



August 14, 2008

The Honorable Grace C. Becker  
Acting Assistant Attorney General for Civil Rights  
U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, N.W.  
Office of the Assistant Attorney General, Main  
Washington, D.C. 20530

RE: [CRT Docket No. 106]

Dear Assistant Attorney General Becker:

On behalf of the National Small Business Association (NSBA), I would like to submit the following comments on the Notice of Proposed Rulemaking: *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; 73 Fed. Reg. 34508 (June 17, 2008)*. NSBA, the nation's oldest nonpartisan small-business advocacy organization, reaches more than 150,000 small businesses across the country. NSBA represents small entities of varying sizes engaged in a broad spectrum of industry.

Thank you for the opportunity to comment on this public rulemaking. I congratulate the Department of Justice for its effort to craft a rule that reflects the unique needs and limitations of small business. Having commented on the initial advance notice of proposed rulemaking, NSBA appreciates the department's continued effort to formulate a rule as least onerous as possible by eliciting and responding to public reaction and input.

#### *General Small Business Safe Harbor*

NSBA applauds the inclusion of the general "small-business safe harbor" in the proposed rule. Small businesses that already have expended the time, effort, and money to reach compliance with the existing 1991 Accessibility Guidelines should not be penalized for their endeavor; and requiring them to enact additional, incremental retrofits to the specific areas targeted by the Access Board in this rulemaking constitutes a financial penalty. In addition to providing significant financial relief, the inclusion of this safe harbor clause helps cultivate a partner relationship between small business and the federal government rather than an adversarial one. The absence of such a safe harbor could serve as a distinct disincentive to small business that otherwise would seek compliance under existing *Americans with Disabilities Act (ADA)* regulations. NSBA also welcomes the provision limiting the proposed rule to new play areas and recreational facilities, rather than existing ones.

To further advance this partner relationship and help achieve the ultimate aim of both the government and small business, namely increased access for the disabled, NSBA recommends the creation of a "good-faith non-compliance safe harbor." This safe harbor would allow small businesses that have made a "good-faith" effort to comply with existing and new regulations to

bypass financial penalties if it is discovered that—despite their best intentions—they are, in fact, not in full compliance, as long as the small business takes steps to address its noncompliance.

**Question 46: Should the Department adopt a presumption whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during the previous tax year, the entity spent at least one percent (1%) of its gross revenues on barrier removal? Why or why not? Is one percent (1%) an appropriate amount? Are gross revenues the appropriate measure? Why or why not?**

Although NSBA appreciates the motivation behind the “cost cap,” it harbors considerable concern over its specific details. Under the proposed rule, a small business that spends at least one percent of its gross revenue in the preceding year on barrier removal would be considered having met its readily achievable barrier removal obligations. NSBA’s chief concerns with this provision are:

(1). Requiring small businesses to spend at least one percent of their gross revenue, rather than their net revenue, on barrier removal is excessively onerous. Many small businesses operate with razor-thin profit lines, so compelling them to expend at least one percent of their gross on barrier removal is significant, and potentially ruinous. At a minimum, the safe harbor should be based on net revenue and the department should make sure that it is clear that this one percent is a ceiling and not a floor. Explicit language stating that small firms are in no way required to spend more than one percent of their net revenue also should be included in the rule. As it is currently constituted, the “cost cap” raises the specter—if not the outright mathematical probability—that small businesses losing money will be forced to compound their financial hardship via regulatory fiat. It also should be made clear that firms spending less than one percent of their gross or net revenue on barrier removal can still successfully meet their barrier removal obligations.

NSBA urges the department to allow small businesses to “roll-over” their barrier-removal expenditures as well. Failure to include such a provision would produce the unintended consequence of providing a disincentive to small firms seeking to undertake expensive, large-scale barrier removal projects as their efforts only would protect them for one year, no matter how large a percentage of revenue they constituted.

Additionally, the costs associated with this “safe harbor” are not reflected in the proposed rule’s small-entity impact, nor are the paperwork obligations necessitated by the rule’s requirement that small businesses chronicle and quantify their expenditures reflected in the proposed rule’s paperwork reduction statement. In addition to properly analyzing the rule’s financial and paperwork burden on small businesses, the department should publish clear guidance on exactly what kinds of records will be necessary to successfully demonstrate that a small firm has spent its requisite one percent. It also is unclear what barrier-removal activities satisfy the one percent requirement? Do consultations with one’s attorney or architect about barrier removal? They should, and this should be made clear.

The indirect costs of the proposed rule also are not considered. The continued failure of federal agencies to consider the indirect impacts of proposed regulations is the largest loophole in the federal regulatory framework. The indirect economic impact of proposed regulations also must be considered. Such costs are being borne by the small businesses affected by the regulations, so why exclude them?

(2). Without a designated end date, this safe harbor effectively establishes an annual financial minimum that small businesses must expend on barrier removal—in perpetuity. Would

small businesses without readily achievable barrier removal obligations be forced to spend at least one percent of their gross revenue on barrier removal for the next ten years? Twenty? Fifty?

(3). It is unclear when the “prior year” outlined in the proposed rule begins, especially given that the regulation is slated to become effective six months from publication. Should small firms that seek compliance begin spending their requisite one percent now, before the rule is published? Or will no penalties be issued pursuant to the new rule for the next eighteen months?

### *Conclusion*

Thank you again for the opportunity to submit comments on this proposed rulemaking. NSBA appreciates the efforts the department has made to provide cost savings to small businesses and listen to their concerns. NSBA supports the retention of both safe harbors but urges additional protective measures and increased clarification of both the extent of the safe harbor and what small businesses must do to fully employ them. To this end, NSBA requests a full and complete Small Business Compliance Guide, as required by law.

NSBA urges increased small business flexibility, as well. The proposed rule would become effective six months from publication, but small businesses must be permitted reasonable time-frames within which to become compliant, whether in regard to new construction of facilities or the retrofitting of existing buildings. Granting small businesses six months to become compliant with the proposed rule is confusing, as explained above, and burdensome. Six months is an extremely short period of time for small businesses to obtain capital, secure contractors, and begin construction—all while maintaining their actual small business. Small-business owners have very limited staff available to monitor the constant barrage of new regulatory requirement and many new start-ups may not be familiar with the initial ADA rules, let alone the incremental changes contained in the proposed rule. The constraints of these small firms—which have created 93.5 percent of all net new jobs since 1989—must be considered.

Sincerely,

Todd O. McCracken  
President