These provisions purport to set forth all of the requirements for swimming pool and spa entries. Not a single one of these requirements says that a pool lift must be “fixed” or attached to the pool deck, that it must be next to the pool or spa at all times during facility hours, or that it cannot be shared between two pools or a pool and a spa at the same location.

Indeed, the rulemaking process discussed in Section II.A above plainly contradicts DOJ’s new position that lifts must be “fixed” and next to the pool or spa at all times during facility hours.

The Access Board’s NCA Pool Study concluded that 81% of the aquatic professionals surveyed used portable or removable pool lifts at their facilities and that 73% of them only brought lifts out upon request. Attachment B at 51. After conducting this study, the Access Board made recommendations for pool lift requirements in which it *defined the term “pool lift” as including “portable lifts that are placed in a deck mounting or rolled into place when needed.”* *See* Attachment C, Appx. A. at 1.

By adopting a definition of the term “pool lift” that included “portable” pool lifts that could be “rolled into place when needed,” the Access Board plainly intended that pool lifts would not have to be poolside and ready for use at all times. This view was consistent with its

statement in the AB Final Rule that lift covers could be used prevent the misuse of pool lifts. *See* AB Final Rule at 56,379.

At no time during the entire rulemaking process that concluded with the Final Rule did DOJ ever disturb the Access' Board's definition of pool lift, which included "portable lifts." The Final Rule contains no definition of the term pool lift, nor does it call into question the Access Board's definition of the term "pool lift." The first time DOJ indicated a change in its understanding of the term "pool lift" was in the January 31, 2012 Pool Lift Requirements Document, which came out six weeks before the March 15, 2012 compliance deadline.

Since the issuance of the Pool Lift Requirements Document, DOJ has taken the position that AH&LA and all of other affected parties were on notice of the New Requirements during the rulemaking process because all elements in the 2010 Standards are supposed to be "fixed." This position contradicts the plain language of the 2010 Standards. The 2010 Standards set requirements for elements that are not fixed, such as washers and dryers (Section 611), ranges (Section 804.6.4), and vending machines (Section 228). Moreover, when the Department wanted to make equipment or other elements to be appliances fixed in the 2010 Standards, it said so explicitly. For example, Section 702.1 states: "Fire alarm systems shall have *permanently installed* audible and visible alarms." Section 704.4 states: "TTYs required at a public pay telephone shall be *permanently affixed* within, or adjacent to, the telephone enclosure." Section 232.2.2 requires "permanently installed" telephones in holding and housing cells for inmates. *Fixed* seating is discussed in Section 35.151(g)(3), 36.406(f)(3), 206.2.4, Exception 2, 221.2, 221.5. *Fixed* guideway stations are specifically noted as a requirement in Section 218.2. *Fixed* shower heads are discussed at Section 607.6 and 608.6—differentiating "fixed" from hand-held or "movable" but noting that they must deliver "substantially equivalent" water pressure. Back support for benches must be "*affixed* to the wall." *See* 2010 Standards 903.4. *In contrast, DOJ did not say that pool lifts would have to be "fixed."*

Thus, the only definition of the term "pool lift" in the entire rulemaking history included "portable" lifts, and nothing in the 2010 Standards or Final Rule changed this fact. In fact, the language of the 2010 Standards supports the interpretation that pool lifts need not be fixed, as the 2010 Standards do not use the term "fixed" anywhere with respect to pool lifts. There is no basis for the assertion that pool owners and operators were on notice of the Fixed Lift and Poolside Requirements and are trying to re-litigate the issues. AH&LA's members merely request the opportunity to exercise their legal right to comment for the first time on proposed legal requirements before they become law.

2. The New Requirements Raise Serious Safety Concerns That Require Further Study by DOJ and Interested Parties.

As DOJ is well-aware, the lodging industry has collectively spent tens of millions of dollars to comply with numerous new requirements imposed by the 2010 Regulations without complaint. However, AH&LA's members cannot stand by and quietly accept new requirements—issued without the required public notice and comment—that may jeopardize the safety of their guests and their businesses. There is simply too much at stake.

DOJ insists that there is no need to consider whether the New Requirements raise safety concerns because there is no evidence of injuries related to pool lifts. DOJ's position blindly ignores the evidence that is already in the rule-making record as well as commonly known facts about pool safety. There are more than sufficient facts to establish DOJ's obligation to consider the safety implications of the New Requirements and to allow the public to provide input. Indeed, attached to this submission is a statement from a national aquatic safety expert expressing his opinion that the conditions presented by having a fixed pool lift out by the pool or spa at all times when it is open—particularly at unattended aquatic facilities—raise serious safety concerns that warrant further study. *See* Report from Oostman Aquatic Safety Consulting Inc. dated April 2, 2012 (Attachment G).

The undisputed facts in the record and in the public domain that raise safety concerns about the use of fixed pool lifts that must always be next to the pool and spa are as follows:

- The Access Board's NCA Pool Study reported that three people with disabilities out of the 200 who were interviewed had been injured while using a pool lift. *See* NCA Pool Study (Attachment B) at 41.
- The Access Board's NCA Pool Study reported that 17% of respondents could not use pool lifts by themselves due to their physical limitations, and 23% of lift users reported problems using lifts. *Id.* The obvious concern that flows from this fact is that individuals with disabilities may attempt to use a pool lift by the pool only to find out when it is too late that they cannot operate it. Having a trained employee promptly bring out a portable lift upon request ensures that the guest will receive personalized instruction on independently using the lift. If a pool lift is left out to be used at all times, hotel employees will not know that the lift is being used or if a guest may need assistance.
- The Access Board's NCA Pool Study also reported that a number of aquatic professionals interviewed expressed safety concerns that ranged from people exceeding the weight limitations (one respondent stated that the lift shaft had bent when used by a person) and the lift being a hazard in the lowered position when no one is using the lift. *Id.* at 51.
- The 2010 Standards Advisory regarding the use of lifts at playgrounds also makes clear that there are risks associated with the use of unattended lifts at playgrounds. The Standards state that “[b]ecause lifts must be independently operable, operators should carefully consider the appropriateness of their use in unsupervised settings.” 2010 Standards 240.2.1 (Advisory). The same concern would certainly apply to the use of pool lifts in unattended settings.
- According to one study published in the American Journal of Pediatrics in 2008, 111,341 children were injured in diving-related accidents at swimming pools from 1990 to 2006. Pool lifts are similar to diving boards in that they provide an elevated platform from which to dive into the pool. The fact that pool lifts must be placed at the shallow end of the pool or at shallow spas makes them potentially even more dangerous.

In response to DOJ's refusal to acknowledge that a rule that could increase the risk of catastrophic injury or death merits careful study, AH&LA asked national aquatic safety expert Michael Oostman to give his opinion on whether fixed pool lifts positioned next to the pools and spas during pool hours raise safety concerns, particularly at unattended pools. Mr. Oostman has served as a forensics and consulting expert in more than a hundred aquatic accident cases and has personally investigated over 600 swimming pool accidents. As indicated in his curriculum vitae (Attachment G), he specializes in accident analysis and reconstruction and consequently understands the human factors and products that cause swimming pool injuries. He has also trained thousands of lifeguards and conducted over 800 inspections of swimming pools, water parks, and other water recreational areas for compliance with safety standards.

Based on his extensive experience, Mr. Oostman believes that a fixed pool lift that is left next to the pool or spa at all times when the facilities are open raises serious safety concerns. His report states the following safety concerns that require further study:

1. Children and adolescents may jump or dive off the pool lift seat into shallow water.
2. Swimmers may become trapped under the seat when the seat is in the water.
3. If a fixed pool lift fails during use, there will be no one to assist the lift user because no one will know that the lift is being used. If the lift has to be brought out upon request, facility employees will know what the lift is being used.
4. Lifts are not manufactured to endure environmental conditions which will have a greater adverse impact if the lifts must be kept out next to the pool and spa even when not in use.

Mr. Oostman also points out that, even though he has seen more than 2,000 swimming pools in his professional career, he has rarely ever seen a fixed pool lift that is left out at poolside. His observation is entirely consistent with the Access Board's NCA Pool Study which reports that portable or removable lifts were used by 81% of the aquatic professionals interviewed and that seventy-three percent stated that they did not have the lifts in place at all times because of safety and liability concerns. *See* NCA Pool Study (Attachment B) at 51. The fact that pool lifts have historically not been fixed or left out at poolside at all times underscores the fallacy of DOJ's position that there is no danger because there are no incidents of injury. There are few incidents of injury because the conditions DOJ now has mandated for the first time—fixed pools lifts placed poolside or spa-side when a facility is open, including unattended facilities—have rarely existed.

The AH&LA urges DOJ to take seriously the safety concerns posed by the New Requirements, to obtain expert input and conduct safety studies under the conditions presented by the New Requirements, and to hear the wisdom of the commenting public on this important public safety issue. With appropriate notice, AH&LA and others will have the time necessary to obtain further input from other safety experts and child behavioral experts about whether fixed pool lifts will be misused by children if left out next to the pool. The potential catastrophic consequences of not studying the safety concerns are simply too great to ignore.

3. Some Lodging Owners/Operators Are Considering Closing Their Pools and/or Spas Because of Increased Liability.

AH&LA's members are extremely concerned about the liability that they would face if their guests are injured while using or misusing a fixed pool lift that they are required by DOJ to leave out at unattended pools and spas. These fears are not based on speculation. Some of our members' insurers have expressed concerns about the new fixed lift requirement. If injuries do occur, our members will have to divert their valuable time, attention, and resources to defending lawsuits. Even if such claims might be covered by insurance, premiums would likely increase after such claims are made. Injuries at a hotel will also harm a hotel's reputation and devalue its goodwill. These exposures will disproportionately impact small businesses that do not have the same resources as larger organizations and which will accordingly be less capable of absorbing these losses.

A number of our members have stated that if they must install a fixed pool lift, they may close their pools and/or spas because they are between the proverbial rock and a hard place. If they install fixed lifts, their risk of being sued for pool lift injuries will increase. If they do not install a fixed lift, DOJ or private plaintiffs will sue them for not having one.

The closure of pools and spas would undermine, not further, the ADA's goal of providing access to swimming pools and spas.

4. DOJ Has Never Considered the Difficulty and Additional Cost Associated with Installing a Fixed Lift in Existing Facilities.

DOJ has apparently never considered the amount of work that is required to install a fixed pool lift as compared to the purchase of a portable lift that can be placed into service promptly upon arrival with minimal to no construction work. This fact became evident in the AH&LA's February 8, 2012 meeting, in which DOJ representatives displayed no awareness of the National Electrical Code's requirement that fixed pool lifts be connected to the pool's equipotential bonding grid or wire to reduce the risk of electric shock. This astonishing revelation underscores the need for a notice and comment process for the New Requirements. The NEC makes clear that any metallic component that is within 5 ft. of the water must be connected to a pool's equipotential bonding grid which lies encased in concrete beneath the surface of the pool deck. *See* Attachment H. Thus, installing a fixed pool lift requires obtaining the necessary state or local permits and demolishing part of the deck in order to make this connection.

The following chart, based on input from AH&LA's members that have developed action plans to install fixed lifts at their hotels, sets forth the additional work and expense associated with the purchase and installation of a fixed pool lift:

	PORTABLE LIFT	FIXED LIFT
PROCESS	<ol style="list-style-type: none"> 1. Identify pools and spas requiring lifts. 2. Review existing conditions to determine if portable lift is readily achievable. 3. Identify compliant lift for purchase and negotiate pricing. 4. Order lifts. 5. Begin using lift immediately upon arrival. 	<ol style="list-style-type: none"> 1. Identify pools and spas requiring lifts. 2. Review existing conditions to make a preliminary determination if fixed lift is readily achievable. 3. Identify compliant lift for purchase and negotiate pricing. 4. Identify contractors for site condition surveys and installation work. 5. Dispatch contractors to evaluate existing conditions. 6. Determine permitting requirements. 7. Develop signed and sealed engineered drawings for permitting based on jurisdictional requirements. 8. Order lifts. 9. Conduct demolition of pool deck: Locate existing rebar or bonding wire under deck, saw-cut deck, dig footing, install new rebar for electrical bonding. A 3-4ft sq. area will have to be demolished using a jack hammer. 10. Inspections. 11. Pour and finish concrete. 12. Allow 1 week for concrete to cure. 13. Assemble and install lifts. 14. After 1 month, apply deck finish coat over the new concrete and blend into deck.
COST	\$5,800-\$6,300	\$7,500-\$9,000

The chart above makes clear that the process for installing a fixed lift is considerably more complicated than the purchase of a portable lift that can be placed into service immediately upon arrival. The fixed lifts are also more expensive because they must be installed by licensed contractors who must obtain permits. Plans must be drawn for permits in some jurisdictions. In addition, because they are fixed, they cannot be shared between two pools or a pool and a spa in the same area. This means that there must be a lift for every pool and every spa (or spa cluster), which doubles the cost of compliance. Again, these higher costs will have a disproportionate and detrimental impact on small business owners.

DOJ has stated in various documents that the New Requirements will not adversely impact small businesses because the businesses that cannot afford to purchase fixed lifts can claim that it is not “readily achievable” for them to make this purchase. However, DOJ’s inability to give any examples of scenarios that would justify a not “readily achievable” determination and its articulation of the multi-factor test that it says should be applied by an attorney exposes the reality that no small business can make such a determination with any confidence. Many AH&LA’s members—ranging from single hotel operators to large hotel companies managing hundreds of hotels—have in fact informed the AH&LA that they cannot make this determination without legal assistance. In any event, a legal opinion would not prevent lawsuits from being filed. The New Requirements provide a basis for plaintiffs to file lawsuits if there is no “fixed” lift next to the pool or spa when those facilities are open, and hotel owners and operators would have to spend tens of thousands of dollars to defend such suits even if their position had merit. All of these issues could be avoided if public accommodations could use portable lifts that are brought out upon request.

5. The New Requirements Will Have Other Negative Consequences.

Fixed pool lifts that must be next to pools and spas at all times when the facilities are open will likely remain out when the pool is closed because they are difficult to move. Thus, they are more likely to be vandalized at outdoor pools. This situation, in turn, will result in less access for individuals with disabilities if the lifts are out of service for repair. In addition, in damp and extremely hot locations, fixed pool lifts will experience greater wear and tear, including corrosion, that will shorten the life of the lift. The requirement that pool lifts must be available for use when the pool is open also precludes the use of covers over lifts. A pool lift seat that has been baking in the hot Arizona sun all day may also cause serious burns, particularly if the user has no sensation in the lower body.

A fixed pool lift permanently stationed at a typical small hotel or motel spa will consume a significant portion of the pool deck and reduce the space for people to sit around and in the spa because most people will not want to sit next to or under a large piece of equipment. This situation can be easily avoided by allowing a facility to provide a portable lift upon request.

Aquatic expert Michal Oostman, as well as the World Waterpark Association, have both noted that having fixed pool lifts next to the pool will also change and compromise the nature of lifeguarding duties because lifeguards’ duties do not normally involve the monitoring of this equipment. *See* Attachment G at 6. They are trained to scan the pool within a set number of seconds and to respond to potential drowning incidents. *Id.*

The New Requirements may have many more adverse impacts, but without the benefit of a notice and comment rulemaking process, the full extent of their impact cannot be known.

6. DOJ Has Never Considered Whether a Fixed Lift that Must Be Poolside Provides Greater Access for Individuals with Disabilities than a Portable Lift.

Conspicuously absent from the Final Rule and the rulemaking that led up to it is any discussion by DOJ as to why a “fixed” lift that is poolside at all times provides greater or better access than a portable lift complying with the 2010 Standards that is promptly brought out upon request. Even after issuing the Pool Lift Requirements Document, DOJ has not articulated a single reason for why “fixed” lifts are necessary, or what advantages they hold over a portable lift that can be wheeled out and locked into position promptly upon guest request. The courts have made clear that agencies must provide an explanation for the choices they made in developing a regulation. *See Motor Vehicles Mfs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 49 (1983). There is no such explanation here because DOJ issued these requirements outside of the regulatory process.

Based on the current record, there is no basis for DOJ to conclude that fixed lifts left out next to the pool or spa when the facilities are open provide greater accessibility or independence for individuals with disabilities. Any such basis asserted going forward must be carefully measured against the safety concerns and other disadvantages discussed above. Indeed, the Access Board’s NCA Pool Study found that individuals with disabilities reported having to wait only an average of 6.1 minutes for the pool lift to be brought out. *See* Attachment B at 40. That is hardly a long or unreasonable wait, but DOJ could prescribe a specific amount to time within which a portable lift can be brought out for a guest with a disability. Moreover, lodging facilities could ask all guests upon check-in if they need the pool lift during their stay, and, if they do, a lift would be set up for the duration of the guest’s stay. Such an approach would relieve guests of the burden of having to request a lift.

B. An Extension of the Compliance Deadline for Swimming Pools, Spas, and Wading Pool to September 17, 2012 Does Not Provide Enough Time for All Covered Facilities To Install Fixed Pool Lifts.

While the AH&LA supports an extension of the compliance deadline, the proposed extension to September 17, 2012 is too short. According to the Association of Pool and Spa Professionals (APSP), there are 85,284 swimming pools at lodging facilities, 55,311 community pools, and 26,883 pools run by parks and recreation departments in the United States. This data comes from the industry’s leading research firm, PK Data, which conducts a commercial pool census based on records in state health departments. This data shows that there are at least 188,000 swimming pools that are covered by Titles II and III of the ADA and must be equipped with at least one or more pool lifts depending on their size. This number does not include the number of spas that must be outfitted with lifts as well. The APSC estimates that a third of the number of hotels with pools also have a spa (*i.e.*, 28,333), which means that there are more than 200,000 pools and spas that must be outfitted with pool lifts.

Although the manufacturing capacity of specific pool lift manufacturers is confidential business information, representatives of the three top manufacturers of pool lifts (S.R. Smith, Aqua Creek, and Spectrum Aquatics) and APSP have informed AH&LA that, based on information known at this time, these three manufacturers combined can only produce anywhere from 2,500 to 5,000 lifts per month, or 15,000-30,000 in six months. While it is possible that at some point in the future these companies might be able to open new plants to increase production capacity, this is purely speculative at this time. *Thus, there will only be enough lifts made to supply 7.5% to 15% of the 200,000 covered swimming pools and spas by September 17, 2012.*

Even using DOJ's much smaller estimate of approximately 104,326 pools and spas from its Final Regulatory Impact Analysis (RIA), there will still only be enough lifts for 14% to 28% of the pools and spas that need them. See Attachment I (spreadsheet showing calculation of pool and spa numbers from RIA and RIA pages with information). This shortage would likely have a disproportionately adverse impact on small independent owners and operators because they will not be as capable of negotiating and securing lifts as the larger companies that will place larger orders. Our members also report that the lead time for ordering fixed lifts is at least 6-8 weeks. This means that even fewer pools and spas will be able to comply.

Setting a deadline that all covered entities cannot meet would be arbitrary and capricious because it unnecessarily exposes businesses that have done nothing wrong to litigation risk. While a hotel might be able to argue that it is not readily achievable to purchase a lift when there is no lift available, the hotel will at that point still incur the cost of defending a lawsuit. The fact is that DOJ's announcement of the New Requirements on January 31, 2012 was a complete game changer. Virtually all of our members had planned to purchase portable lifts that they could put away when not needed. Prior to that date, as explained in Section III.A above, the lodging industry had every reason to believe that portable lifts were acceptable. Given the scarcity of lifts, a minimum one-year extension of the compliance deadline would be much more appropriate.

IV. CONCLUSION

The AH&LA appreciates the opportunity to provide its views on this NPRM. The AH&LA believes that the most straightforward solution that will ensure that individuals with disabilities have access to pools and spas more quickly is to rescind the January 31, 2012 Pool Lift Requirements Document and replace it with a guidance document that reflects the fact that (1) the 2010 Standards allow for the use of any type of lift (fixed or portable) as long as it complies with the requirements of Section 1009, (2) there is no prohibition against bringing a lift out upon request as long as it is done in a timely manner, and (3) a pool lift can be shared between two pools and a pool and a spa in the same location. However, if DOJ insists that the New Requirements are necessary to ensure access, they must go through the NPRM process required by the APA so that the issues, particularly safety issues, can be fully vetted. The public's safety depends on it.

ATTACHMENTS

Attachment A	Excerpts from Access Board Recreational Access Advisory Committee Recommendations for Accessibility Guidelines: Recreational Facilities and Outdoor Developed Areas (July 1994)
Attachment B	Excerpts from National Center on Accessibility: Swimming Pool Accessibility Final Report (September 1996)
Attachment C	Excerpts from Access Board Report: Swimming Pool Accessibility -- Executive Summary (September 1996)
Attachment D	February 21, 2012 Letter from DOJ to AH&LA
Attachment E	February 28, 2012 Letter to Attorney General Holder from AH&LA (without attachments)
Attachment F	March 9, 2012 Letter to AH&LA from Assistant Attorney General Perez
Attachment G	Report and CV of Michael Oostman, Oostman Aquatic Safety Consulting, Inc.
Attachment H	Excerpt from National Electrical Code concerning equipotential bonding
Attachment I	Excerpts from Final DOJ Regulatory Impact Analysis and spreadsheet showing calculations of the number of affected pools and spas in the United States.