

ADA and The ADA Accessibility Guidelines: Legal Issues and Liability Reduction for Commercial Real Estate Professionals

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I. Introduction

Since it was enacted in 1990, the Americans with Disabilities Act (“ADA” or the “Act”) has posed unique challenges to businesses. On the one hand, the Act is very general in its requirements, mandating removal of barriers except where “readily achievable” and “reasonable” modifications of existing policies. At the same time, the implementing regulations go into such minute technical detail that they can seem overwhelming. Over the last decade and a half, businesses have worked hard to balance the nebulous demands of the statute with the precise minutiae of the regulations.

Now, after a number of years have passed in which businesses have carefully studied and made great efforts to comply with the ADA and its regulations, new revised regulations were proposed during the Bush Administration. After a period in which the revised requirements, known as the ADA Accessibility Guidelines, had been released for public comment by the Department of Justice (DOJ), the Obama Administration withdrew the proposed regulations and they are on hold for the moment. BOMA has been carefully monitoring the proposed regulations as they advance toward final adoption. Beyond collecting and disseminating information to its members about the proposed regulations, BOMA also submitted comments to the DOJ on the proposed regulations to ensure that its members’ concerns receive a fair hearing.

As part of its continuing efforts to educate and guide its members during this transition period to the new regulations, this paper seeks to give BOMA’s members an overview of what will change once the regulations - if they are adopted in their current form - are promulgated. It will also provide some easy yet effective tips for ensuring compliance, avoiding litigation, and reducing the cost of litigation should it arise. When and if the regulations are finally issued, BOMA will release a final compilation of the regulations with information that outlines areas that may impact commercial real estate.

II. Overview

A. Why You Need to Know About Title III

Title III states that, “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” It is a civil rights law that provides equal rights for disabled persons to use public accommodations.

1. DOJ Aggressively Investigates and Pursues Litigation

As a civil rights statute, the Department of Justice (DOJ) enforces the ADA by investigating complaints from aggrieved individuals or parties and filing discrimination suits on the aggrieved party’s behalf.

2. Private Right of Action Allows Disabled Citizens to Sue

Disabled individuals may also bring their own private claims against businesses for alleged violations. In fact, the bulk of ADA enforcement suits in the past have been through private lawsuits. Lawsuits involving public accommodations under Title III of the ADA have proliferated over the past several years. In addition, so-called “plaintiffs’ mills” law firms specializing in representing plaintiffs in cases where the violation of the ADA is marginal at best have proliferated. BOMA has been active in combating such lawsuits, such as by filing amicus briefs supporting business owners.

3. Non-compliance Can Bring Bad Publicity

Some have described the ADA as the most sweeping non-discrimination legislation since the Civil Rights Act. Many people view it as a significant contribution to the elimination of societal and physical barriers for disabled individuals at places of public accommodation. Because of the ADA's broad public support, businesses should take care to ensure compliance with the ADA or else risk damage to their customer goodwill.

B. Definition of "Disabled" Persons Covered by Title III

Under Title III of the ADA, an "individual with a disability" is a person who has a physical or mental impairment that substantially limits one or more major life activity (e.g. seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, or working).

C. Definition of "Public Accommodations" Covered by Title III

A "public accommodation" is a private entity that owns, leases (or leases to), or operates a place of public accommodation. The place of public accommodation is a private facility whose operations affect commerce and fall within at least one of 12 categories: (1) place of lodging—inn, hotel, motel; (2) establishment serving food or drink—restaurant or bar; (3) place of exhibition or entertainment—movie house or theater; (4) place of public gathering—auditorium, lecture hall, or convention center; (5) sales or rental establishment—bakery, grocery store, clothing store; (6) service establishment—dry cleaner, bank, barber shop, travel agency, office of an accountant or lawyer, pharmacy, or health care provider; (7) station used for specified public transportation; (8) place of public display or collection—museum, library, or gallery; (9) place of recreation—park, zoo, or amusement park; (10) place of education—nursery school, elementary or secondary school, undergraduate or graduate private school; (11) social service center establishment—day care center, senior citizen center, or food bank; (12) place of exercise or recreation—gymnasium, health spa.

III. Title III Requirements

Title III generally requires: removal of architectural barriers; provision of auxiliary aids and services; and reasonable modification of policies, practices, and procedures to provide access for disabled persons.

A. Barrier Removal

1. As Defined by ADAAG

The ADAAG defines when a specific element of a public accommodation poses a barrier to access by the disabled; variance from the ADAAG standard means that a barrier exists. The ADA requires public accommodations and commercial facilities to remove architectural barriers that inhibit the mobility of persons with disabilities. This obligation extends equally to all private entities, be they lessor, lessee or operator of a public accommodation.

But this barrier removal requirement only applies to buildings constructed before January 26, 1993. Buildings constructed, or alterations made to existing buildings, after that date must fully comply with the ADAAG and its detailed specifications. For alterations, only the element altered needs to comply with the applicable ADAAG standard.

2. Existing Facilities v. New Construction/Alterations

The ADAAG distinguishes between existing facilities and new construction/alterations to existing facilities. While new construction and alterations must adhere to ADAAG standards,

owners of existing buildings are not necessarily required to bring the building into compliance with ADAAG. Rather, they must only remove barriers where removal is readily achievable, recognizing that it is much more difficult for a longstanding structure to make modifications than for a new facility or one that is undergoing alterations anyway. The ADA defines readily achievable as “easily accomplishable and able to be carried out without much difficulty or expense.” For example, where a restroom is accessible by climbing one or two steps, the DOJ has stated that ramping the steps would be readily achievable in most cases.

Although the statute does not describe in detail which modifications are readily achievable, DOJ regulations list five factors that must be considered: (1) the cost and nature of the action; (2) the financial status of the site involved, the number of individuals employed at the site, the effect on expenses and resources, and legitimate safety requirements for safe operation; (3) the geographic separateness of the site to its parent corporation; (4) if applicable, the overall financial resources and size of the parent corporation, and the number and type of its facilities; and (5) if applicable, the type of operation of the parent corporation. The cost of removing the barrier includes not only the cost of the removal itself, but also any lost revenue that results from the removal.

B. Provision of Auxiliary Aids and Services

To ensure the full and equal enjoyment of goods and services provided by public accommodations, the ADA requires public accommodations to provide disabled individuals who are limited in their capacities to communicate with auxiliary aids and services. Title III broadly defines auxiliary aids and services to include qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices; and other similar services. Public accommodations are free to furnish the auxiliary aid or service of their choosing provided that the selected aid or services enables “effective communication.”

Title III’s auxiliary aid and service obligation is not absolute. Rather, the statute places two major limitations on this obligation. A public accommodation is not required to provide an auxiliary aid or service if either a “fundamental alteration” or an “undue burden” would result. Under Title III, a “fundamental alteration” is a modification that is so significant that it alters the inherent characteristics of goods, services, and accommodations offered or provided.

C. Reasonable Modification of Policies, Practices and Procedures

The final major obligation under Title III requires places of public accommodation to reasonably modify services to ensure their full and equal enjoyment by disabled individuals. Specifically, Title III provides that “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary” constitutes discrimination “unless the entity can demonstrate that making such modification would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”

The DOJ’s Technical Assistance Manual on Title III provides illustrations of a reasonable modification. For example, suppose that in compliance with the ADA’s removal of architectural barriers requirement, a hotel has made several rooms accessible to the disabled, but that under its present reservation system, the hotel has no way to guarantee that when a disabled individual requests one

of these rooms, the room will actually be made available when the guest arrives. The ADA would require that the motel reasonably modify its reservations system to ensure the availability of the accessible rooms. As another illustration, if a retail store currently follows a policy of only taking out-of-stock merchandise orders from individuals who personally sign the order, it can reasonably modify that policy to allow mobility impaired individuals to place their orders via phone or mail.

The DOJ has been particularly active in this area: the DOJ entered into approximately 40 settlement agreements involving the “reasonable modification” requirement under Title III, many requiring public accommodations to allow service animals onto the property or to provide medical care to HIV patients. These settlements provide useful lessons for businesses seeking to comply with the reasonable modification requirement. First, hotels, motels, and restaurants should implement and maintain clear standards on service animals and educate their workforces about them, as the DOJ’s position has been that neither a “fundamental alteration” nor an “undue burden” defense is likely to justify an accommodation’s refusal to modify its policy on service animals. This will ensure consistent enforcement and compliance.

Additionally, these settlements indicate that in order to comply with Title III, medical facilities must provide medical care to HIV patients. The DOJ is zealous in ensuring that medical offices modify policies to require treatment of patients regardless of HIV status. Accordingly, medical facilities should implement and maintain clear policies requiring treatment of patients who are HIV positive.

IV. ADAAG Requirements

A. Background on Access Board and the Original and Proposed Revised ADAAG

The ADA charges the Access Board, an independent federal agency which consists of thirteen public members appointed by the President, of whom the majority must be individuals with disabilities, and the heads of twelve federal departments and agencies specified by statute, to “issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of [Title II and III of the ADA] to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to disabled persons.” It is the DOJ, however, that is given the authority to promulgate enforceable standards and must then interpret and enforce those standards. The ADA allows the DOJ to determine how and to what extent to use the ADAAG guidelines with respect to the barrier removal requirement to existing facilities.

B. Application of Proposed Revised ADAAG to Existing Buildings

Compliance with the new proposed standards, as was the case under the previous standards, will be assessed for two different categories of facilities: new construction and existing facilities as of the effective date of the new standards. Facilities constructed after the effective date of the regulations will be required to comply strictly with the guidelines during construction. The proposed standards may impact existing facilities if either: (1) alterations are made, or (2) barrier removal becomes readily achievable.

First, the alterations requirement is only triggered when an entity voluntarily undertakes an alteration project, and, even then, generally applies only to the particular elements undergoing alteration.

Second, barrier removal, by contrast, is a continuing obligation that applies to all public areas of existing title III-covered facilities. For this reason, all elements in existing facilities must satisfy revised proposed requirements to the extent barrier removal is readily achievable.

The revised proposed standards, however, sensibly propose to codify a safe harbor for all elements of existing facilities that are in compliance with the specific requirements—both the scoping and technical specifications—of the current Standards. Under this approach, elements in existing facilities that are not altered after the effective date of the new standards, and that comply with the current Standards, would not be required to be modified in order to comply with the proposed guidelines.

The safe harbor would not act as a blanket exemption for facilities but rather compliance with the 1991 Standards would be determined on an element-by-element basis. Further, elements that the Access Board addressed for the first time in the supplemental guidelines (e.g., play area requirements introduced in the supplemental guidelines, etc.) would not be subject to the safe harbor nor would any noncompliant elements.

V. Proposed New ADAAG Requirements

The ADAAG provides specifics as to how a public accommodation can comply with the broad outlines of the ADA. While much will remain the same under the new Guidelines, there are a number of revisions that businesses should be aware of. This section will highlight the most important changes.

A. New Provisions Regarding Specific Building Types

The chart below summarizes the key changes to specific types of buildings comprising a large percentage of the buildings that will be affected by the proposed Guidelines.

<p>Medical Buildings</p>	<ul style="list-style-type: none"> • Medical or long-term care facilities that are required to provide at least one passenger loading zone at an accessible entrance will no longer have to provide a canopy or roof overhang. • Toilet rooms that are part of critical or intensive care patient sleeping rooms will no longer be required to provide mobility features.
<p>Lodging</p>	<ul style="list-style-type: none"> • A multi-story hotel guest room or residential dwelling unit that is required to be accessible will be allowed to use a platform lift in lieu of an elevator as part of the accessible route. Currently, only elevators are permitted. • Vanity counter top space that is comparable in terms of size and proximity to the lavatory will be required in mobility-accessible rooms. Currently, accessible counters are only required to comply with height and knee space specifications. • Sinks in transient lodging facilities that include a cook top or conventional range will have to be positioned for a forward approach.

Lodging cont.	<ul style="list-style-type: none"> • At least 2% of dwelling units will be required to provide communication features if certain elements are provided for inaccessible units. • The revision clarifies that “galley” style kitchens (those with only one entrance and a dead-end on the other side) with a cook-top or conventional range have to meet the greater clearance requirements (60 inches).
Stadiums/ Auditoriums/ Convention Centers	<ul style="list-style-type: none"> • Sports stadiums with 25,000+ seats will have to provide real-time open captioning of emergency announcements, which can appear on a scoreboard, a line board, a handheld device, or by any other effective means. • For stages where the circulation path (for the general audience) directly connects the stage to the seating area, the accessible route will also have to be direct. Currently, an accessible route connecting accessible seating locations to performing areas may go outside the assembly area and use an indirect interior accessible route. • Wheelchair spaces will not be permitted to overlap accessible routes or circulation paths. This is not a change with respect to accessible routes (which are and have been required to have a 36 inch minimum clear width - without obstructions), and though it is new with respect to circulation paths, it only applies to the path width as required by applicable building codes and fire and life safety codes. Since such codes prohibit obstructions in the required width of assembly aisles anyway, this doesn’t really effect a change. • Lawn seating and exterior overflow seating areas without fixed seats would have to connect to an accessible route. The accessible route does not, however, have to extend through the lawn seating area. • Handrails on aisle ramps adjacent to seating in assembly areas that are part of an accessible route to accessible seating or other accessible elements, which are required to be on only one side of the ramp (the side that is not adjacent to the seats), will be permitted to be discontinuous and need not have extensions beyond the ramp where the handrails must be discontinuous to allow access to seating and aisle crossing. • A revised formula will reduce the number of wheelchair spaces required in larger assembly areas with fixed seating. • In newly constructed facilities, an accessible route will have to be provided to 25% (rather than 100%) of tiered dining areas. Each tier will have to provide the same services and the accessible route will have to serve accessible seating.

<p>Stadiums/ Auditoriums/ Convention Centers cont.</p>	<ul style="list-style-type: none"> • Where the aggregate area of all press boxes does not exceed 500 square feet, small press boxes that are located on bleachers with entrances on only one level and freestanding small press boxes elevated more than 12 feet will be exempted from accessible route requirements (e.g., a lift). • Currently, assistive listening systems are required in any assembly area that provides an audio amplification system OR has an occupant load of at least 50 people, and the number of required receivers is 4% (minimum 2) of seats no matter how many seats there are. Under the proposed revised standards, only (a) assembly areas with audio amplification systems and (b) courtrooms will be subject to the requirement, and fewer receivers will be required in larger assembly areas (3% of seats between 501-1000, 2% of seats between 1001-2000, and 1% of seats over 2000). • At least one wheelchair space will be required in team or player seating areas with fixed seats. With respect to team or player seating areas serving bowling lanes, the requirement applies only to those lanes required to be accessible. • At least one accessible route will be required to directly connect both sides of the court in a sports facility.
<p>Universities</p>	<ul style="list-style-type: none"> • Public post secondary schools that had previously opted to comply with the Uniform Federal Accessibility Standards (UFAS) will now be subject to the requirements for transient lodging. With respect to dormitory facilities, the biggest differences are accessible vertical access (i.e., elevators, platform lifts, etc.) between all levels, distribution of rooms with communications features for people who are deaf or hard of hearing, and distribution of rooms with mobility features. The proposed standards require broader access for people with disabilities than UFAS.
<p>Amusement Parks</p>	<ul style="list-style-type: none"> • An accessible route will be required to serve each ride at amusement parks, including the load/unload area. • Each newly constructed amusement ride (except for mobile/temporary rides and a few additional excepted rides), will be required to provide at least one type of wheelchair access (namely, one wheelchair space, one transfer seat, or one transfer device). • Each amusement ride (except for mobile/temporary rides) will be required to provide specified maneuvering space in the load/unload area.

Amusement Parks cont.	<ul style="list-style-type: none"> • Signs identifying the type and location of wheelchair access for each amusement ride will be required at entries to queues and waiting lines.
Golf Courses	<ul style="list-style-type: none"> • An accessible route will have to serve all accessible elements within the boundary of the golf course; all golf car rental areas, bag drop areas, teeing grounds, putting greens, and weather shelters; and all accessible practice putting greens, practice teeing grounds, and teeing stations at driving ranges. • Golf cars will have to be able to enter and exit each putting green, each weather shelter, and, for each hole, at least one teeing ground (two if more than two teeing grounds are provided), including the forward ground. • In existing golf courses, the forward teeing ground shall not be required to be one of the teeing grounds on a hole designed and constructed so that a golf car can enter and exit the teeing ground where compliance is not feasible due to terrain. • Golf cars will have to be able to enter and exit each putting green, each weather shelter, and, for each hole, at least one teeing ground (two if more than two teeing grounds are provided), including the forward ground. • Golf cars will have to be able to enter and exit at least 5% but no fewer than one of each of practice putting greens, practice teeing grounds, and teeing stations at driving ranges.
Malls	<ul style="list-style-type: none"> • With respect to areas within sites or between an entrance and site arrival point that can only be accessed by vehicle (such as the roads and parking areas of many suburban “big-box” retail shopping malls), facilities will be exempt from providing a pedestrian accessible route. Now, buildings and facilities on a site must be connected by an accessible route even if there are no sidewalks.
Parking Garages	<ul style="list-style-type: none"> • Facilities with valet-only parking services, which currently must provide an accessible passenger loading zone but are not required to provide accessible parking spaces, will now have to provide accessible parking spaces as well.

<p>Parking Garages cont.</p>	<ul style="list-style-type: none"> • Mechanical access parking garages (garages that use lifts, elevators, or other mechanical devices to move vehicles from the street level to a parking tier) will no longer be exempt from providing an accessible passenger loading zone, which would be required at vehicle drop-off and pick-up areas • All direct pedestrian connections from a parking structure to a facility will be required to be accessible, rather than one as currently required.
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B. New Provisions Regarding Specific Elements

The chart below summarizes the key changes to some of the most common elements, such as parking areas, circulation paths, and bathroom and toilet features.

<p>Parking Areas</p>	<ul style="list-style-type: none"> • One in six (rather than one in eight) accessible spaces will be required to be van accessible. There is no change in the total number of accessible parking spaces required; however, van accessible parking spaces are 3 feet wider than accessible parking spaces. For each van accessible space, facilities have the option of either providing an 11 foot parking space with a 5 foot aisle, or an 8 foot space with an 8 foot aisle. If the facility has 600 or fewer spaces, only two van accessible spaces are needed, which can be together and share a common access aisle. • Parking lots containing spaces designated for the exclusive use of buses, delivery vehicles, law enforcement vehicles and the like will have to provide an accessible loading zone. • Facilities with four or fewer parking spaces and residential facilities with assigned parking spaces will no longer be required to identify accessible parking spaces (including the van accessible space) with signs displaying the International Symbol of Accessibility.
<p>Accessible Routes</p>	<ul style="list-style-type: none"> • An accessible route will have to coincide with or be located in the same area as the circulation path used by the general public. Currently, accessible routes must coincide with general circulation paths to the maximum extent feasible. Because, by statute, altered facilities need only comply with accessibility requirements to the maximum extent feasible, this revision effects no change for altered or existing facilities. • With respect to areas within sites or between an entrance and site arrival point that can only be accessed by vehicle (such as the roads and parking areas of many suburban “big-box” retail shopping malls), facilities will be exempt from providing a pedestrian route. Now, buildings and facilities on a site must be connected by an accessible route even if sidewalks are not provided.

Circulation Paths	<ul style="list-style-type: none"> • A circulation path is an exterior or interior way of passage provided for pedestrian travel, including but not limited to: walks, hallways, courtyards, elevators, platform lifts, ramps, stairways, and landings. Common use circulation paths within employee work areas will have to comply with the technical requirements for accessible routes, with specific exceptions provided where compliance may be difficult due to the size, arrangement, location or function of the work area. Currently, employee work areas are only required to permit individuals with disabilities to approach, enter, and exit.
Ramps, Stairs, Doors	<ul style="list-style-type: none"> • When an automatic door serves as part of an accessible means of egress, it will be required to have sufficient maneuvering clearance unless stand-by power is provided or the door/gate remains open when the power is off. • Automatic doors that are part of a means of egress that do not have standby power will be required to provide 32 inches minimum break out openings ("swing out" option) when operated in emergency mode (unless there are manual swinging doors serving the same means of egress). • Exterior sliding doors that are part of an accessible route will have to provide lower ($\frac{1}{2}$ inch) thresholds (currently $\frac{3}{4}$ inch). The revision maintains the current exception for existing thresholds that do not exceed $\frac{3}{4}$ inch and are beveled on each side, and so will effect no change for altered or existing facilities. Neither is there a change for interior sliding doors, which are currently required to provide $\frac{1}{2}$ inch thresholds. • Swinging doors and gates except tempered glass doors without stiles will be required to have smooth surfaces on their lowermost 10 inches so that individuals who use wheelchairs and scooters can open these doors/gates without creating a trap or pinch point. Now, there is no requirement with respect to the surface features of doors. Existing doors and gates are specifically exempted. • All stairs in newly constructed facilities that are part of a means of egress will have to comply with the requirements for accessible stairs, which cover treads, risers, and handrails. Currently, stairs serving levels that are connected by an accessible route (e.g., an elevator) are exempt.

	<ul style="list-style-type: none"> • In existing facilities where levels are connected by an accessible route (e.g., an elevator), all stairs that are part of a means of egress will have to provide handrails. Currently, stairs serving levels that are connected by an accessible route (e.g., an elevator) are exempt. • Handrails on non-ramp walkways will be subject to technical requirements for handrails (including height, gripping surface, and clearance requirements). Compliant handrails are required on only one side of the walkway. • The technical requirements for handrails will be more flexible (permitting the distance between handrail gripping surfaces and other surfaces to be 1.5 inches or more, rather than exactly 1.5 inches; a wider range of approved handrail gripping surface diameters; and no longer requiring a horizontal section at the bottom of stairs.)
Bathrooms and Toilet features	<ul style="list-style-type: none"> • In multi-user men’s toilet rooms where the total of toilet compartments and urinals is six or more (as opposed to just the toilet compartments), at least one toilet compartment will have to be ambulatory accessible. • In single-user toilet rooms, the water closet will have to provide clearance for both a forward and a parallel approach (the current provision permits one or the other), and the lavatory will no longer be permitted to overlap the water closet clearance, except in special dwelling unit cases. • In accessible bathtubs and shower compartments, the revision will require shower spray controls to have a “non-positive” on/off control. • In a men’s toilet with one urinal, an accessible urinal will no longer be required. • Where multiple single-user toilet rooms are clustered in a single location, 50% (rather than 100%) will be required to be accessible. Accessible single-user toilets will have to be identified by the international symbol of accessibility. • In single-user toilet rooms, the water closet will have to provide clearance for both a forward and a parallel approach (the current provision permits one or the other), and the lavatory will no longer be permitted to overlap the water closet clearance, except in special dwelling unit cases. The in-swinging doors of single user toilet or bathing rooms will be permitted to swing into the clearance around any fixture, as long as clear floor space is provided within the toilet room beyond the door’s arc.

Bathrooms and Toilet features cont.	<ul style="list-style-type: none"> • The revisions allow greater flexibility in the placement of the centerline of water closets (permitting it to be between 16-18 inches from the wall rather than exactly 18 inches), and will also permit a shorter grab bar where there is not enough space due to special circumstances (e.g., because a lavatory is located next to the water closet and the wall behind the lavatory is recessed so that the lavatory does not overlap the clear floor space at the water closet). • Under the revised provisions, at least 5% of sinks in each accessible space will be required to be accessible. • The revisions will provide more flexible specifications for transfer-type and roll-in showers.
Alarms	<ul style="list-style-type: none"> • New exception will require visible alarms to be added to existing fire alarm systems only when systems are upgraded or replaced, or when a new system is installed.
Drinking Fountains	<ul style="list-style-type: none"> • Drinking fountains will be required to provide a forward approach (rather than either a forward or a parallel approach) unless exclusively used by children.

VI. Recommendations and Technical Assistance

A. Educational Offerings

The DOJ provides free ADA materials. Printed materials may be ordered by calling the ADA Information Line (1-800-514-0301 (Voice)). The DOJ also provides a Title III Technical Assistance Manual (1993) and Supplement which is an 83-page manual that explains in lay terms what businesses and non-profit agencies must do to ensure access to their goods, services, and facilities. Many examples are provided for practical guidance. Other educational resources are available online at www.ada.gov. These guidance documents, however, are often written in an expansive manner, such that building owners, operators, and tenants are at times advised to make more extensive modifications than necessary. Businesses are therefore well advised to consult with legal counsel before adopting such recommendations.

B. Federal Agency and Private Sector Assistance

In addition to the assistance from the DOJ, organizations such as BOMA provide its members with assistance in complying with the new proposed regulations. BOMA also provides research publications, seminars, and the designation programs to keep you informed. The BOMA Magazine is also a source for up-to-the-minute news and information as is the BOMA website, www.boma.org.

C. Requesting a Compliance Audit by Counsel

The most important thing every company can do to limit Title III liability is to determine how the law applies to your company and whether your company is in compliance. The DOJ encourages

entities to establish procedures for an ongoing assessment of their compliance. In addition to avoiding litigation in the first place, self-reviews are favorably viewed during trials. Critically, counsel should be used to bring the audit under the umbrella of attorney-client privilege prior to seeking the audit. The failure to do so could result in the creation of documents that do not serve the best interests of the company.

A competent audit must consider at least four different areas of the law. First, buildings built or remodeled after 1992 are required to strictly comply with ADAAG. The requirements are specific and include virtually every feature of a building and its surrounding areas. These requirements also apply to facilities that have undergone significant renovation or alteration. All businesses must remove physical barriers in existing facilities where it is “readily achievable” to do so. If removal is not possible, goods and services must be made available in ways that are “readily achievable.” Buildings built after the new requirements go into effect will similarly have to strictly comply with the new guidelines. Second, businesses must make reasonable modifications to usual practices and procedures when it is necessary to accommodate disabled customers. Businesses are not required, however, to change their policies and procedures in a way that would cause a “fundamental alteration” to goods or services. Third, public facilities must ensure effective communication with customers who have vision, hearing, speech, or cognitive disabilities. The type of assistance that is appropriate can vary greatly depending on the type of service provided. Lastly, businesses that provide transportation to customers as a convenience to support their primary operations (e.g., car rental shuttle vehicles) must provide equivalent transportation services to individuals with disabilities. The services offered to people with disabilities need to be as convenient as the services offered to other people in terms of schedules or response times, hours of operation, pick up and drop-off locations, and other measures of equivalent service.

D. Carefully Structuring Corporate Relationships to Minimize Liability of Franchisors for Franchisee Compliance

Corporate liability can be reduced by carefully structuring franchisor-franchisee relationships to avoid holding franchisors directly liable for their franchisees’ ADA violations. This area of the law is currently in flux, as courts examining the exact same franchise operation in different parts of the country have come to completely different findings on the question of franchisor liability. While some courts have concluded that liability should only be found where the franchisor meets the traditional standards for a responsible party under the Act, other courts have focused more heavily on the degree of control the franchisor has over the facility. *Compare U.S. v. Days Inns of Am., Inc.*, 22 F.Supp. 2d 612 (E.D. Ky. 1998) (holding that Days Inns was not liable for its franchisee because it was not acting as an owner, operator, lessor or lessee when it designed and constructed the hotels), *with U.S. v. Days Inns of Am., Inc.*, 151 F.3d 822 (8th Cir. 1998) (holding that Days Inns was liable for its franchisee because it had a significant amount of control over the final design and construction of the hotels). Franchise documents must therefore be drafted in a way that clearly emphasizes that review and approval of facilities and operations by franchisors are solely for the purpose of determining compliance with corporate system standards, and not for determining whether the facilities satisfy the legal requirements of the ADA.

E. During Litigation, Remedial Action Can Eliminate Plaintiff’s Standing

Challenging a plaintiff’s standing to file suit can often be an effective means for getting a claim dismissed. In federal court, a plaintiff must establish standing by showing: (1) an injury in fact;

(2) that is fairly traceable to the defendant's conduct; and (3) that that injury is likely to be redressed by the requested relief. The first and third prongs of this test often present a problem for plaintiffs. Under Title III, plaintiffs can only request prospective relief. The ADA authorizes the court to issue an injunction to correct ongoing violations, but it does not authorize damages for past violations. A plaintiff must therefore demonstrate that an award of prospective relief will redress a past violation. To the extent that remedial action reduces the possibility of a violation in the future, a defendant may be able to defeat standing by demonstrating that there is not a substantial likelihood that a violation will occur in the future. The modification need not include the specific change sought by the plaintiff, but must instead show that the changes are such that there is not a substantial likelihood plaintiffs will encounter the same violation.

VII. Conclusion

The proposed ADAAG promises to open a new chapter in ongoing efforts to comply with the ADA. While the regulations have not yet been enacted, businesses can take steps to minimize disruption to their operations by being proactive now in learning about and taking steps to comply with them. BOMA will continue aiding its members in this evolving area of the law by issuing further guidance once the final regulations are released.

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For more information on this and other issues related to Title III of the ADA, please contact:

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