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

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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

TUESDAY, APRIL 24, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4:38 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Nadler, Scott, and Conyers.

Staff Present: (Majority) Holt Lackey, Counsel; Jacki Pick, Counsel; (Minority) David Lachmann, Subcommittee Staff Director; and Heather Sawyer, Counsel.

Mr. FRANKS. I just want to welcome all of you today. You know, I usually have just a written opening statement, and I am going to read that in a moment, but if I could just speak to you just for a moment from my heart here. I know that there are a lot of people here that are trying to do every good thing that you can. And I want you to know there is nobody in the world on your side more than I am.

One of the people in my office, a man named Brian Van Hovel, has worked for me for 10 years in this Congressional office. He is paralyzed from the neck down. And he is absolutely one of the most effective, best workers we have.

Last year he was the staff member of the year in our office. And I want you to know that I care very much about your circumstances and the challenges that you have. And this isn't about, this hearing today isn't about some attempt to reduce access on anybody's part. It is about making sure that the law is followed. And in the Administrative Procedures Act, that wasn't done. And in a sense, that has two implications, I believe, for all of you—or for many of you.

One, when the rule of law is ignored, it damages and hurts the rights of those who are either disabled or weaker than others, in the most profound way. Because otherwise, we would just have, you know, the survival of the fittest prevail if we don't have the rule of law. And secondly, I believe that there are some implications to some of the policy here that could actually reduce the access of the handicapped and disabled in this situation.

So I just want you to know that. And I hope that we can find the best policy here. And this isn't about—we are not hearing a bill as it were, we are trying to hear the truth from everybody. And I want everybody to have a chance to be heard. And I want you to have a chance to be heard. And if we do that, if we are respectful to each other, we have a chance do what only America has been able to do. With that, I am going to read my opening statement, and just want you to know that is just something I wanted to say to you.

I want to welcome you all to this hearing on the Department of Justice's Guidance to Access to Pools and Spas Under the Americans with Disabilities Act. This hearing is about transparency, open debate, and fairness in the regulatory process. Without objection, the Chair is authorized to declare a recess of the Committee at any time. Congress has given great power to Federal regulatory agencies, but we have done so within strict limits. A regulatory agency may not exceed the authority that Congress has given it, and it must abide by the Administrative Procedures Act, or the APA.

Complying with Federal regulations is time consuming and very expensive. The least that Congress can do is to minimize the burden of regulation on American job creating and businesses to ensure that regulations are imposed according to the APA.

In 2010, the Department of Justice issued a regulation, the ADA Standards for Accessible Design, which sets requirements to ensure that disabled Americans could access public accommodations. These standards were the result of a public rulemaking process dating back to 2004 guidelines adopted by the United States Access Board, an agency that develops design standards for disabled access. Like all new regulations, the 2010 Standards were subject to a comment period so that citizens could express their approval or their concerns, or perhaps even their ways of improving them. Like all proposed major regulations, the 2010 Standards were also submitted to the Office of Management and Budget for analysis of their costs and benefits, and then submitted to Congress so it could allow or reject them.

One public accommodation that the 2010 Standards regulated was access into and out of swimming pools. Small swimming pools were required to have either a sloped entry or a pool lift. Larger pools were required to have two accessible means of entry, one of which must be a sloped entry or pool lift.

On January 31 of this year, Department of Justice issued what it called a technical assistance document. DOJ claims that this document merely interprets the 2010 Standards, but it does more by detailing three new pool access requirements. The document states that pool lifts must generally be fixed rather than portable, pool lifts must remain at pool side and operational during all pool hours, and pool lifts cannot be shared between pools. Nothing in the 2010 Standards, the 2004 guidelines on which they were based, or the regulatory record drew any distinction between a portable pool lift and a fixed lift. The means of how a pool owner complied with the requirement to provide access into a pool, whether using a portable or a fixed lift, was not an issue, so it was not debated and analyzed during the rulemaking process.

Because DOJ invented these new requirements by circumventing the rulemaking process, there was no opportunity for the public, Office of Management and Budget, or Congress to comment, or any of you for that matter, to comment or analyze the DOJ's guidance. This means that there is no adequate record of the cost, benefits, and impacts of this guidance. There is no record of the costs of buying portable lifts compared to construction necessary to install fixed lifts, or significantly, the potential risk that children playing around, like my 3-year old twins do on a moment's basis, could hurt themselves in an elevator attached to a pool.

DOJ skipped all of those steps that require them to show their work when making new requirements, and simply imposed their preferred policy. This policy will mean trial lawyers bringing more ADA lawsuits against businesses. It could actually impact you all in a very negative way. This is why a bipartisan group of Congressmen have called on DOJ to delay enforcing its so-called interpretations and begin a proper APA rulemaking process. Several bills have been introduced to address the issue directly, which may be necessary if DOJ will not comply with the APA. And I don't know what else to add.

I want to hear everyone here today. We are going to allow the Ranking Member to express his opinion. I am sure he is going to beat the tar out of me, and I am ready. Okay? So God bless you.

And with that, I now yield to the Ranking Member of the Subcommittee, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman. Last week, the Subcommittee called a hearing on the Justice Department's voting rights enforcement without inviting the Department of to testify. Now we have a hearing to examine Department of Justice regulations regarding the Americans with Disabilities Act and, once again, the Justice Department is not here to speak for itself, this time, having been invited much too late, less than a week ago, to be able to arrange for testimony today. Instead, we have a lawyer representing a hotel association who can speak to her clients' interests, but unlike the Justice Department, is not obligated to make an objective assessment and issue regulations that serve all stakeholders, business owners and patrons alike, and achieves the law's underlying purposes.

As I said at last week's hearing, holding hearings to examine the actions of a Federal agency without ensuring the agency's presence might do for a kangaroo court, but it should not be the standard for the United States Congress. We should not be moving forward on this without hearing from DOJ, which made clear that if we would delay this hearing by a week they would be able to attend. Increasing access and opportunities are core goals of the ADA, and are critical to greater independence and community integration for people with disabilities.

This law and these goals have always enjoyed widespread support. I hope that today's hearing does not signal an erosion of our historic bipartisan commitment to the law's guiding principles or to our promise of equality for our friends, families, co-workers, and neighbors with disabilities. One of the ADA's guiding principles is that public entities and public accommodations must take "readily achievable" steps to increase access to existing facilities. The law

does not require that every step must be taken regardless of burden or expense. Rather, it requires only those that are "easily accomplishable and able to be carried out without much difficulty or expense," which is exactly how "readily achievable" is defined in the ADA.

This standard, established by Congress when it passed and the first President Bush signed the ADA 22 years ago, was sought and supported by the business community because it provides flexibility to determine what is achievable based on the covered entity's particular circumstances.

With this flexibility, of course, comes the responsibility for determining what is readily achievable for your own business. But a mom-and-pop outfit that operates three hotels will never be required to take the same steps as the Marriott chain. Given this, the current claim that every owner of an existing pool will have to install permanent or fixed lifts or pay civil penalties or cash settlements rests on an alarming and alarmist misreading of the ADA and the accompanying regulations.

The ADA and the new regulations require a hotel to consider whether installing a sloped entry into a pool or a fixed or permanent lift is "readily achievable." While we have heard and anticipate that some of the witnesses will testify today that the DOJ has demanded that all pool owners install a permanent or fixed lift in every pool, that simply is not the case. Here, in fact, is exactly what the Justice Department's January 2012 guidelines provide. "For an existing pool, removing barriers may involve installation of a fixed pool lift with independent operation by the user to the extent that it is readily achievable to do so." "May," not "must" install a fixed lift, and then only to the extent that doing so is readily achievable.

There are compelling reasons why installing a permanent lift is preferable to a portable lift, and something that should be done if it can be done easily and inexpensively. A fixed or permanent lift is available at all times a pool is open without the need for staff to locate the lift, ensure it is in operating condition, and provide timely and safe installation. An underlying goal of the ADA is to achieve equality of access and independence. A fixed lift is far superior in achieving this goal, as it allows a person with a disability to access a pool on the same terms as everyone else. A fixed lift also poses no greater safety risk than any other means of entry or exit into a pool, and is no more likely to be misused by children or others, particularly as lifts become a more commonplace feature of our everyday landscape.

Of course, while a fixed lift or a sloped entry, which is another possibility, may be the best options, they simply are not required unless "readily achievable," which means if they are too hard or too expensive, the law doesn't require either, and there is no possibility of civil penalties. The ADA requires courts to take into account the size and financial resources of the business in determining what is readily achievable, which means that small family-owned hotels are especially unlikely to have to install new lifts in their existing pools. Moreover, the DOJ has always focused enforcement of new ADA standards on education and technical assistance, making it

additionally unlikely for the Department to sue any business that has engaged in a good faith effort to comply with the law.

It is also important to remember that this is not something that the Obama administration rushed through the regulatory process. The foundations for this rule originated under the second President Bush. The hotel industry has known about this issue for a decade, and has participated at every step of the way. Once the rules were finalized in September 2010, the hotel industry had an additional 18 months to prepare before the pool standards were set to go into effect this month.

Responding to concerns of some hotel groups, the DOJ has already delayed the effective date another 2 months to May 21, and is proposing to delay it again until September 2012. While these delays are being granted, Americans with disabilities are still waiting, and they have already been waiting a very long time.

For these Americans, as for everyone else, access to water and the opportunity to swim provides tremendous physical, emotional, and social benefits. It allows, for example, a teenager in a wheelchair to get in the water and play with her peers. A mother can teach her children to swim so that the family all can enjoy this activity together. Swimming builds strength and self-confidence that translates in other critical and practical ways to one's ability to gain greater independence by, for example, increasing one's physical strength to perform self-care tasks like transferring from a wheelchair to a bed.

We should never lose sight of these and the many other benefits that are gained when we live up to the ADA's promises. And we certainly should not consider enacting legislation like H.R. 4200 or H.R. 4256 that would override a nearly decade-long regulatory process that merely sets the guidelines for what should be done by a business if readily achievable, and that would roll back critical, balanced, and negotiated civil rights standards. With that I look forward to hearing from the witnesses. I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman. And since the Chairman of the full Committee is not available, we will now yield to the distinguished Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you very much, Mr. Chairman. And I want to welcome all the witnesses. But I especially want to welcome all of the citizens who are concerned with this question of how we deal with the disabled and these regulations and whether they ought to be changed.

Now, I want everybody to know, because I want to put most of my statement in the record, that two bills have been introduced that would nullify the Department of Justice's regulation regarding access to swimming pools, and I oppose both these bills. Now, the fact that every seat in this place is taken, we have a couple hundred people outside in the hallway trying to get in; we have the access room, 2237, already filled up to capacity, it tells everybody on this Committee that this is a very important subject and that we want to move on it with great care and caution.

Now, the disabled deserve extra attention, not less attention. And what we want to do is try to have a civil hearing. We got to remember that everybody on the Committee has a right to their

own opinion. And you as well have a right to your opinion. The only problem is that in a hearing, you can't express your opinion, and we express ours and the witnesses express theirs.

So we have to be cordial. It is not like at a baseball game, where you cheer when somebody does something that you like or you boo when somebody does something you don't like. So please bear with us. And if necessary, we will have a follow-up to this hearing, or if we don't have another hearing, I haven't talked with the Chairman about this, but I am gratified that so many people have come to this hearing. It demonstrates how important access guaranteed under the Disability Act is to all of you.

And so I welcome you all and thank you for being here. And I ask that the rest of my statement be included in the record, Mr. Chairman. And I yield back the balance of my time.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on the Constitution

Thank you, Mr. Chairman.

Today's hearing will examine regulations issued by the Department of Justice in 2010 to enforce the Americans with Disabilities Act of 1990. That civil rights law was passed with overwhelming bipartisan support in both chambers of Congress and has enjoyed the support of both parties since, with this Committee voting unanimously to report favorably the ADA Amendments Act of 2008. Those bills sought to achieve equality of access and opportunity for people with disabilities. Both are protective civil rights measures that also take into account and balance the practical and financial needs of entities that must comply with its requirements.

Unlike those bipartisan efforts, today we are considering whether Congress should undermine the DOJ's ability to enforce one of this nation's most important civil rights laws. This effort does not enjoy bipartisan support.

I am especially disappointed that the Justice Department is not testifying at today's hearing. It is my understanding that DOJ was invited to participate a week ago. As my colleagues are well aware, seven days is not nearly enough notice to obtain a witness from DOJ. This is the second time in as many weeks that this Subcommittee has invited hear critics of DOJ policies without the benefit of a DOJ witness. That is not the way to do oversight. There is no way members can get a clear and balanced understanding of the issue without hearing from the agency that is the subject of the hearing.

In order to ensure that the Members are fully informed, I would ask the distinguished Chairman to commit to holding another hearing on this topic so that the Justice Department can participate before there is any effort to move legislation on this issue through the Committee. I believe that failing to do so would undermine the credibility of any legislative action we might take in the future.

Despite my disappointment that DOJ is not here to provide its perspective, I am heartened that we have here with us today two witnesses who can speak to the very real harm that congressional interference in the enforcement of the ADA's accessibility standards will cause for people with disabilities. One of these witnesses was invited by the Minority, and the other was invited by the Majority. That should not go without being noted. Their testimony should remind all of us why it is critical for us to move forward—not backwards—on enforcing the ADA.

We need to keep three very important points in mind as we consider today's testimony:

First: The regulations at issue did not come out of the blue. They reflect two decades of public policy, and a decade of work on the particular standards. They have been the subject of public notice, public comment, and extensive scrutiny.

Second: Legislation that would undercut or eliminate this rule is ill-considered and lacks the carefully crafted balance that is reflected in the Americans with Disabilities Act and the rule itself.

Third: The rule itself is carefully crafted, flexible, and will not—contrary to many concerns that have been raised—impose an undue burden on affected businesses. Indeed, that burden is precluded not just by the rule, but by the ADA itself.

These regulations are not something that the Obama Administration cooked up and rammed through the regulatory process. The hotel industry has known about this issue for a decade, and the guidelines incorporated in the 2010 regulations were developed during the Bush Administration. The Access Board first issued pool lift standards in its accessibility guidelines for recreation facilities issued in 2002, which it then incorporated into its 2004 ADA Accessibility Guidelines.

The pool lift standards of the 2010 ADA regulations come directly from those 2004 guidelines, and follow a 6-year public notice and comment period, which started with issuance of an Advanced Notice of Proposed Rulemaking in 2004 and a two Notices of Proposed Rulemaking in 2008. The hotel industry and other key stakeholders participated in this process every step of the way.

Once the regulations were finalized in September 2010, the hotel industry had another 18 months to prepare for the pool lift standards to go into effect, which was scheduled to happen on March 15, 2012. That date has now been delayed, with likely extension to September 2012, to provide additional guidance requested by the industry.

Two bills have now been introduced in the House—H.R. 4200 and H.R. 4256—that would nullify DOJ regulations regarding access to swimming pools. H.R. 4200 currently has 18 co-sponsors; all are Republicans. H.R. 4256 has 57 cosponsors, only one of whom is a Democrat.

H.R. 4200 would strip DOJ entirely of its ability to enforce any of its regulation regarding access to swimming pools. H.R. 4256 would leave some of the DOJ's regulatory guidance on swimming pools intact but would excuse public accommodations from providing a fixed lift for entry into a pool—that is, a lift that is affixed to the deck and available whenever a pool is open to guests—even where installing such a lift is "readily achievable." That term—"readily achievable"—is defined in the ADA as meaning "easily accomplishable without much difficulty or expense" (42 U.S.C. 12181(9)). Thus, H.R. 4256 excuses a hotel from installing a fixed lift even where it would be easy and inexpensive.

It is important to make clear that, contrary what we have heard, neither the regulations, nor the January 2012 guidance require a fixed permanent lift in all cases, and the Justice Department already has taken steps to make this additionally clear.

What is required by the ADA and the DOJ's regulatory guidance is for pool owners to take steps to accomplish what is "readily achievable" based on the financial and other resources of the covered entity. The best option, if "readily achievable," is a fixed, permanent lift or sloped entry into a pool, but if it is not "readily achievable," it is not required.

There are important reasons why fixed and permanent pool lifts are preferable where they are readily achievable.

- A compliant fixed pool lift ensures that the lift will be consistently mounted for safe and independent use in an accessible location that complies with the requirements in the 2010 Standards and that persons with disabilities will not experience discrimination on the basis of their disability.
- Prior to the pool requirements in the 2010 Standards, many older portable lifts were not independently operable and difficult to use by the swimmer. Because of these inherent flaws, individuals with disabilities did not feel safe using them and ultimately stopped asking for these lifts to be deployed.
- The use of non-fixed portable lifts that are made available only on the request of a person with a disability raises safety concerns because of the possibility that the lift will not be assembled and located properly in relationship to the pool for the safe and independent use of a person with a disability.
- In addition to safety concerns, the use of non-fixed portable lifts only on the request of a person with a disability significantly increases the likelihood that persons with disabilities will not be provided the equal opportunity the ADA requires in order to prevent discrimination on the basis of disability.

But even though fixed/permanent is the better option, it is not legally required in all cases. While businesses that can install a permanent lift relatively easily and inexpensively should, those that cannot must simply consider what else might be "readily achievable." This might be, for example, providing a portable lift or transfer wall. Or it may mean doing nothing for the time being as the ADA also recognized that sometimes a business simply is not in a position to do anything until its financial circumstances change.

It is therefore false to claim that *all* owners of existing pools are legally required to install permanent lifts.

It is also not the case that businesses face heavy monetary penalties if they do not install permanent lifts. While a court may assess civil penalties in a suit brought by the Justice Department to enforce Title III's public accommodation requirements, a court must first consider "any good faith effort or attempt to comply with [Title III] by the entity," making both the pursuit and imposition of civil penalties unlikely in any case involving a public accommodation that has made a good faith effort to comply with the law. Private parties are not entitled to money damages and may only obtain attorneys fees if they prevail in court. Businesses that voluntarily take corrective action may thus avoid liability for attorneys' fees.

So, Mr. Chairman, I hope that, if there is any effort to move legislation on this important issue, that we have the opportunity to hold another hearing first and have the most complete record we can assemble. The longstanding, bipartisan commitment to the ADA is too important to do anything else.

With that, I yield back the balance of my time.

Mr. FRANKS. I certainly thank the gentleman. Just for the record, the rule that we are discussing here today becomes effective May 21 in part because of the circumvention of the regular process. So the time was of essence. If we were going to have any input in this at all, we had to hold a hearing earlier. And the DOJ was invited, but because of this time frame it was too late for them to come. We have invited them, and we look forward to their written comments just for the record. Without objection, other Members' opening statements will be made part of the record.

And our first witness, Hemant Patel, has owned and operated an independent hotel and franchise hotel outside Miami since 1989. Long active in his community, he serves as chairman of the Asian American Hotel Owners Association. Mr. Patel.

Our second witness, Christa Bucks Camacho, has worked for the Social Security Administration in Maryland since 1999. Currently, she is the director of the Center for Records Management. Ms. Camacho has a significant disability which requires her to use a wheelchair, and she has been swimming throughout her life. Previously, she was a volunteer in the Peace Corps in Paraguay.

Our third witness, Ann Cody, is currently the director of policy and global outreach for BlazeSports America, and a member of the International Paralympic Committee's governing board. She is a recipient of the Congressional Award from the National Consortium for Physical Education and Recreation for Individuals With Disabilities. That is a nice short name. She represented the United States in three paralympics. And welcome, Ms. Cody.

Our final witness, Minh Vu, is a partner with the law firm Seyfarth Shaw, where her practice focuses on labor and employment law. Previously, Ms. Vu served as counselor to the Assistant Attorney General for Civil Rights in the Department of Justice, where she represented the DOJ on the U.S. Access Board. She is testifying today as counsel for the American Hotel and Lodging Association.

And I would just thank all of the witnesses for appearing before us today. And each of the witnesses' written statements, your full statements, will be entered into the record in its entirety. So I would ask each of you as witnesses to summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have ex-

pired. And I would also, because it always happens, admonish the witnesses to turn on your microphone before you talk. So Mr. Patel, you are recognized for 5 minutes, sir.

TESTIMONY OF HEMANT D. PATEL, CHAIRMAN, ASIAN AMERICAN HOTEL OWNERS ASSOCIATION

Mr. PATEL. Thank you. Honorable Judiciary Committee Chairman—Subcommittee Chairman Mr. Franks, Ranking Member Mr. Nadler, and the Members of the Committee. Thank you for the opportunity to discuss the need for safe access to public pools for all Americans. My name is Hemant Patel. I am the chairman of Asian American Hotel Owners Association, also known as AAHOA. Our nearly 11,000 members own in excess of 20,000 hotels in the United States, which is more than 40 percent of all hotels in this country. Many of our members own independent hotels, or limited service brands, with less than 100 rooms.

The majority of our members have small outdoor swimming pools. These pools are largely unattended. They are principally used by our guests with children. AAHOA members are dedicated to providing excellent service to the traveling public, including the disabled community. We care deeply about our guests. We do all we with can to provide an enjoyable stay. We support the Americans with Disabilities Act. We spend a substantial amount of time and resources to remove barriers and provide accessibility to our hotels. We have always been good actors in complying with the Federal law, and we will continue to lead the way. However, we have serious concerns about the manner in which recent pool lift requirements from the Department of Justice will impact a struggling sector of our economy which has taken a beating in the last 4 years. These concerns include whether actual safety and feasibility studies were considered, and whether a cost-benefit analysis would support the implementation of permanent pool lift requirements. The hotel guests who use our pools are typically families with children, and most of the pools are unattended by a lifeguard.

Because of this, our first major concern is this permanent pool lift would become a safety hazard. It is highly likely that a pool lift would be used by children for playing or diving into the shallow end of the pools. With no one to monitor these activities, pool lifts could present a serious safety concern and issue for our children. The unattended pool lifts could also be a target of vandalism. If a guest with a disability subsequently uses a pool lift that has been broken or damaged because of acts of vandalism, this could pose a safety concern. The ability to offer disabled guests a portable pool lift instead of a permanent one would answer the serious concern.

The second major concern is the costs of purchasing and installing permanent pool lifts. In speaking with hotel owners and pool lift manufacturers in recent weeks, the costs of pool lifts can range from $2,400 to $9,700, depending on the manufacturer, model, and type of lift ordered. The cost of installation can range from $500 to $3,000 in the case of such a State like California. If a hotel owner with a small pool and a hot tub in California needs to install two permanent lifts, the costs of purchasing and installing two lifts could range from $11,000 to more than $25,000.

The Department of Justice will not allow owners to include the maintenance costs of the pool lifts when determining if it is readily achievable to install them. But to disallow the high cost of installation poses serious concerns. The costs of a pool lift alone is significant, but to add the additional costs of permitting, electrical bonding, and other installation requirements raises the bar even higher. It is significant to note that for those hotels that have had pool lifts in place for years, we have reported guests with disabilities have not been using the lifts. One of our board members reported that 12 years ago he constructed a pool at the city of Austin, Texas.

[Disturbance in the hearing room.]

Mr. FRANKS. Ladies and gentlemen, speech is a civil right, too. Speech is a civil right, too. Speech is a civil right, too. Ladies and gentlemen. Ladies and gentlemen. Free speech used to be a civil right, too, ladies and gentlemen. The hearing is about making sure that all voices of Americans with an interest in this rule are heard. And I would appreciate the respect and order for the people that are talking here. This doesn't reflect well on anyone. This doesn't reflect well on anyone. All right, Mr. Patel, if you would proceed, sir. If you would proceed, Mr. Patel.

Mr. PATEL. Thank you, sir. It is significant to note that for hotels that have had pool lifts in place for years, we have reports guests with disabilities have not been using the lifts. One of our board members reported that 12 years ago, he constructed a pool at his hotel in the city of Austin, Texas. At that time——

[Disturbance in the hearing room.]

Mr. FRANKS. Ladies and gentlemen. Ladies and gentlemen. Access to the process is a civil right, too. Access to the process is a civil right, too. You were given access to this hearing. Ladies and gentlemen, I am going to have to call upon security here. If you don't have respect for the civil rights of access to government, then we will have to clear it. I know that is what you want.

[Disturbance in hearing room.]

Mr. FRANKS. If security would close the door. Let me state for the record that the people who just left the room left of their own accord, and were not forced to leave by anyone. The reason that the Chair maintained restraint in a situation like this which you would normally not do, is because he is very aware that there are certain people who have exploited these individuals in a very despicable way that does not serve their cause or serve the cause of freedom in any way for anyone.

And for those people I have great disdain. But with that, I would just say that the people being exploited were doing what they thought would bring attention to their issue, and I understand that. And that is why we did not clear the room by using security. And if security would please close the door, I would appreciate it.

Mr. Patel, we are going to go ahead and continue here the best that we can. Again, part of this process is about process. It is about giving everyone a chance to be heard. And unfortunately, that has been breached today in a fairly significant way. And I apologize to the witnesses.

Mr. PATEL. Sure. It is significant to note that for hotels that have had pool lifts in place for many years, there are reports that guests with disabilities have not been using the lifts. One of our board

members reported that 12 years ago he constructed a pool at his hotel in the city of Austin, Texas. At that time, Austin had a requirement that all hotels must have a portable lift for their guests with disabilities. During the 12 years that he has maintained a portable pool lift at the hotel, he has never had a guest request to use the pool lift. He is also a board member of Austin Hotel and Lodging Association.

Based on his information and beliefs, none of the hotels in Austin has ever had a guest use their pool lift. Further, we have testimony from a member in the Washington, D.C. area. He had a pool lift at six hotels. In the past 9 years, no one has ever used them. This is a just an example of the evidence and statements we have collected. Hotels with fewer than 100 rooms are most negatively impacted by the pool lift mandate. The high cost of purchase and installation, along with the nonuse by guests makes it economically unrealistic for those small business owners. The end result will be many simply close their pools, which is not a benefit to anyone.

With this serious concern, we strongly support the Pool SAFE Act of 2012. The Pool SAFE Act strikes the appropriate balance between providing individuals with disabilities access to hotel pools and spas while taking into important factors such as child safety, feasibility, and costs.

We thank this Committee for the opportunity to testify in support of the important Pool SAFE Act. I welcome your questions. Thank you.

[The prepared statement of Mr. Patel follows:]

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WRITTEN STATEMENT BY HEMANT D. PATEL, CHAIRMAN OF THE ASIAN AMERICAN HOTEL OWNERS ASSOCIATION (AAHOA)

ON

"POOL SAFETY AND ACCOUNTABILITY FOR EVERYONE (Pool SAFE)" ACT OF 2012

BEFORE

JUDICIARY COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

April 24, 2012

Honorable Judiciary Committee Chairman Lamar Smith, Ranking Member John Conyers, and members of the Judiciary Committee, thank you for this opportuuity to discuss the need for safe access to public pools for all Americans.

I. INTRODUCTION

My name is Hemant Patel, and I am Chairman of the Asian American Hotel Owners Association, also known as AAHOA. AAHOA was founded more than twenty (20) years ago. We currently have nearly 11,000 members who own 20,000 hotels across the U.S., which is more than forty percent (40%) of all hotels in this country. Many of our members own independent hotels, or limited service brands, with less than 100 rooms.

The majority of our members' more than 20,000 hotels have a small outdoor swimming pool, and many also have a hot tub or spa. These pools are largely unattended. They are principally used by our guests with children.

AAHOA members are dedicated to providing excellent services to the traveling public, including the disabled community. We care deeply about our guests, and do all we can to provide an enjoyable stay. We support the ADA, and spend a substantial amount of time and effort to remove barriers and provide accessibility to our hotels.

A. The DOJ Issued New Guidance On January 31, 2012 That *Surprised* Pool Owners; It Failed To Address *Safety, Feasibility* And *Cost* Concerns

In 2010, the Department of Justice ("DOJ") adopted updated standards for accessible design to replace the 1991 standards. These updated standards included requirements for hotels (as places of public

accommodation) to make pools and spas accessible for our guests with disabilities. The deadline for compliance was March 15, 2012.

On January 31, 2012 -- only six (6) weeks before this deadline -- the DOJ issued a new Guidance Document on the 2010 ADA standards for pools. This new ADA Guidance Document contained ***major and significant revisions*** to the 2010 ADA Standards concerning existing swimming pools. This was done ***without providing advance notice to pool owners***. The January 31 changes in the ADA requirements included the following:

a) For all existing, altered and newly constructed pools, they must install a "fixed" pool lift. If installation of a fixed lift is not readily achievable, the owner may only then consider alternatives such as use of a portable pool lift that complies with the 2010 Standards.
b) Pool lifts must be at poolside and fully operational during all open pool hours.
c) Sharing of accessible equipment between pools is not permitted.

As a result of these new rules, there was confusion in the hotel industry and among the pool lift manufacturers. In our discussions over the past few months, we have been informed that on January 31, 2012, many owners tried to cancel their orders for portable pool lifts. Others placed a "hold" on such orders. Numerous members tried to place orders for permanent or fixed lifts but learned that the backlog was substantial, and considered closing their pools to avoid liability. Still others who had already received their portable lifts tried to return them in exchange for permanent lifts.

In addition to the surprise element of this new Guidance Document, the more important concern is that it does not adequately address the concerns of hotel owners regarding ***safety***, ***feasibility*** and the ***cost of permanent pool lifts***.

B. <u>The New Pool SAFE Act Strikes The Appropriate *Balance* Between Providing Access To Pools And Addressing Industry Concerns</u>

The proposed Pool Safety and Accessibility for Everyone (Pool SAFE) Act of 2012 ("Pool SAFE Act") will strike the appropriate balance to provide access to pools for guests with disabilities while also allowing pool owners the necessary time to purchase and install the lifts, to use the lift that will provide be safe for all guests, and to comply with the ADA requirements in a cost-effective manner. Specifically, the proposed Pool SAFE Act will:

- Extend the compliance deadline for places of public accommodation for one year;
- Allow a place of public accommodation to use a portable pool lift upon request to comply with the accessibility standards; and
- Allow a place of public accommodation to use a single portable pool lift for multiple water features at that location.

This reasonable and balanced approach to the ADA requirements will benefit all, and AAHOA strongly supports the proposed proposed Pool SAFE Act in its entirety.

II. <u>DISCUSSION</u>

On January 31, 2012, the DOJ issued – ***for the very first time*** – the new ADA Guidance Document that substantially changed the ADA requirements for pool owners. The concerns among AAHOA members and throughout the industry were substantial. The key concerns outlined below are based on the fact that the DOJ did not have adequate information and studies to support these changes or show how they would impact the industry overall.

A. With The Passage Of The Pool SAFE Act, The Key Concerns Arising From The New ADA Guidance Document Issued By The DOJ On January 31, 2012 Will Be Addressed

With passage of the proposed Pool SAFE Act, these concerns will be appropriately addressed to ensure the accessibility of pools for guests with disabilities while still offering pool owners the ability to provide a safe environment and the flexibility to install pool lifts in a timely and cost-effective manner.

1. The New ADA Guidance Document Did Not Consider The Serious Safety Concerns, The Possibility Of Vandalism, Or The Potential Liability Of Pool Owners

In recent weeks many of our AAHOA members expressed deep concerns about the impact of these new pool lift requirements on their guests and their businesses. As they considered their unattended pools and what it would mean to have permanent lifts installed at them, they clearly saw the danger for families with young children who would try to climb on the pool lifts, and/or jump and dive off them into the shallow end of the pools.

Specifically, since a large number of AAHOA members own independent and limited service hotels, many of their guests are young families with children. With no lifeguards on duty at the pools, the children and young guests will be drawn to the pool lifts and want to sit in the chairs, stand on the lifts, and jump or dive into the pools. The unattended lifts could also be the target of vandalism. This could pose dangers if guests with disabilities then tried to use a damaged or broken lift.

The DOJ has commented that it did not receive any information or studies on the safety risks of the fixed pool lifts. Of course, since AAHOA members were unaware that the DOJ was going to issue a surprise Guidance Document on January 31, 2012 which mandated that fixed pool lifts be installed at all pools at all times when the pools are open to the public, we did not commission any such studies.

Some might wonder whether portable lifts pose any less of a safety hazard than the fixed lifts. While portable lifts might also attract children, it is presumed that the lift will only be at the pool when a guest with a disability is using it. Thus, children will be far less likely to play on a lift when it is being used by someone with a disability, and their parents will also stop them from climbing on a lift that is in use. Of course, without studies on these issues, it is impossible to make an informed decision.

2. The New ADA Guidance Document Did Not Address The Fact That Pool Lifts Are Not Being Used By Guests With Disabilities At Smaller Hotels, And It Did Not Account For The Significant Costs for Hotel Owners To Comply

At the time it released the new Pool Lift Requirements Document on January 31, 2012, the DOJ had not conducted or received any cost / benefit analyzes or studies to determine how best to serve guests with disabilities without bankrupting hotel owners. The DOJ simply announced the new Rules, and did not consider the significance of its decision.

As explained in AAHOA's comments to the DOJ almost four (4) years ago, there is no evidence that guests with disabilities use pool lifts at swimming pools and hot tubs in smaller hotels. Specifically, this was raised during the DOJ's July 15, 2008 hearing by Sunny Patel, an owner/operator of six (6) hotels in the greater Washington, D.C. area. In Mr. Patel's case, each of the 6 hotels in question had indoor swimming pool lifts. However, during the nine (9) years he has been an owner and/or operator of the six hotels, Mr. Patel testified that not a single person used "that lift chair . . . in all of this time."

That same story has recently been told by several AAHOA Board members concerning their swimming pools, and the fact that guests with disabilities do not use the available pool lifts. One of our AAHOA Board members reported that he has had a portable pool lift at his hotel in Austin, Texas for 12 years. The City of Austin required that hotels have portable pool lifts at the time he constructed the hotel. However, over the past 12 years, no guests have ever requested the pool lift. This owner is also a member of the Austin Hotel Lodging Association, and according to his reports, none of the hotels in Austin has ever had a guest use the pool lifts.

Further, we have statements from Board members that have ordered the pool lifts and are waiting for them to be installed, but they have never had a request for pool lifts in their years of operating the hotels.

A cost-benefits analysis is always useful when implementing new requirements under the ADA and should be carefully considered as part of sound rule making. With additional time, interested parties can submit such studies and provide the DOJ with the necessary tools and information to make the right judgment call on the pool lift requirements.

3. The New ADA Guidance Document Did Not Address How Quickly A Portable Lift Can Be Installed To Minimize Any Wait Time for Guests with Disabilities

As indicated above, it appears that the DOJ has consistently maintained that the only reason it is mandating fixed lifts is because it will take too long for pool owners to secure the portable lifts at the pools for guests with disabilities. Significantly, the total time needed to set up and secure a portable lift is only 6.12 minutes. With advance notice, this wait time can be eliminated entirely.

It is not uncommon for guests in hotels to wait for a few minutes for special amenities. For example, if a guest with disabilities does not provide advance notice of the need for an assisted listening device, the guest will have to wait for the hotel to bring the TTY for their use. The same is true here. Hotels are in the business of pleasing their guests. They will do all they can to ensure that guests with disabilities are not kept waiting for a portable pool lifts. This is all part of providing excellent services to the traveling public, including the disabled community.

Indeed, if the hotels implement new policies whereby they ask each guest checking into the hotel whether they will need a pool lift, if the guest says "yes," the hotel owner can have the lift at the pool by the time the guest goes to the room, changes into their swimsuit and returns to the pool for a swim.

4. The New ADA Guidance Document Mandated That No Sharing Of Pool Lifts Is Allowed Without Analyzing The Benefits Of Sharing Lifts

In the new Pool Lift Requirements Document, the DOJ stated that pool lifts could not be shared between pools and spas at the same property and in the same location. The DOJ failed to analyze the benefits of sharing the lifts, and did not allow the pool owners to submit comments or studies on these benefits. .

5. The New ADA Guidance Document Mandated Installation Of Permanent Lifts Without Studying The Costs Involved In Permitting, Electrical Bonding And Reconstruction Of The Applicable Pool Decks

When the DOJ issued the new Pool Lift Requirements Document on January 31, 2012, it failed to understand the process for installation of the "fixed" or permanent lifts. In order to comply with these new Requirements, a hotel owner will need to hire experts to prepare drawings of the proposed reconstruction of the pool deck area, apply for permits, do the electrical bonding, and install the fixed

pool lifts. Along with the back log in ordering the pool lifts, this total process can take several weeks to finalize and be costly for many small hoteliers.

In speaking with hotel owners and pool lift manufacturers in recent weeks, the costs of pool lifts can range from $2,500 to over $9,700 (depending on the manufacturer, model and type of lift ordered), and the cost of installation can range from $500 to over $3,000 in States such as California.

If a hotel owner with a small pool and hot tub in California needs to install two (2) permanent lifts (one at each body of water), the costs for purchasing and installing the two lifts could range from $11,000 at the low end to $25,400 at the high end.

It is significant to note that the DOJ will not allow owners to include the maintenance costs of the pool lifts when determining if it is "readily achievable" to install them, but to disallow the high cost of installation poses serious concerns. The cost of a pool lift alone is significant, but to add the additional costs of permitting, electrical bonding, and other installation requirements raises the bar even higher.

The DOJ's failure to consider the additional time and expense of suddenly mandating fixed lifts at all pools calls for a retraction of the new ADA Pool Lift Requirements, and we strongly urge the DOJ to provide an opportunity for pool owners to submit comments so that an informed decision can be made.

6. **The New ADA Guidance Document Did Not Consider Whether Hotel Owners Would Be Forced To Close Their Pools And Spas Because Of The Increased Costs And Liability If They Were Required To Only Use "Fixed" Lifts At Their Pools**

In response to the new Pool Lift Requirements, many hotel owners started discussing among themselves whether they should simply close their hotel pools and spas to avoid the serious safety concerns they were now facing for all of their guests, along with the increased liability. They discussed the fact that diving boards were removed from all pools a few years ago because of the increased risks of serious injuries to guest, but they were now being required to install lifts that could serve as diving board -- in the shallow end of the pools.

Such concerns and ramifications must be considered before any final Requirements are implemented. Indeed, swimming pools and spas provide therapeutic benefits to all guests, and it would be a shame to see them close because the DOJ was unwilling to work with the hotel community to implement reasonable measures for the benefit of all.

7. **The New ADA Guidance Document Did Not Recognize The Potential For A Widespread Increase Of ADA "Drive-By" Lawsuits By Unscrupulous Plaintiffs' Attorneys Without Benefiting the Disabled Community**

In the AAHOA community, hotel owners are sometimes subjected to ADA "drive-by" lawsuits by unscrupulous plaintiffs' attorneys. These attorneys are typically asking for payment from the hotel owners of a specified amount up front for their fees and damages, and they do nothing to serve guests who have disabilities. Some of these ADA attorneys file hundreds and thousands of cases each year, and the vast majority of them are settled based on the money – instead of the alleged violations of the ADA.

If the DOJ does not work with the hotel community and continues to mandate that fixed lifts must be in place at all pools when they are open, this will provide new opportunities for drive-by lawsuits and only the attorneys will benefit.

8. **The New ADA Guidance Document Did Not Consider Whether Smaller Hotels With Less Than 100 Rooms Should Be Given Special Considerations**

As a final point, AAHOA respectfully submits that the DOJ should grant an extension and obtain comments on whether smaller hotels with less than 100 rooms should be given special consideration with respect to the pool lifts.

Given their size, the smaller hotels typically have fewer guests staying with them who have disabilities. We request the DOJ to consider ways in which special considerations might be granted to these smaller hotels as they seek to provide accessibility to guests with disabilities.

III. CONCLUSION

On behalf of our nearly 11,000 members with their 20,000 hotels, we strongly support the "Pool Safety and Accessibility for Everyone (Pool SAFE) Act of 2012." The Pool SAFE Act strikes the appropriate balance between providing individuals with disabilities access to our hotel pools and spas, while still taking into account important factors such as child safety, feasibility and costs.

We thank this Committee for the opportunity to testify in support of this important Pool SAFE Act. I welcome your questions.

Mr. FRANKS. Ms. Camacho, before I recognize you, the Chair notes the irony that perhaps one of the persons on the panel here with a great credential is not being allowed to be freely heard. And there is a great irony there that I think is unfortunate. But if you will proceed the best you can.

If you will turn on your microphone, please.

TESTIMONY OF CHRISTA BUCKS CAMACHO, SENIOR EXECUTIVE SERVICE CANDIDATE DEVELOPMENT PROGRAM, SOCIAL SECURITY ADMINISTRATION

Ms. CAMACHO. Good afternoon, Chairman Franks, Vice Chairman Pence, and Subcommittee Members. Thank you very much for inviting me. My name is Christa Bucks Camacho, and I am a person with a significant disability. And I have been swimming for all of my life. Today, my goals are to illustrate, by sharing my personal experiences, one, how important swimming is to the quality of my life, and two, how the ability to share portable lifts can limit or deny access to a pool.

My parents started taking me to the swimming pool when I was 6 months old. Later, as my ability to walk progressed slowly, swimming became even more important. That exercise eventually did help me to walk for a period of time. During middle school, I spent roughly a year in a full body brace following surgery. When my doctor said I was allowed to get in the pool as long as I kept my brace on, I was able to resume socializing with my peers and get the necessary exercise that I would need when my brace would eventually come off.

I did regain the muscle strength I had lost following the surgery. And I say thank you to my mom, who made me this great bathing suit that fit over my body jacket. It had this colorful jacket that I wore over the top of it. Swimming enabled me to begin doing things out of the water that I had been unable to do before. I mean, I could go to the bathroom by myself, I could independently get in and out of a car, I could get into and out of bed on my own.

Swimming helped me to become independent, and it has helped me stay independent. In recent years, when I broke my legs, I could not swim. However, when the casts did eventually come off, the doctor said I could get right back in the pool. And you could find me every day for a month in the pool. And I gained back my independence. The pool provided me relief from pain, and gave me the ability to do things again. I also am a mother of two children. During pregnancy, I exercised in the pool all the time. It was great for my health and the health of my child. I swam to provide exercise and also to relieve my stress. I was a working mom.

Swimming continues to be a very important part of my life. I started taking my children to the pool at 6 months of age. I would ride the pool lift. And when I got in the water, another parent would pass me my child. We would have a great time splashing, singing songs, learning to put our face in the water. We have become a swimming family. My son Antonio, he swims on the swim team, and we go all the time. When he is in one side of the pool, I am in the other getting my exercise.

I share these stories to illustrate to you a point. While swimming can be good for anyone, it is extremely important to the physical, mental, and emotional health of many millions of people with significant disabilities. For us, access to a swimming pool promotes personal health, social interaction, and family fun, not to mention stress relief. For many of us, access to a swimming pool means

more than having a recreational alternative. It is a quality of life issue.

For me, however, access to a swimming pool has not always been easy, and at some facilities, it has been denied. When I visit a new pool, which usually occurs when I travel, I first look for the lift. My experience with fixed lifts has been positive. They are there, they are easy to spot, I pull up my wheelchair, I transfer, the lifeguard typically knows how to turn it on, and I get in the pool. I want to mention something to you about safety concerns that I have heard expressed. In my opinion, a fixed lift is no more hazardous than any other pool equipment. I say this because I am a parent of young children, and I spent a considerable amount of time in the pool with other parents and their children, and as someone who has taught swimming to other children. My experiences with portable lifts, on the other hand, have not always been good. When near the pool, portable lifts sometimes are in locations where I can't get my wheelchair close enough, so I can't transfer, I can't get in the water independently.

When I ask for a portable lift, it is not always made available. I usually have to show a lifeguard, when they find the lift, how to hook up the hose, how to attach the battery. And for a person who does not know how to do this, the lift would be effectively unavailable. Every time that a portable lift has been made available upon request, there has been a time that one has not been made available. I have been told that although a portable lift existed, it had been loaned out, or was put in a closet, could not use it because the battery was not charged, which would take another set of hours.

When no lift was available, lifeguards refused to help me get into the pool or out of the pool, so the pool was not available to me. My personal experiences are consistent with the years of post-ADA access issues that helped inform the Department of Justice rules for ensuring access to swimming pools. By negating these rules or the ability to enforce them, H.R. 4256 would, one, give permission to those who deny such access to continue doing so; and two, invite those who have been more careful about making these pools accessible to people like myself to not do so anymore. Thank you for considering my testimony, and I am available to answer your questions.

Mr. FRANKS. Thank you, Ms. Camacho.

[The prepared statement of Ms. Camacho follows:]

Testimony of Christa Bucks Camacho
Before the House Committee on the Judiciary, Subcommittee on the Constitution

April 24, 2012

Chairman Franks, Vice-chairman Pence, and members of the Subcommittee:

Thank you for inviting me to share with you some personal experiences that may be of relevance as you consider H.R. 4256, The Pool Safety and Accessibility for Everyone Act.

I am Christa Bucks Camacho. I have a significant disability and I have been swimming all my life. My parents started taking me to swimming classes when I was six months old. Later, as my ability to walk progressed slowly, swimming became an increasingly important means of exercise for me. That exercise eventually helped me to walk for a number of years.

During middle school, I spent roughly a year in a full-body brace following surgery. I studied at home with a tutor, but I missed school and I missed swimming. When my doctor said I could swim as long as I kept the brace on, swimming enabled me to resume socializing with other children in normal and fun ways and it helped me regain muscle strength I had lost as a result of the surgery. Thank you, mom, for making a swim suit that fit over that brace.

Swimming enabled me to begin doing things out of the water that I had been unable to do before. I could go to the bathroom unassisted. I could independently get into and out of a car. I could get into and out of bed without help. ***Swimming thus helped me to become independent and it has helped keep me independent ever since.***

In recent years, when I broke both of my legs, I could not swim. However, when the casts were removed, the doctor prescribed water therapy. I went to the pool almost daily for a month to heal. The water enabled me to be able to move my legs with minimal pain and, once again, regain my independence.

I am the mother of two children. During pregnancy, exercise can be important to the health of the child as well as the mother. I swam throughout both my pregnancies. It was my primary form of exercise and a great way to relieve stress.

Swimming continues to be a very important part of my life. I started taking my children to swim classes when they were six months old. I would ride the lift into the pool and another parent would hand my child to me. We have become a swimming family. My son, now seven, goes to swimming practice several times a week. I take full advantage of this to get in my own exercise. While he practices in one part of the pool, I swim in another.

I share these stories to illustrate the point that, while swimming can be good for anyone, it is extremely important to the physical, mental, and emotional health of many of the millions of people who have significant disabilities. For us, access to a swimming pool promotes personal

health, social interaction, and family fun, not to mention stress relief. ***For many of us, access to a swimming pool means more than having a recreational alternative; it is a quality-of-life issue.*** For me, however, access to a swimming pool has not always been easy and, at some facilities, it has been denied.

When I visit a new pool, which usually occurs when I travel, I first look for the equipment I will need in order to get into and out of the pool on my own. My experiences with fixed lifts have always been positive. They are there and easy to spot. They are situated so that I can park my wheelchair close enough to transfer. Lifeguards typically know how to operate the equipment.

A note here about the safety concerns that some have expressed regarding fixed lifts. In my opinion, a fixed lift is no more a hazard to children than any other pool equipment. I say this based on my experience as a parent with young children, who has spent considerable pool time with other parents and their children, and as someone who has taught swimming to children.

My experiences with portable lifts, on the other hand, have often been negative. When near the pool, portable lifts sometimes are in a location that makes it difficult or impossible for me to transfer from my wheelchair. But portable lifts often are not by the pool. When I ask, a portable lift is not always made available even when there is one. When a portable lift is made available, I usually have to show the lifeguards where to hook up the hose or place the battery. For a person with a disability who does not know how to do this, the lift would be effectively unavailable.

For every time that a portable lift has been made available upon request, there has been a time that one was not made available. I have been told that, although a portable lift existed, it had been loaned to another hotel, or was in a storage closet, or could not be used until the battery was charged, which could take hours. When no lift was available, lifeguards refused to help me get into and out of the pool, so the pool was unavailable to me.

My personal experiences are consistent with the years of post-ADA access issues that helped inform the September 2010 Department of Justice rules for ensuring access to swimming pools for people with disabilities. By negating these rules or the ability to enforce them, HR 4256 would: (1) give permission to those who deny such access now to continue doing so; and (2) invite those who have been more careful about providing such access to stop doing so.

Thank you again. I will be pleased to answer any of your questions that I can.

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Mr. FRANKS. Ms. Cody, you are recognized for 5 minutes.

TESTIMONY OF ANN CODY, DIRECTOR, POLICY AND GLOBAL OUTREACH, BLAZESPORTS AMERICA

Ms. CODY. Good afternoon, Chairman Franks, Ranking Member Nadler, and distinguished Members of the House Subcommittee on

the Constitution. My name is Ann Cody, and I am the director of policy and global outreach for BlazeSports America. BlazeSports assists communities across the country with providing access to sports and recreation for people with disabilities. I also serve on the governing board of the International Paralympic Committee, and as vice chair of the U.S. Olympic Committee's Paralympic Advisory Committee. I hold a master's degree in therapeutic recreation, and have worked in the recreation and sports industry for more than 20 years.

As a three-time Paralympian in the sport of track and field, I spent 10 years training and traveling to competitions all over the world. In my professional life, I travel extensively. And as a wheelchair user, I have experienced firsthand the inability to use swimming pools and hot tubs when I am on the road. Ironically, much of my travel is for the purpose of educating local recreation and sport professionals about how to include people with disabilities in their programs. When I am traveling, I can't just slap on a pair of running shoes and exercise on the treadmill. While many facilities have made the necessary adaptations, I find that pool lifts in hotels are the exception and not the rule. This is disappointing nearly 22 years after passage of the ADA. And frankly, I am stunned that we are having this conversation in 2012. I have used a wheelchair for 32 years, and swimming is one of the best forms of exercise for me.

In my family, weekends and vacations revolve around water activities. Before I became disabled, I swam every day in the summer, and so did my siblings, friends, classmates, and peers. The swimming pool in our community was the hub of social interaction and physical activity. Children and adults with disabilities have a fundamental right to engage in the very activities that shape our relationships, our bodies, our health, and our communities.

The ADA is a civil rights statute that aims to maximize the independence of people with disabilities and to promote full integration into all aspects of society. The ability to access swimming pools and other facilities is critical to achieving greater independence and community integration. Just as for anyone, and as Christa mentioned, being physically active is critically important for people with disabilities. We are among the most sedentary, most obese minority groups in the country. Physical activity significantly enhances our physical, mental, social, and emotional well-being.

Swimming is a highly desirable activity for many people with mobility impairments, including our returning veterans, who benefit from swimming with their families for rehabilitation, and for fitness. ADA's accessibility requirements for barrier removal in existing facilities are very reasonable. The rules are carefully crafted to take the needs of covered entities like hotels into account. The regulations direct public accommodations to use a fixed or permanent lift, or a sloped entry into the pool only, and only if either can be done easily, without significant difficulty, or expense.

In my experience, similar to Christa's, the best way to ensure access to swimming pools is a fixed, permanent lift. A fixed lift is there and ready whenever a person with a disability wants to swim. The person doesn't have to find a staff person who knows where the lift is, who has the key, who knows how to operate it. In my experience, the keys often reside with a staff person who has

to be paged. If the person with the key is in the middle of a job or on a meal break, then we are left wondering if we will be able to use the pool at all because we don't know when that person is going to show up with the key.

In conclusion, it is excellent that DOJ has finally addressed accessibility standards for recreation facilities. It has been a long time coming, including swimming pools so that people with disabilities have opportunities that have been available to the general public all along. Exercise and recreation opportunities should not be withheld on the basis of a disability. And I would encourage the hotel industry to begin marketing and figuring out ways to let people with disabilities know that their amenities are inclusive and accessible.

Recreation facilities such as swimming pools are key features of the lodging industry. The ADA pool requirements are not unduly burdensome. In an existing hotel, all that is required is what is readily achievable. Congress should ensure strong civil rights protections and end discrimination against people with disabilities. The ADA must be enforced, and the DOJ must have the enforcement power to do so. Please do not weaken the enforcement we need. That concludes my oral testimony, Mr. Chairman.

Mr. FRANKS. Thank you, Ms. Cody.

[The prepared statement of Ms. Cody follows:]

Testimony

Statement by
Ann Cody
Director of Policy and Global Outreach
BlazeSports America
on "The Department of Justice's Guidance on Access to Pools and Spas Under the ADA"

before
Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives

Tuesday, April 24, 2012

Good afternoon Chairman Franks, Ranking Member Nadler and members of the House Subcommittee on the Constitution.

My name is Ann Cody and I am the Director of Policy and Global Outreach for BlazeSports America. BlazeSports assists communities across the country with providing access to sports and recreation for people with disabilities. I serve on the governing board of the International Paralympic Committee, and as Vice Chair of the US Olympic Committee's Paralympic Advisory Committee. I hold a Masters degree in therapeutic recreation, and have worked in the recreation and sports industry for more than 20 years. As a three time Paralympian, I spent 10 years traveling to competitions all over the world.

Personal Experience

I travel extensively in my profession and, as a wheelchair user I have experienced first hand the inability to use swimming pools and hot tubs. Ironically, much of my travel is for the purpose of educating local recreation and sport professionals about how to include people with disabilities in their programs.

When I'm traveling I just can't slap on a pair of running shoes and get my exercise on a treadmill. While many facilities have made the necessary adaptations, I find that pool lifts in hotels are the exception and not the rule. This is disappointing nearly 22 years after passage of the ADA. Frankly, I am stunned that we are having this conversation in 2012. I have used a wheelchair for 32 years and swimming is one of the best forms of exercise for me.

In my family, weekends and vacations revolve around water activities. Before I became disabled I swam everyday in the summer and so did my siblings, friends, classmates, and neighbors. The swimming pool in our community was the hub of social interaction and physical activity. Children and adults with disabilities have a fundamental right to

engage in the very activities that shape our relationships, our bodies, our health, and our communities.

Access is Critical to Independence and Integration

The ADA is a civil rights statute that aims to maximize the independence of people with disabilities and promote our full integration into all aspects of society. The ability to access swimming pools and other facilities is critical to achieving greater independence and community integration.

Just as for anyone, being physically active is critically important for people with disabilities. We are among the most sedentary, most obese minority groups in the country. Physical activity significantly enhances our physical, mental, social, and emotional wellbeing. Swimming is a highly desirable activity for many people with mobility impairments including returning veterans, as it enables us to move freely with fewer limitations.

The ADA Only Requires that Existing Pools Comply with the New Accessibility Standards if Doing So is "Readily Achievable"

The standards in the new ADA rules have undergone extensive review for more than 10 years, with multiple comment periods and many opportunities for hotels to learn about their responsibilities. The new requirements already had a generous phase-in period of 18 months.

Providing access to swimming pools is doable, not burdensome. The ADA's accessibility requirements for barrier removal in existing facilities are very reasonable. The rules are carefully crafted to take the needs of covered entities like hotels into account. The regulations direct public accommodations to use a fixed (or permanent) lift or a sloped entry into the pool, only if either can be done easily without significant difficulty or expense.

In my experience, the best way to ensure access to swimming pools is a fixed or permanent lift. A fixed lift is there and ready whenever a person with a disability wants to swim. The person doesn't have to find a staff person who knows where the lift is, where the keys are, how to set it up, and operate it. Often the keys to these lifts reside with a staff person who has to be paged over the radio. If the person with the key is in the middle of a job or on a break they are not able to respond quickly leaving the person with a disability wondering if they'll be able to use the pool at all.

Some hotels argue that it is safer to be able to use a portable lift because keeping it stored away when it is not being used will avoid accidents involving children. However, lifts pose no greater risk than any other means of pool access or other equipment around a pool. In fact, when children are exposed to lifts and to people using them, they learn not to play with them. Indeed, normalizing the experiences of people with disabilities is one of the core goals of the ADA.

It is good business

Americans with disabilities and our families work, travel, shop and spend our money in our communities. Businesses will benefit from marketing their facilities and amenities to consumers with disabilities. The auto industry markets their mobility programs and the cruise lines promote their accessibility features on TV and print media. In fact, my family is taking a cruise because I know I can use the pool and hot tub with everyone else. There is a market that these businesses are not yet fully considering – and the income generated from guests with disabilities would far exceed the $2000-3000 it would cost to purchase a fixed lift for a pool.

Universal Access

Accessibility features prompted by ADA such as curb cuts, elevators, wider toilet stalls, ramps, and automatic doors are used by everybody—seniors, mothers with strollers, people with disabilities and others.

The accessible entrance to the swimming pool in my building is used by many residents who prefer the level entry over a flight of steps. The permanent pool lift is bolted to the ground on the pool deck and does not pose a hazard to anyone. It not only allows me to use the pool, but has also increased use by seniors and others whose mobility impairments previously prevented them from using the pool. Children who use the pool with adult supervision do not bother the lift.

Conclusion

It is excellent that the DOJ has finally addressed accessibility standards for recreation facilities, including swimming pools, so that people with disabilities have opportunities that have been available to the general public all along. Exercise and recreation opportunities should not be withheld on the basis of disability.

Recreation facilities such as swimming pools are key features of the lodging industry. The ADA pool requirements are not unduly burdensome. In an existing hotel, all that is required is what is readily achievable. Congress should ensure strong civil rights protections to end discrimination against people with disabilities. The ADA must be enforced and the DOJ must have the enforcement power to do so. Please do not weaken the enforcement we need.

Mr. FRANKS. Ms. Vu, you now have 5 minutes.

TESTIMONY OF MINH N. VU, PARTNER, SEYFARTH SHAW LLP

Ms. VU. Good afternoon, Mr. Chairman and Members of the Subcommittee. On behalf of the American Hotel and Lodging Association, thank you for the opportunity to testify on the new and arbitrary pool lift requirements that the Department of Justice has issued in January of this year.

The DOJ issued these requirements without following the requirements of the Administrative Procedures Act, the Small Business Regulatory Enforcement Fairness Act, and Executive Order 12866. These new requirements affect hundreds of thousands of businesses, all State and local governments, and all Americans who use the facilities at these establishments. Many other business groups have joined the Association in objecting to the DOJ's end run around laws that are designed to ensure that rules are only issued after a thoughtful process that considers factors such as public safety, the cost to society, reasonable alternatives, and impact on small businesses.

The AH&LA represents a wide variety of hotel owners and operators, many of whom are small businesses. I have served as the Association's ADA Title III counsel since 2006.

I want to begin by reiterating that the lodging industry recognizes the importance of providing access to its pools and spas to guests with disabilities. The industry is fully committed to this effort. After DOJ issued new ADA Title III regulations on September 15, 2010, which I will call the 2010 final rule, most of the Association's members researched their pool lift options and planned on buying or had already purchased portable pool lifts which complied with all of the requirements of the 2010 Standards.

Now, some here have expressed negative experiences in the past with portable pool lifts, and what we must remember is that, up until now, there have not been any pool lift requirements, nor have there been any particular specifications for pool lifts. Therefore, we can anticipate that in the future, now that the Department of Justice has actually mandated a requirement to have pool lifts, that in fact their availability and accessibility will be ensured.

Now, much to the surprise and dismay of the Association's members, the DOJ decided to change the rules of the game on January 31, 2012, only 6 weeks before the compliance deadline. In a technical assistance document that I will refer to as the Pool Lift Requirements Document and in subsequent communications with the AH&LA, the DOJ announced the following requirements:

First, instead of portable pool lifts that can be purchased and used immediately, businesses must install fixed or built-in pool lifts that are attached to the pool deck.

Second, instead of being brought out upon request, the pool lifts must be poolside or spa-side at all times when the facilities are open.

Third, a pool lift cannot serve more than one body of water, according to the Department of Justice, even if there is a pool and a spa right next to each other in the same facility.

The DOJ violated the Administrative Procedures Act when it issued the substantive new requirements without public notice or comment. These requirements—let me emphasize this—were never mentioned by the DOJ at any time during the rule-making process that led to the 2010 final rule, and it is nowhere mentioned in the 2010 final rule that there is a requirement for a fixed lift or that it be out there all the time.

Now, the DOJ's disregard of the rulemaking process in this case has very serious consequences, and I will just mention a few.

First, there has been no analysis about the impact of these new requirements on small businesses, as required by SBREFA, or a cost-benefit analysis, as required by Executive Order 12866.

Secondly, the DOJ did not consider the difficulty and costs associated with installing fixed lifts at existing pools or spas and whether they are outweighed by any benefits that only a fixed lift can provide.

Installing a fixed lift requires a contractor, permits, a feasibility assessment, partial pool deck demolition, electrical bonding, and deck reconstruction even before the lift can be put in place. This is a completely different process than the purchase of a portable pool lift.

We have heard some of the benefits and burdens of a fixed lift today, but this discussion should have been part of a regulatory process that followed the Administrative Procedures Act. Our objection is not to pool lifts but rather to the fact that the DOJ decided to issue requirements without ever having notice and comment on the issue so that we could hear all of the concerns that would be expressed.

Third, the DOJ did not consider the increased risk of injury to children who will play on and jump off of the pool lift into the shallow end of the pool, which is where the pool lift has to be installed. The DOJ dismisses these concerns because it says there is no evidence of injury. But the access board study in 1996 does show evidence of injury in connection with use of the lift.

In addition, we have to remember that we have never had this condition before. Never have there been pool lifts that are permanent and left out at an unattended swimming pool for children to play with. This is not a condition we have ever had. So, therefore, there wouldn't necessarily be evidence of children being injured on these lifts. Nonetheless, we should not wait. The DOJ should not wait until a child is catastrophically injured before saying, gee, we should study this issue. This should be done before the requirements are issued.

In fact, we tried to convince DOJ of this fact, and they dismissed the concerns. So we actually went to a national aquatic safety expert who has investigated over 600 pool accidents, and this individual stated that the conditions posed by the pool lift being unattended and fixed pose serious safety concerns that must be studied.

There are a host of other concerns, including the liability that businesses will face if in fact children and other people injure themselves using unattended lifts. There are issues concerns individuals with disabilities being injured while using the lift, particularly at an unfamiliar lift that they have not used before. And, of course, there is also the real possibility that, because there is increased liability, that businesses will close their pools and spas instead of essentially buying the fixed lift.

Let me just say one thing, also. The readily achievable defense—or not readily achievable defense is not a silver bullet at all. Because, essentially, once there is a requirement for a fixed lift, a business will have to decide—if it decides it can't afford to do the fixed lift, it is going to be subject to a lawsuit, and it is going to have to defend that lawsuit. And defending that lawsuit in the best-case scenario, which is a victory, will cost more than actually

putting in the lift in the first place. In the worst-case scenario, the business loses and pays its fees, the other side's fees, and the costs of the lift. So it is really not a silver bullet. It is a no-win situation.

I know my time is up, and we encourage this Committee and Congress to act to essentially nullify the DOJ's illegal actions. The Pool SAFE Act accomplishes this objective, and we support it.

Thank you.

[The prepared statement of Ms. Vu follows:]*

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

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Page 1 of 146

*See Appendix for the attachments submitted with this statement.

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 12186. 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 are 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

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[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 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 ASSOCITION

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

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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.

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[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 issued 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	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.	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.

Mr. FRANKS. Thank you, Ms. Vu.

I will now recognize myself for 5 minutes to begin questioning. Mr. Patel, I will begin with you.

In Arizona some years ago we had environmentalists pressing very hard to make sure that we didn't clear small trees away from close towns because of the fear of impacting the environment. But what it did, of course, was to create a tinderbox close, and we on several occasions lost whole forests.

And I am asking this question sincerely. If as a small business owner like yourself you find that the cost of installing and main-

taining a fixed pool lift for a spa and pool is too great or the liability, the risk that potentially comes with it, is too great, or the fear, as Ms. Vu mentioned, of having to defend the lawsuits of not doing it just in the right way, is it possible that some hotel owners might conclude, all right, we just won't have a pool at all and that that could affect the accessibility not only of the disabled but for all individuals as well?

Mr. PATEL. Thank you, Mr. Chairman.

Yes. You know, going back many years, back in the early '80's some of the hotel owners just gave up with the pool because the insurance costs of just insuring the hotel with pool and without pool became a huge difference in insurance costs of hotel owners. And in this particular case also some of the—you know, some of the older hotels, let's say, for example, from Florida, where I come from, usually just the small mom and pop hotels had pools to fulfill the needs of guests who like to be in sunny Florida with pools. But those old hotels have no room to put a pool and accessibility the factor. Now, going through the huge cost of putting a pool, I am pretty sure some of the hotel owners will end up giving away the pool, if that answers your question.

Mr. FRANKS. It does. We don't know how many, but, yes, it will.

Mr. PATEL. It will. I am pretty sure it will.

And, as you know, in this last cycle of the economy, the hotel industry has been hit so hard that so many hotels have been foreclosed. So you add another $15,000, $20,000 worth of cost to put a pool lift, guess where the hotel owner is going to end up. And you know how the market has been in the hotel industry.

Mr. FRANKS. Yes. Well, the unfortunate issue here is that somehow the DOJ I think very deliberately have tried to cast this as a struggle between business owners and the disabled, when really it is a struggle against the fire, ready, aim approach of the DOJ.

Ms. Vu, I would turn to you now.

Some argue that because only the Justice Department rather than private parties can bring a claim for money damages under the ADA then small businesses won't have to worry about private-sector trial lawyers suing them based on the DOJ's new requirements. Is that something that you agree with? Or help us understand that.

Ms. VU. I absolutely disagree with that statement. Frankly, the greatest level of litigation activity is brought by private plaintiffs, not necessarily by DOJ. And, as I had stated, once you have a requirement for a fixed lift, even if a hotel owner decides legitimately that perhaps it is not readily achievable for that business to install a fixed lift and it doesn't do so, it is not immune from lawsuits at all. As soon as a private plaintiff sees that there is no fixed lift there, there will be a lawsuit filed. And they don't have to give notice or do anything. They just file the lawsuit. And that will instantaneously result in the business having to hire an attorney to defend the lawsuit.

Now, the readily achievable—or, rather, the not readily achievable defense is not a silver bullet, as I said, because it is a highly fact-specific analysis that requires the examination of at least five different factors. So essentially it is the kind of lawsuit that cannot be dismissed immediately. You have to go to the end basically for

an on-the-merits determination. That means that the fees will be high on both sides. And the hotel owner is essentially gambling that, in the best-case scenario, his position will be justified and so he will only have paid his own attorney's fees, which could be maybe $50,000, $100,000. And if he didn't pick correctly and he got bad advice the first go-around about whether it is readily achievable or not, then he is going to pay his own fees and the other side's fees, and, of course, there will be injunctive relief that will be ordered and a fixed lift would have to be installed.

So that is a very expensive proposition. The upshot is either you put in the lift or you close your pool.

Mr. FRANKS. My last question is really for all of you, and I would like to thank you all for taking so much time here to come and talk to us and to shed light on the subject and the topic. But if the DOJ were to open a full rulemaking process, as they certainly should have for the new requirements, would each of you plan to participate so that any new rule would be informed by a full, transparent, and fair process and a fair record as possible?

If it is all right, we will begin with you, Ms. Camacho, and you, Ms. Cody. Just quickly give me your answer. Would you be available to testify for a full, transparent process?

Ms. CAMACHO. Mr. Chairman, I would be happy to, and I would welcome for people to come along with me on a swimming——

Mr. FRANKS. I am sorry you didn't get that opportunity the first time.

Ms. CAMACHO. And I think that we could answer a lot of questions with life experience.

Mr. FRANKS. Ms. Cody?

Ms. CODY. As I said, I am really concerned about the fact that we are here in 2012 having this conversation. I am happy to lend my expertise as an advisor, but I am not sure that a second hearing on this issue is warranted.

Mr. FRANKS. I understand.

Ms. Vu?

Ms. VU. Yes. The Association would absolutely participate in such a proceeding. It is what we are really asking for.

Mr. PATEL. Yes, Mr. Chairman.

Mr. FRANKS. With that, I am going to just suggest that it is too bad that didn't happen here. Because it certainly didn't serve anyone well for the DOJ to proceed in sort of the lawless, again, fire, ready, aim approach that they took.

Mr. Nadler, I recognize you for 5 minutes, sir.

Forgive me, Mr. Scott first.

Mr. SCOTT. Thank you, and I thank the gentleman for deferring.

Ms. Camacho and Ms. Cody, what is wrong with the precedent that would be set if the normal regulatory process is bypassed? If we bypass the normal regulatory process with the legislation, what is wrong with that?

Ms. CODY. Well, it presents an issue for us in terms of being able to enforce the Americans with Disabilities Act. If we look at the regulations and allow the Department of Justice, who has made their regulations clear and who has followed a very long process of getting public comment and input from everyone, I don't understand why we would need to go back and force the Department to

again open up these regulations. We have been waiting a long time. There has been a lot of time and energy invested in developing these regulations, going back to the access board and the Bush administration and then when the Obama administration came in.

Mr. SCOTT. Would every subsequent regulation be politicized if you went into legislation every time they came up with an enforcement?

Ms. CODY. Yes. I think the answer is yes.

Mr. SCOTT. Mr. Patel, what portion of an expense to comply with the ADA would be offset by tax credits?

Mr. PATEL. I will say I don't see any which will be offset by tax credits because of the fact, if there are any tax credits available from the Department of Justice to enforce this law, we haven't been informed about it.

Mr. SCOTT. Ms. Cody, are there tax credits available for compliance with ADA?

Ms. CODY. Yes, there are.

Mr. SCOTT. And what are they?

Ms. CODY. Pardon?

Mr. SCOTT. What are they?

Ms. CODY. What are they? The tax credits are available. I don't know the specific numbers and ratios, but they are available to business owners.

Mr. SCOTT. The tax credit would pay 50 percent of eligible expenses up to a maximum of $10,000 after the first 250 for those who qualify. This would then cover half the cost of the lift. The rest would be a deductible. Is that right, Ms. Vu?

Ms. VU. Congressman, there is a tax credit. There is also a tax deduction. It is limited.

But that is not really the only issue here. It is not just about cost. The issue is also one about safety, child safety, the increased liability that would result from injuries that could happen to both individuals with disabilities and children.

Mr. SCOTT. You have that with all pools. Is there any increase—Ms. Cody and Ms. Camacho, is there any danger with increased danger?

Ms. CODY. Not in my experience. I know how to operate pool lifts. They are similar to other lifts. They are designed similarly to every accessibility mechanism that I use. And in my experience at my apartment complex, children who are there playing in the pool supervised by their parents, because they wouldn't be there unsupervised, are curious about what the pool lift is, but once they understand what it is—I mean, they understand that it is not something to play with—just like an elevator or an escalator. And, besides, aren't pools inherently dangerous for children to begin with?

Ms. CAMACHO. May I offer some background based on my experience?

I mentioned to you that we swam bright and early, my son and I, because he is on the swim team, and we have traveled to various pools throughout Maryland for swim meets this year. And when there are two pools at the facility, the swim meet will be going on in one and I will be swimming in the other one, and they have often open membership time in the other pools. And in my experience, when the lift is at the pool, there is no equipment being

moved around when there are lots of children all lining up to run their heats. They are constantly lining up and walking around the pool decks getting ready to swim a 100 meter dash.

So in my experience, when you have to roll out a pool lift when you have many people around you, you are bringing in a hazard. When a lift is there, it is part of the facility. Kids see it as if they would see a diving board or they would see other pool equipment.

In my experience with my children and being around their friends, we have not had issues with the lift. There will be questions of curiosity, maybe touching it to turn off the water valve. But it has been simply to explain to the children, well, that water valve is what makes the lift operate, and then I have had no further issues.

Mr. SCOTT. Thank you, Mr. Chairman, and I thank the gentleman from New York for deferring.

Mr. FRANKS. I thank the gentleman.

I recognize the Ranking Member, Mr. Nadler, for 5 minutes.

Mr. NADLER. Thank you.

Ms. Vu, you testified that DOJ, the Department of Justice, did not know about and had never considered the work involved with the installation of a fixed lift before issuing the new requirements. You also testified that the January, 2012, guidance was the first time that your Association's members knew that fixed lifts should be installed, if doing so is readily achievable.

But the American Hotel and Lodging Association submitted comments to the DOJ in 2005, 7 years earlier, with cost estimates that included the cost of building permits for installing lifts. A building permit isn't needed for a portable lift but only for a permanent lift. Doesn't this cast doubt on whether the Association can truly claim surprise since your cost estimates were based on a fixed lift as the recommended standard back in 2005?

Ms. VU. You asked several different questions in that——

Mr. NADLER. No, I asked one question. Don't the facts that I outlined cast doubt on the statement that the Association was surprised, since you had cost estimates for this back in 2005?

Ms. VU. Well, let me say this. If you look at both the proposed rule that eventually became the final rule and you also look at the entire regulatory record from the access board, every time—the only times that the term "pool lift" was ever defined, that was on three separate occasions in the access board rulemaking process. The definition of pool lift included portable lifts, fixed lifts, and also removable lifts.

Mr. NADLER. Excuse me. Do you need a building permit for a portable lift?

Ms. VU. That is—absolutely not.

Mr. NADLER. Therefore, you were talking about a permanent lift in your testimony or in your submissions back in 2005.

Ms. VU. With all due respect, let me say this.

The way the final rule came out, there was no specific requirement for a fixed lift. It was basically the business owner that could choose whether it was going to go with a fixed lift, a portable lift, or some other type of lift. The 2010 Standards contain nine separate, very specific requirements about what a pool lift needs to do, and fixed being attached to the pool deck is not one of them.

Mr. NADLER. Okay. But a fixed lift was one of the alternatives, and you gave cost estimates—or your Association gave cost estimates back in 2005, which means you weren't surprised by this in 2012.

Also, in 2005, AH&LA raised safety concerns describing lifts as an attractive nuisance to children, as you did a few minutes ago. Again, if this is a concern that you claim is limited to fixed or permanent lifts, doesn't this also call into question your current claim of surprise over the fixed lift requirement—or recommendation, I should say?

Ms. VU. Actually, not at all. In fact, obviously, those concerns were expressed, and in the final rule as well as the entire rulemaking there was never a requirement for a fixed lift. That would seem that DOJ actually heard the safety concerns at that point.

Mr. NADLER. But there is still no requirement for a fixed lift.

Ms. VU. Well, there is now after DOJ has announced it in the January 31st document.

Mr. NADLER. Only if it is readily achievable.

Ms. VU. Yes, but that means presumptively it is required, unless the business can demonstrate that it is not readily achievable, using a test that is virtually impossible to administer. And that subjects the business to a lawsuit it must defend to the bitter end——

Mr. NADLER. But why is DOJ now—if you had concerns about safety problems with this back in 2005, why did you wait until 2012 to submit these concerns?

Ms. VU. The Department of Justice never proposed fixed lifts as the only option. There was always the option——

Mr. NADLER. That is still not the only option. Only if it is readily achievable.

Ms. VU. Well, the way the Department has—basically, readily achievable is only an option—is a defense. The presumption is you must follow the 2010 Standards unless you can demonstrate that it is not readily achievable. If the Department of Justice would like to issue a guidance today that says that you don't have to put in a portable lift—I mean a fixed lift—and that it is not just only in the instances where it is readily achievable and you don't have to, we would be delighted by that.

Mr. NADLER. Since there seems to be a dispute between what we are told was required by the Justice Department and what you say, don't you think we should hear from the Justice Department on this?

Ms. VU. You know, we really were hoping that the Department of Justice would actually be here today.

Mr. NADLER. So your answer is yes.

Ms. VU. Absolutely. But, as I understand it, they were invited.

Mr. FRANKS. They were invited.

Mr. NADLER. They were invited a week ago, and they have told this Committee on previous occasions that they need at least 2 weeks to prepare, and they then asked us to postpone this by 1 week so they could be here, and they were told no.

Mr. Patel and Ms. Vu—Mr. Patel, Ms. Camacho testified that her experience with portable lifts has often been negative and that she had been told by hotels that they have a lift but it has been loaned

to another hotel or it is broken or otherwise unavailable. What is your response to her in that situation, better luck next time?

Mr. PATEL. I will disagree with her. As you know——

Mr. NADLER. Wait a minute. You will disagree with her? That never happened?

Mr. PATEL. About the pool lift.

Mr. NADLER. Yes, that she didn't have that experience? That portable pool lifts, she wasn't told they are unavailable now, they are loaned, they are not here?

Mr. PATEL. If I may understand your question correctly, sir—sorry.

Mr. NADLER. My question is, we are told that one problem with the portable pool lift is that it is often not there. It is unavailable. It has been lent to somebody else. Excuses are made. And if you don't have a permanent pool lift but only a portable pool lift, it is often not available when it is needed.

Mr. PATEL. I think I will disagree with her that, you know, we have made many corrections through the years, so many of our members own old properties, and we respect the community and we have made so many changes, which is not just because of the cost of retrofitting our rooms to the standards. We have spent money. So I don't think we will ignore that fact.

But as every hotel—if you are standing in a queue for a hotel to renting a room and if there are five people in front of you, obviously, you know, a 10-minute wait is much less a complicated issue than to have a pool lift, which can create a huge liability for a hotel. What would you prefer?

Mr. NADLER. Well, you have gotten far afield of my question.

Might she and the Justice Department—she having experienced the unavailability of portable lifts when needed on several occasions, might she and the Justice Department not also have legitimate concerns that while a fixed or permanent lift is guaranteed to be placed where it is safe in terms of water depth, location, et cetera, a particular staff person called upon to set up a portable lift might not know in a given case how to ensure safe setup, and shouldn't this also be a safety and liability concern for hotel owners?

It is easier, in other words, when you install a permanent lift to make sure it is done right than to be sure that every employee puts the portable lift in right every time.

Mr. PATEL. I haven't experienced that, you know, as I have some of my members who have lifts for many years. Especially in the case of Austin, they have installed the lift, and in 11 years nobody has used it.

I will still say that a portable lift is a much better option and, you know, our employees will equally do the same to accommodate the needs if the portable lift is asked. I haven't experienced that.

Mr. NADLER. My last question is, since Mr. Patel just testified that many of his members installed a permanent lift and nobody ever used it, in other words, it is not necessary, when Ms. Camacho——

Mr. PATEL. That is not what I said.

Mr. NADLER. That is not what you said?

Mr. PATEL. It is a portable lift, not permanent. A portable lift in Austin, Texas. We have so many hotel owners——

Mr. NADLER. You have put in lifts, and nobody ever used them?

Mr. PATEL. Yes.

Mr. NADLER. Okay.

Now, Ms. Camacho and Ms. Cody, when you travel on your own or with your family, what steps do you take to ensure that the places you stay will be accessible and how highly do you rank having access to a pool? Have you chosen a particular hotel over another hotel because of accessibility and have there been times when you simply couldn't find a hotel in the area that you were traveling to that was accessible that had a portable or permanent lift?

Ms. CAMACHO. Yes. Am I on?

Accessibility is of utmost importance to me, and when we make a reservation, we ask about the amenities. We ask about the accessibility in the hotel room, about the shower, and the bathroom facilities. We also ask about the pool and what is available at the pool. And I have to say that sometimes when you travel, you know, it is not always what people say on their Web site or what they say on the telephone.

Mr. NADLER. Thank you.

Mr. FRANKS. Thank you, Mr. Nadler.

Just for the record, we did in fact, as I say, invite the DOJ. Given the way that they approached this, regardless of the outcome, not even speaking to that, the process here was so mishandled and completely disregarded the law, if I had been them perhaps I would have been ashamed to show up here as well. But the notion that they had to have 2 weeks to be here, they could have been here if they had wanted to be here. I certainly want to——

Mr. NADLER. Mr. Chairman, I must say I object to the tenor of your remarks just now. It is standard practice to give executive agencies 2 weeks. They have told this Committee on many occasions they require 2 weeks. They weren't ashamed to show up here. They have done nothing improper. And they did ask for one additional week. If this hearing had been held next week, they would have been here. Obviously, the leadership of this Committee didn't care whether they were here or not.

Mr. FRANKS. If they weren't ashamed to be here, they should have been, and your objection is noted.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which will be forwarded; and I ask the witnesses to respond as promptly as they can so their answers may be made part of the record.

Without objection, all Members will have 5 legislative days with which to submit any additional materials for inclusion in the record.

Mr. NADLER. Mr. Chairman, before you finish—go ahead.

Mr. FRANKS. Do you have additional——

Mr. NADLER. I ask unanimous consent to place in the record a letter from the Department of Justice from October, 2010——

Mr. FRANKS. Without objection.

Mr. NADLER [continuing]. Asking that they always have 2 weeks notice for appearing at these hearings.

[The information referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 25, 2010

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

This letter memorializes recent conversations with your staff about our efforts to ensure the timely preparation of Justice Department testimony before congressional committees.

Traditionally, the Department has required at least two weeks' notice prior to the appearance of a Department witness at a congressional hearing. The process of developing a Department official's formal statement on behalf of the Executive Branch is quite involved, and we have found that at least two weeks' notice is generally necessary to ensure that we are able to submit written testimony to the committee prior to the hearing. Depending upon the complexity and scope of the issue, it typically takes a week or more to draft, circulate and obtain clearance of the statement within the Department, and an additional week to obtain interagency clearance through the Office of Management and Budget (OMB).

In recent years, we have occasionally waived the two week notice requirement at the request of a committee. But it has become clear that the burden on our operations and the OMB process in compressing the preparation time is significant and not sustainable. Such waivers increase the risk that we will be unable to provide the written statement to the Committee in a timely way. For this reason, we must respectfully advise you of our intention to adhere firmly to the requirement of a formal written invitation at least two weeks in advance of the Department's participation in a congressional hearing.

The invitation should describe the purpose of the hearing and the specific issues on which the Department is being asked to testify. This will enable us to identify the appropriate witness and to prepare testimony that is responsive to the Committee's interests. In addition, we hope that Committee staff will continue to engage with us informally before the formal invitation is

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sent to provide information about your plans and goals for hearings that may involve Department witnesses.

We appreciate your willingness to accommodate our need for sufficient notice before a Department official testifies before your Committee. Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Lamar Smith
Ranking Minority Member

Mr. FRANKS. With that, again, I sincerely thank the witnesses. The Chair has made a tremendous effort here to try to give everyone a chance to speak. In fact, as you note on the panel today, there are two people that are essentially in favor of the DOJ and two that are not. That is generally not the way that we do it.

So I thank all of you for being here, and may the best policy prevail.

With that, this meeting is adjourned.

[Whereupon, at 6 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Attachments to the Prepared Statement of Minh N. Vu, Partner, Seyfarth Shaw LLP

ATTACHMENT A

RECREATION ACCESS ADVISORY COMMITTEE

Recommendations for Accessibility Guidelines:

Recreational Facilities and Outdoor Developed Areas

HV1607
U1
R245

developed for:
U.S. Architectural and Transportation Barriers Compliance Board
July 1994

IMPORTANT Notice

This report contains recommendations only and are not proposed or final accessibility guidelines. The draft guidelines language does not necessarily conform to the ADAAG format or numbering system. Persons reviewing the report need not comment on the format of the report. The Access Board will address format issues when it develops a notice of proposed rulemaking. Persons reviewing the report should focus on the substance of the recommendations.

The final report of the Recreation Access Advisory Committee is the result of a year long effort to provide the Access Board with information and advice in the development of accessibility guidelines for recreation facilities and outdoor developed areas. The committee was requested to accomplish the following objectives:

- Develop a list of the various types of recreation facilities and outdoor developed areas;
- Identify the design features of each facility type that are not adequately addressed by the Americans with Disabilities Act Accessibility Guidelines (ADAAG);
- Consider any unique design issues or constraints affecting access to each facility type;
- Review any existing voluntary guidelines for providing access to the various facility types; and
- Make recommendations for accessibility guidelines for each facility type.

The committee organized itself into six subcommittees based on facility types to accomplish these objectives. The subcommittees include:

1. Sports Facilities
2. Places of Amusement
3. Play Settings
4. Golf
5. Boating and Fishing Facilities
6. Outdoor Developed Areas

Each subcommittee approached their work with the premise that every newly constructed and altered recreation facility should be accessible. In some cases, the subcommittees recommended amending existing ADAAG sections to address specific design features. In other cases, the subcommittees recommended new scoping provisions and technical specifications for ADAAG and drafted recommended language with rationale.

Individuals are encouraged to comment on the recommendations contained in this report in writing to:

Access Board
Recreation Report
1331 F Street, N.W., Suite 1000
Washington, DC 20004-1111

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The Americans with Disabilities Act became effective for public and private providers of recreation, leisure, and entertainment on January 26, 1992. Various regulations have been issued for the implementation of this civil rights law, which prohibits discrimination on the basis of disability. Among those regulations authorized by the Act are regulations regarding the accessible design of recreation facilities and outdoor developed recreation areas.

The Access Board is the federal agency responsible for the development of design guidelines for accessibility. Recognizing the broad scope of programs, entities and structures which are made available to the public for recreation, an advisory committee was appointed to provide advice and information to the Access Board on accessible design in these environments. Craig Kiser of Florida, a member of the Access Board, served as the Board's liaison to the Committee.

Access to recreation facilities and outdoor developed recreation areas is a valuable right for people with and without disabilities. As the Americans with Disabilities Act Accessibility Guidelines (ADAAG) have ensured that places of public accommodation and the workplace will be accessible, these recommendations are the first step toward ensuring that beaches, golf courses, playgrounds, sports facilities, amusement parks, swimming pools, boat launch facilities, campgrounds, and trails, will be designed for accessibility. These unique sites are part of the fabric of life in America and will be accessible to people with disabilities.

Committee Membership

There are 27 members on the Committee, all experts in their areas of knowledge. In order to have diverse input, the members represent people with disabilities, manufacturers of leisure products, operators of leisure facilities, public agencies, designers, and others interested in accessibility. The members also represent many professional disciplines, including architecture, law, engineering, manufacturing, and construction. The members include:

John McGovern of the Northern Suburban Special Recreation Association in Northfield, Illinois who was appointed as chair of the Committee and represented the National Recreation and Park Association; Peter Axelson, with Beneficial Designs in Santa Cruz, California; Kim Beasley, representing the Paralyzed Veterans of America in Washington, D.C.; Jack Buchheister with Winter Park Resort in Winter Park, Colorado, representing the American Ski Federation; George DeVilbiss of Bethesda, Maryland, representing Self Help for Hard of Hearing People; Ron Drach (represented by Mark Giblin) with Disabled American Veterans in Washington, D.C.; Marcie Goldstein of Clifton Park, New York, representing the National Council on Independent Living; Susan Goltsman with Moore, Iacofano, and Goltsman in Berkeley, California, representing the American Society of Landscape Architects; and Rodney Grozier of Y.M.C.A. of the U.S.A. from Chicago, Illinois.

Others serving are Tom Hall of Adventure World, in Largo, Maryland, representing the International Association of Amusement Parks and Attractions; Drue Kale, of the New Jersey Department of Community Affairs; Steven King of Landscape Structures in Delano, Minnesota, representing the American Society for Testing and Materials (ASTM) Public Playground Safety Committee; Francine Wai with the State of Hawaii Commission on Persons with Disabilities; Katherine McGuinness of Katherine McGuinness & Associates in Waltham, Massachusetts; Joe Meade of the U.S. Forest Service; David Park of the National Park Service; and Robert Pike of Environmental Access in Portland, Oregon.

Also serving are George Renault of the Burning Tree Club in Bethesda, Maryland, representing the Golf Course Superintendents Association of America; Judy Rice of the U.S. Army Corps of Engineers; Catherine Roth of Universal Studios/Florida in Orlando, Florida; John Paul Scott of Walt Disney Imagineering in Glendale, California; Richard Skaff of the City and County of San Francisco Department of Public Works; James E. Strates of James E. Strates Shows in Orlando, Florida, representing Outdoor Amusement Business Association; Henry Thrower of the Professional Golfer's Association in Palm Beach Gardens, Florida; Judith Wheeler of the Michigan Department of Natural Resources in Lansing, Michigan, representing the States Organization for Boating Access (SOBA); Jan Wilson of the United States Olympic Committee in Colorado Springs,

Colorado; and Kenneth Wiseman of Lehman, Smith, and Wiseman Associates in Washington, D.C.

Meetings

The Recreation Access Advisory Committee met first in July, 1993 in Washington, D.C. At that meeting, the Committee discussed the scope of work, heard representatives of the Access Board and the Department of Justice explain pertinent portions of the Americans with Disabilities Act, and divided into subcommittees to address specific leisure environments. The Committee also worked as a group to identify leisure environments where a structure or human-made improvement was necessary for that recreation to occur.

Four other working meetings of the full Committee were held. The Committee met in October in San Jose, California in conjunction with the National Recreation and Park Association annual Congress, in January, March and May in Washington, D.C., and finally in July in Washington, D.C. to report to the Access Board. Between 50,000 and 60,000 person-hours of work have gone into this Committee effort.

At most meetings, the Committee met as a whole to hear issues which affected all subcommittees, or to hear reports from subcommittees, and then separated to meet in subcommittee to work on the details of how to provide accessibility in the environments assigned to the subcommittee.

Subcommittee Assignments

The subcommittee approach was vital to the success of the Committee, as it allowed members to concentrate their expertise in the areas with which they had the most knowledge. The leisure environments fit into six basic areas. These are sports facilities, places of amusement, playgrounds, golf, outdoor developed recreation areas, and recreational boating and fishing. Committee members with expertise in areas within the subcommittees were appointed to one subcommittee. A subcommittee chair, and in one case a co-chair, was also appointed. These assignments are below:

SPORTS FACILITIES: Kim Beasley, Chair; Rodney Crozier; Kenneth Wiseman, George DeVilbiss, Jan Wilson, and Robert Pike.

PLACES OF AMUSEMENT: Tom Hall and John Paul Scott, Co-Chairs; Marcie Goldstein, Catherine Roth, and James Strates. Craig Kiser, member of the Access Board, was also involved with this subcommittee.

PLAY AREA SETTINGS: Susan Goltsman, Chair; Steven King, John McGovern, and Richard Skaff.

GOLF: Henry Thrower, Chair; and George Renault.

BOATING AND FISHING FACILITIES: Judith Wheeler, Chair; Ron Drach (represented by Mark Giblin), Katherine McCuinness, and Francine Wai.

OUTDOOR DEVELOPED RECREATION AREAS: Dave Park, Chair; Peter Axelson, Joe Meade, Drue Kale, Judy Rice, and Jack Buchheister.

Subcommittee Work

The subcommittees all had the same charge. The approach was based on the assumption that every new or altered environment shall be made accessible. Subcommittees met five to ten times, many times in person at other conferences, sometimes just as the subcommittee, and often by conference call. At each meeting, public comment time was made available. All subcommittees did their own form of outreach, seeking people with disabilities who had expertise in the area of study or knew someone with expertise. Each subcommittee had to consider that both title II (State and local government facilities) and title III (public accommodations and commercial facilities) may be subject to the Board's final recommendations.

The charge to each subcommittee was simple and comprehensive. First, examine existing design guidelines for applicability to the subcommittee's environments. ADAAG was reviewed carefully; if the ADAAG provisions were adequate for a recreation environment, no change or new requirement was needed.

Second, there may be small changes in definitions or a need for the addition of text, which will enable

ADAAC to address certain elements in a recreation environment. Where a change in definition or technical requirements can result in a requirement for access, language is suggested by the subcommittees.

Third, it may be clear that ADAAC in its present form cannot address certain elements in certain leisure environments. In that situation, the subcommittees were asked to prepare both scoping language and technical requirements for that element. A rationale for these positions is included. Where possible, advisory language was offered which provides the public with greater insight about the recommendation.

Fourth, it was anticipated that there would be a number of elements where accessible design options could not be recommended without further research, or without resulting in an alteration in the fundamental nature of the element. Subcommittees were encouraged to identify these issues and articulate potential solutions and conflicts. Subcommittees also identified areas where a recommendation for access conflicted with a law or regulation for another reason, such as worker safety or preservation of open space.

It was also anticipated that not every subcommittee, again because of the scope of work, would adequately address every element or every environment. Access to ski area chairlifts and access to soft contained play systems are two examples where more information is needed. Subcommittees were asked here to identify those areas where unfinished work exists.

Finally, subcommittees were limited to design guidelines for newly constructed recreation facilities and outdoor developed recreation areas, and existing facilities or areas where an alteration occurs. The work of the Committee does not necessarily apply to existing facilities and areas without an alteration or addition. Not all subcommittees advanced to guidelines for alterations.

Subcommittees reported to the full Committee and accepted suggestions and questions from the full Committee. But, because the scope of work was so large, not every member of the Committee is fully aware of the recommendations of all six subcommittees. Thus, the subcommittee reports tend to represent a consensus of the opinions of the members of the subcommittee, but not necessarily of the full Committee.

The Work of Others

The Committee and subcommittee meetings were heavily attended by other people with disabilities, professionals, and individuals not on the Committee. More than 250 people worked actively with one or more subcommittees, made public comment, submitted written comment, or attended meetings and provided information. Among the groups that provided significant input in this process are: The Association of People with Severe Handicaps, Eastern Paralyzed Veterans Association, World Water Park Association, Six Flags Theme Park, Miniature Golf Association of America, Paramount Parks, National Center on Accessibility, Association of Disabled Golfers, Golf Course Owners Association, National Pool and Spa Institute, American Society of Golf Course Architects, Club Corporation International, Universal Studios/Hollywood, International Association of Fairs and Expositions, and the Amusement Industry Manufacturers and Suppliers, International.

In addition, many organizations have published advisory material regarding access in leisure environments. Two states (New Jersey and California) have statutory requirements. SOBA (boating and fishing) and ASTM (public playgrounds) have both issued guidelines for industry compliance. The U.S. Forest Service and the National Park Service have published materials in this area. All were thoroughly reviewed and constitute a considerable part of the recommendations in this report.

Several groups deserve congratulations for their efforts. The National Council on Independent Living surveyed members and conducted a forum on access at their April national conference. Almost half the state affiliates of the National Recreation and Park Association regularly reviewed the work of the Committee and provided comments back to the Committee.

The ASTM committee on Public Playground Safety was represented on the Committee and contributed greatly to the work of the Committee. The ASTM Soft Contained Play Systems committee provided valuable information about this young and growing part of the leisure industry. The ASTM Playground Surfacing work group interacted closely with the Committee, and is accelerating work on the development of a measure of accessibility in playground surfaces. The ASTM Amusement Ride Device committee provided valuable information and assistance.

Finally, the ANSI B77 (American National Standards Institute) committee on ski area operations has agreed to assist by coordinating research on some of the issues regarding ski area accessibility. Without this tremendous effort by others, this report would not be as complete. The dedication of both consumers and professionals to this issue has been evident from the beginning of the process.

Department of Justice Issues

For many recreation environments, it is nearly impossible to separate the design issues, over which the Access Board has purview, from program or policy issues, over which the Department of Justice has purview. The mesh between safety and access is a good example. The nature of certain recreation experiences is such that risk is present and skill and ability are required to participate without injury. Without concern for safety, design solutions for access can cause more problems and injuries.

Throughout the work of the subcommittees, questions regarding this blend of program and design were garnered and forwarded to the Department of Justice. Four representatives of the Department attended the May meeting of the Committee for an informal discussion of these issues. For the most part, what was clear is that the ADA is a complaint-driven statute and that the facts of a complaint can decide compliance. Many issues need further examination and those are highlighted throughout this report.

Subcommittee Reports

The reports of the six subcommittees follow. This is the substance of the report and again, tends to represent a consensus of the members of the subcommittee. The subcommittees, the public who consulted with the subcommittees, and consumers, have worked hard to generate these recommendations.

3. Existing/Proposed ADAAG Changes

SCOPE

EXISTING: 4.1.2(4) Ground surfaces along accessible routes and in accessible spaces shall comply with 4.5.

PROPOSED: 4.1.2(4) Ground surfaces along accessible routes and in accessible spaces shall comply with 4.5.

EXCEPTION: Field-of-play in sports facilities during play where inherent characteristics of the playing field surface do not meet 4.5, including but not limited to ice rinks, sand courts, and grass courts.

Rationale: Requiring special surfaces found in sports venues to meet ADAAG requirement for "stable, firm, slip-resistant" surfaces would fundamentally alter the nature of some sports or would eliminate a sport altogether.

Aquatic Facilities/Natatoria

1. Issues. Aquatic facilities provide opportunities for individuals to recreate, exercise, and compete in water sports. Activities such as swimming, diving, water polo, and aqua aerobics are typically facilitated through the use of pool tanks and similar structured elements and spaces. The following aquatic facilities are studied in this section:

- competition pools
- public pools
- diving pools
- therapy pools
- lap pools
- wading pools
- leisure pools
- whirlpools/spas
- natatoria

The above-referenced aquatic facilities, unlike natural settings such as lakes, ponds, streams, beaches, and other outdoor amenities, are highly developed spaces with complex mechanical, electrical, and plumbing systems and equipment. As a result, providing accessibility for persons with disabilities is more easily achievable, especially when the design requirements are established early in the design process. ADAAG currently requires accessibility into and throughout new facilities. Access into the pool tank is the primary issue.

Access into the pool, for persons with mobility impairments, presents a range of challenging issues because of the diverse needs of this group of users. The subcommittee concludes that the best solution for access into the pool is to provide a range of alternatives, recognizing that no one solution satisfies all needs. These solutions range from fixed elements such as steps and ramps, to portable equipment such as transfer tiers, lifts, and other similar devices. An overriding objective in providing alternative methods for entering and exiting the pool is to allow persons with disabilities to use the facilities independently and in a dignified manner.

The following section addresses elements and spaces within aquatic facilities that require new or expanded design guidelines:

a. Ramps - Ramps into swimming pools constitute one of many alternatives that permit someone with a mobility impairment to enter and exit the pool. There are, however, some misconceptions about pool ramps. The basic intent of the ramp is to allow someone who uses a wheelchair to roll into and out of the pool. However, standard wheelchairs are not designed for underwater use and health department regulations would probably prohibit their use in the pool. In addition, resistance inherent in moving in water increases the challenge of exiting via a ramp. The buoyancy of the swimmer using a wheelchair is also a factor.

In therapeutic settings, a special pool chair is typically used to transport an individual down the ramp and into the water. Most pool chairs are not designed for independent use. How then, are pool ramps used in public settings? While pool ramps are sometimes used by individuals who have access to pool chairs, anecdotal evidence suggests that a much broader range of people use this amenity. For example, beginner swim classes often use a pool ramp, if broad enough, to acclimate new students to the water and teach basic techniques in the shallow areas of the ramp. Adult classes such as water aerobics for elderly people, use the ramp to gain access to the shallow end, especially for those who

have limited mobility. Other wheelchair users will dismount from their chair and ease themselves down the ramp to gain access. The process is reversed when exiting the pool.

Most building codes do not currently require permanent ramps into pools. This amenity is often found in large community facilities that recognize its multipurpose use. The minimal economic impact of a permanent ramp in large pool facilities is also a factor.

b. Stairs - A stairway into the pool, used alone or in conjunction with a transfer tier located on the adjacent deck surface is another alternative to permit someone with a mobility impairment to enter and exit the pool. Like ramps, stairs are often used by young children to acclimate themselves to the water or remain at a comfortable depth above the shallow end floor. They also accommodate elderly people or others with ambulatory mobility impairments to gain access into the water.

Transfer tiers extend the stair tread-riser configuration to a transfer surface above the pool deck, permitting someone to transfer from a wheelchair to that surface, then ease him/herself down to and into the water, one tread at a time. Transfer tiers can be either permanent or movable, though the latter may be preferred in multipurpose pools so as to not obstruct access to the stairs for ambulatory persons, as long as the tier could be used independently by persons with disabilities at any and all times. For wheelchair users, stair/transfer tier access requires a degree of upper body strength that not all people with disabilities have.

The tread and riser dimensional requirements of ADAAG may be sufficient for staired pool access, though a 7-in. riser may be difficult for a wheelchair user moving up or down a stair/transfer tier. Handrails may not be necessary on both sides of the stair and transfer tier, and handrail extensions would be unnecessary at the bottom (there is no tripping/falling risk in the water) and impossible at the top (as they would obstruct transferring from a wheelchair). ADAAG handrail heights would also be impractical for wheelchair users, as they are specified for persons standing, not sitting on the stair treads.

c. Lifts - Lifts that ease someone into or out of the water are yet another option to provide access into or out of a pool. They can be permanently installed, placed in a deck mounting when needed, or rolled into place. Many are operated by someone other than the lift user, and the resulting lack of independent access is a drawback. However, for persons who lack sufficient upper body strength to use a transfer tier, and where the size of the pool precludes a ramp, a lift may be the only practical way to get into the water.

The wide variety of pool lifts currently on the market (molded plastic seats vs. cloth slings, independent vs. attendant/assisted operation) complicates the decision on whether lifts can be an accessible means of getting into and out of the water. Further research on these devices may be warranted.

d. Movable Floors - Movable pool floors can provide improved access for people with mobility impairments, allowing someone to step or transfer to the floor from the deck, then lowering to the level necessary for the pool activity.

The consensus of the subcommittee is that one accessible means of getting in and out of pools should be required by ADAAG. To require a specific feature, such as a ramp, lift, or transfer tier, however, may limit the use of a particular aquatic facility depending on its usage. For example, a pool open to the general public primarily for recreational purposes is used differently than a lap pool or diving pool used by athletes. Moreover, the capabilities of persons with disabilities using various aquatic facilities would vary greatly from facility to facility.

In order to maintain maximum flexibility and require accessibility into pools, the subcommittee concluded that accessible means of access into pools should be facility-specific, as long as one of the three choices are utilized. It is also strongly recommended that any ADAAG requirement for access into pools be accompanied by detailed appendix information describing the usage of each feature, the varying capabilities of persons with disabilities, and the appropriateness of each feature in accommodating persons with varying capabilities.

ATTACHMENT B

PB97124317

National Center on Accessibility

Recreation · Parks · Tourism

A Program of Indiana University Department of Recreation and Park Administration in cooperation with The National Park Service Office on Accessibility

Swimming Pool Accessibility

ATBCB Award Number: QA95007001

FINAL REPORT

September 1996

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National Center on Accessibility
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School of Health, Physical Education & Recreation
Department of Recreation & Park Administration

Swimming Pool Accessibility

ATBCB Award Number: QA95007001

FINAL REPORT

September 1996

Edward J. Hamilton, Ph.D.
Kathy Mispagel
Raymond Bloomer

Submitted to:
U.S. Architectural & Transportation
Barriers Compliance Board

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Swimming Pool Accessibility Project

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National Center on Accessibility
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National Center on Accessibility
Swimming Pool Accessibility Project

Executive Summary

This project was conducted for the U.S. Architecture and Transportation Barriers Compliance Board to identify and evaluate methods and standards related to enabling access to swimming pools by people with disabilities. It focused on the appropriateness, independent use, degree of consistency with existing building standards, level of safety, and impact on pool design.

With the assistance of a national advisory panel, four principal activities were undertaken: a comprehensive review of literature; a national telephone survey of people with disabilities; a national telephone survey of swimming pool operators, managers, aquatic directors, and adaptive aquatic instructors; and actual pool testing of identified designs and devices by people with disabilities.

A comprehensive review of the literature was organized into four areas. The first area was a review of the published literature of the past 35 years. Seven means of pool access were identified: ramps, lifts, stairs, transfer steps, lifts, zero depth entry, movable floors, and transfer walls. The second area reviewed was the state building codes related to swimming pools. Relevant standards from each state code were presented in table format. The third area examined was the existing standards for public swimming pools and spas, ANSI/NSPI-1 1991 and ANSI/NSPI-2 1992. Finally, the fourth area analyzed the report of the Recreation Access Advisory Committee (1994). The recommendations of each of the sub-committee reports that dealt with swimming pools, sports facilities, places of amusement, and developed outdoor recreation areas, were analyzed separately. Though minor differences in technical specifications were found, there was general agreement among the various sources.

A national telephone survey of 300 people with disabilities was conducted to determine their needs and preferences relative to the effective access to swimming pools. Telephone interviews were completed with 205 subjects, 69% of the sample. Data were collected regarding subject characteristics; pool behavior including frequency, purpose and type of pool used; preferences and problems associated with various means used to access swimming pools. The findings indicated that people with disabilities do use swimming pools with some regularity. There was nearly unanimous agreement that at least one accessible means of entry and exit should be provided at all pools, and most believed that more than one accessible means should be provided. Subjects also clearly indicated that the ability to use a design or device independently was important to them. Although no one means of access was preferred by a majority of

subjects, the means of access most often preferred were lifts, ramps stairs, and zero depth entry. Stairs however were only preferred by those who were ambulatory. Similarly, ramps, zero depth entry, movable floors and lifts were the means of access most subjects would be willing to use at a pool. Yet, most of those who had previously used a movable floor would not be willing to use one again.

A national telephone survey of 150 professionals involved with swimming pool operation was conducted. The sample included swimming pool operators, pool managers, aquatic directors, adaptive aquatics instructors, and aquatic therapists. The purpose of this study was to determine the current practices of pool operations related to entering and exiting swimming pools by people with disabilities. Specifically, the study was designed to examine the prevalence of designs and devices used to provide pool access, related policies and procedures, as well as safety and maintenance concerns of aquatic professionals. The results supported the finding of the earlier survey that people with disabilities do frequent pools. People with disabilities account for 14% of pool users at those pools that collect data on pool users with disabilities. Seventy-three percent of the respondents indicated that each of the pools operated by their agencies had a least one accessible means of entry for people with disabilities and 48% reported more than one. Stairs, lifts, ramps, and zero depth entry were the means of access most frequently found at pools. Respondents reported on the safety and maintenance concerns for each of the devices or designs.

On-site testing of the identified means of pool access was conducted to examine the appropriateness, independent use, and safety of the identified means of pool access by people with diverse disabilities. This was accomplished by observing 84 people with disabilities using the identified means of providing access to swimming pools. Subjects' buoyancy points ($\bar{x}$=34.6 in.) and their perceptions of design/device strengths and weaknesses were presented. Entering was perceived as easier than exiting swimming pools using each of the identified means of water access. There were significant differences between ambulatory and non-ambulatory subjects in the perceived difficulty of the designs and devices. Most of the designs and devices were significantly easier to use by ambulatory subjects than they were for non-ambulatory subjects. Only lifts and transfer steps were easier for non-ambulatory subjects, although non-ambulatory subjects who required assistance in transfers were unable to use the transfer steps. Specific problems with each of the designs and devices were reported.

Recommendations

Based on the findings of the review of literature and three research studies, the following recommendations were presented:

General

1.1. At least one accessible means of water entry/exit shall be provided for each swimming pool and shall be located on an accessible route.
1.2. Swimming pools with more than 300 linear feet of pool wall shall provide at least two accessible means of water entry/exit located on accessible routes.
1.3. When only one accessible means of water entry is provided, it shall be a swimming pool lift, wet ramp, or zero depth entry.
1.4. When a second accessible means of water entry/exit is provided, it shall be a transfer wall, transfer steps, movable floor, stairs, swimming pool lift, wet ramp, or zero depth entry. Lifts, wet ramps, and zero depth entry may not be used as a second accessible means of water entry/exit if the same means is used as the first accessible means of water entry/exit.
1.5. When a second accessible means of water entry/exit is provided, it must be located so that in combination with the first accessible means of water entry/exit to serve both ends and sides of the pool.

Ramps

When pool ramps are provide, they should meet the following specifications:
2.1. Surface: The surface of pool ramps must be firm, stable, and slip resistant.
2.2. Slope: The least possible slope should be used for a pool ramp. The maximum slope of a pool ramp shall be 1:12.
2.3. The maximum rise for any run shall be 30 inches.
2.4. The minimum clear width of a pool ramp shall be 36 inches.
2.5. Landings: Level landings must be located at the bottom and top of each ramp and each ramp run. At least one level landing must be located between 24 inches and 30 inches below the stationary water level. The landings must:

2.5.1. be at least as wide as the ramp run leading to it;
2.5.2. have a minimum length of 60 inches clear;
2.5.3. have a minimum of size of 60 inches by 60 inches if the ramp changes direction.

2.6. Handrails: Handrails should be required on all ramps. Ramp handrails should include the following:

2.6.1. Two handrails shall be provided and located 32 to 36 inches apart.
2.6.2. In addition to a top handrail gripping surface mounted at 34 inches to 38 inches above the ramp surface, a second handrail should be mounted between 16 inches and 26 inches.
2.6.3. Handrails should not be required to extend beyond the base of stairs or the base of a ramp where such would protrude into a lane or otherwise programmable area.
2.6.4. Handrails must be affixed so as to not allow movement in any direction.
2.6.5. Handrail diameter should be 1.25 inches to 1.5 inches.
2.6.6. If handrails are mounted adjacent to the pool wall, the space

between the wall and the handrail shall be 1.5 inches.
2.7. Aquatic chairs: Facilities that provide ramps must also provide an aquatic chair that meets recommendations 12.1 to 12.5.

Pool Lifts

When provided, pool lifts should meet the following specifications:
3.1. Pool lifts shall facilitate unassisted operation.
3.2. Clear space: A minimum clear deck space of at least 60 x 56 inches to one side and to the front of the lift seat must be provided. The space under the lift seat could be included as part of the clear space as long as the area is unobstructed.
3.3. Seat location: In the raised position the lift seat edge used for transfers must be located over the pool deck at least 12 inches inside the deck edge.
3.4. Seat height: Lift seats should be located 17 inches from the deck to the top of the seat surface.
3.5. Seat width: The lift seat width should be a minimum of 19 inches wide.
3.6. Footrest: A footrest should be attached to the lift seat.
3.7. Armrests should be located on both sides of the lift seat. The armrest located next to the clear deck space should be capable of moving away from the transfer area.
3.8. Controls and operating mechanisms: Controls and operating mechanisms at both the deck level and water level positions should be operable from the front edge of the lift seat and unobstructed by any other component of the lift. Controls and operating mechanisms shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate controls shall be no greater than 5 lbf (22.2 N).
3.9. Lifts shall be operable from both the deck level and water level.
3.10. Vertical travel: The vertical travel of the lift should allow the lift seat to be submerged 18 inches to 20 inches below the water level.
3.11. Minimum lifting capacity: A minimum weight of 300 lbs. is required for all single person lifts. The lift should also be capable of sustaining a static load of at least three times the rated load.

Zero Depth Entry (Beach Entry)

When zero depth entry is provided it should meet the following specifications:
4.1. Surface: The surface shall be firm, stable and slip resistant.
4.2. Slope: Zero depth entry pools are typically designed with very slight slopes. The maximum slope of a zero depth entry should not exceed 1:12 continuing to a minimum depth of 30 inches. For pools less than 30 inches deep, the slope should continue to the depth of the pool. Whenever the slope exceeds 1:20, it shall be considered a ramp and all recommendations for a ramp would apply.
4.3. Vertical rise: Whenever a zero depth entry slope exceeds 1:20, a maximum rise for any run should be 30 inches.

4.4. Landings: For zero depth entry slopes that exceed 1:20, at least one level landing must be located between 24 inches and 30 inches below the stationary water level. The landings must have a minimum length of 60 inches and a minimum width of 36 inches
4.5. Handrails: Whenever the slope of a zero depth entry exceeds 1:20, two handrails should be required 36 inches apart.
4.6. Whenever the slope of a zero depth entry exceeds 1:20, handrails shall have a top handrail gripping surface mounted at 34 inches to 38 inches and a second handrail mounted between 16 inches and 26 inches.
4.7. Handrails must be affixed so as to not allow movement in any direction.
4.8. Aquatic chairs: Facilities that provide zero depth entry must provide an aquatic chair that meets recommendations 12.1 to 12.5.

Transfer Wall

When a transfer wall is provided, it should meet the following specifications:
5.1. Clear deck space: Clear deck space of 60 inches by 60 inches should be required at the transfer wall.
5.2. Wall height: The wall height should be 17 inches above the pool deck.
5.3. Wall depth: The transfer wall should be 12 inches to 18 inches deep.
5.4. Wall surface: The transfer wall surface must be non-abrasive and without any sharp edges.
5.5. Handrails: A minimum of one handrail should be located perpendicular to the pool wall, 4 to 6 inches above the transfer wall and with a minimum of 22 inches clearance on either side of the handrail.
5.6. Dry ramp: If a dry ramp is used to achieve the transfer wall, all of the requirements of ADAAG 4.8.5 will apply to the ramp.

Movable Floors

When a movable floor is provided, it should meet the following specifications:
6.1. Pool coping: Changes in level in the pool coping should be no greater than one-half inch and be beveled with a slope no greater than 1:2.
6.2. Aquatic chairs: Facilities that provide a movable floor as an accessible means of water entry/exit shall provide an aquatic chair that meets recommendations 12.1 to 12.5.

Transfer Steps

When provided, transfer steps should meet the following specifications:
7.1. Clear deck space: Clear deck space of 60 by 60 inches should be required adjacent to the surface of the transfer steps.
7.2. Transfer surface: The transfer surface of the highest step should be 17 inches above the pool deck.
7.3. Surface: The surfaces should be firm, have no sharp edges, and should not be abrasive in texture.

7.4. Step risers: The risers of transfer steps should be 5 to 7 inches in height. The last step in the water should be at least 18 inches below the water surface.
7.5. Step surface: Transfer steps should have a minimum of 12 inches of tread depth and a minimum of 22 inches tread width.
7.6. Handrails: One handrail should be provided at the side of the transfer step opposite the clear deck space. The handrail should be between 4 inches and 6 inches above the step surface.
7.7. Handrail diameter should be 1.25 inches to 1.5 inches.

Stairs

If stairs are provided as an accessible means of water entry/exit, they should meet the following specifications:
8.1. Surface: The surface of pool stairs must be firm, stable, and slip resistant.
8.2. The minimum clear width of pool stairs shall be 36 inches.
8.3. All steps shall have uniform riser heights and uniform tread widths. Stair treads shall be no less than 11 inches wide.
8.4. Two handrails shall be provided and located 32 to 36 inches apart.
8.5. In addition to a top handrail gripping surface mounted at 34 inches to 38 inches above the ramp surface, a second handrail should be mounted between 16 inches and 26 inches.
8.6. Handrails should not be required to extend beyond the base of stairs or the base of a ramp where such would protrude into a lane or otherwise programmable area.
8.7. Handrails must be affixed so as to not allow movement in any direction.
8.8. Handrail diameter should be 1.25 inches to 1.5 inches.
8.9. If handrails are mounted adjacent to the pool wall, the space between the wall and the handrail shall be 1.5 inches.

Wading Pools

9.1. A minimum of one accessible means of water entry/exit shall be provided for each wading pool and shall be located on an accessible route.
9.2. An accessible means of water entry to wading pools shall be one of the following: transfer wall, transfer steps, pool lift, a wet ramp, or a zero depth entry, provided the means of entry/exit meets each of the recommendations for that means of entry/exit.

Spas

10.1. A minimum of one accessible means of water entry/exit shall be provided for each spa and shall be located on an accessible route.
10.2. An accessible means of water entry to spas shall be one of the following: transfer wall, transfer steps, or lift, provided the means of entry/exit meets all recommendations that apply to the selected means of entry/exit.
10.3 An accessible spa that is unattended shall have a means of emergency

notification that is adjacent to the accessible means of egress, within reach of someone seated in the spa, and operable at all times.
10.4. Controls and operating mechanisms shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate controls shall be no greater than 5 lbf (22.2 N).

Removable Designs & Devices

11.1. A removable device must remain in place until all users of the device have exited the pool tank.
11.2. Removable devices shall be on-site, readily available, maintained and operable at all times. Whenever possible, removable devices should be in place.
11.3. Signage: Whenever devices are removable and not in place at all times, signs must be posted to instruct users as to how the designs/devices can be requested.

Aquatic Chairs

12.1. Whenever a ramp, zero depth entry, or movable floor is used as an accessible means of water entry/exit, an aquatic chair with push rims must be provided.
12.2. At least one aquatic chair with a top surface of the seat at 17 inches above the deck shall be provided.
12.3. Seat width: The aquatic chair seat width should be a minimum of 19 inches wide.
12.4. Footrest: Footrests should be provided on the aquatic chair.
12.5. Armrests should be located on both sides of the aquatic chair seat. At least one armrest should be capable of moving away from the side of the chair.

National Center on Accessibility
Swimming Pool Accessibility

On September 29, 1995, the U.S. Architectural and Transportation Barriers Compliance Board awarded a research contract to the National Center on Accessibility. The purpose of the project was to identify and evaluate methods and standards related to enabling access to swimming pools by people with disabilities. It focused on the appropriateness, independent use, degree of consistency with existing building standards, level of safety, and impact on pool design. The following goals were pursued during the project:

- to comprehensively review the existing literature, both published and unpublished, to determine the problems, issues and available solutions to providing swimming pool access to people with disabilities;
- to determine the needs and preferences of people with disabilities regarding access to swimming pools;
- to determine the issues and concerns of pool/equipment designers and manufacturers, pool operators, and adaptive aquatic instructors regarding providing swimming pool access to people with disabilities; and
- to identify and evaluate available solutions to providing the highest degree of independent access possible for people with disabilities.

With the assistance of a national advisory panel, four principal activities were undertaken: a comprehensive review of literature; a national telephone survey of people with disabilities; a national telephone survey of swimming pool operators, managers, aquatic directors, and adaptive aquatic instructors; and on-site testing by people with disabilities of identified designs and devices used for entering and exiting swimming pools by people with disabilities. This report is organized according to the four principal activities, comprehensive project recommendations, and extensive appendices.

The comprehensive review of the literature presented in the first chapter is organized into four sections. A review of the published pool-related literature of the past 35 years is presented in the first section. A review of the state building codes related to swimming pools comprises the second section. The third section examines the existing standards for public swimming pools and spas, ANSI/NSPI-1 1991 and ANSI/NSPI-2 1992. An analysis of the Recreation Access Advisory Committee recommendations is presented in the fourth section of the first chapter (1994). The recommendations of each of the sub-committee reports that dealt with swimming pools, sports facilities, places of amusement, and developed outdoor recreation areas, were analyzed separately. Though minor differences in technical specifications were found, there was general agreement among the various sources.

Results of the survey of people with disabilities, the survey of aquatic professionals, and the on-site testing of designs and devices by people with disabilities are presented in chapters two, three, and four. The study sample, procedures, results, and summary are provided. Results are presented for pool behavior, pool policies, and experiences with the seven identified means of access: lifts, ramps, zero depth entry, stairs, transfer steps, transfer walls, and movable floors.

Comprehensive recommendations are presented in Chapter Five. A rationale based on the project findings is provided for each recommendation. Finally, extensive resource information as well as project documents are presented in the Appendices.

Study Limitations

Findings of this project should be considered in light of the following limitations:

- Although subjects in the survey of people with disabilities were randomly drawn from the sample pool, the sample pool was developed from volunteers who had agreed to participate in the study.
- Subjects in the on-site testing volunteered for the study and were paid for their participation.
- No attempt was made to determine statistically the validity and reliability of the survey instruments.
- The on-site testing was limited by the availability of designs and devices, thus wet ramp slopes between 8.3% and 5% could not be tested and transfer walls could only be tested by a small number of subjects.

Advisory Panel

A national advisory panel was formed to provide assistance in the literature review, study design, survey development, and critique of project findings and recommendations. Representing people with disabilities, architects, pool builders, equipment manufacturers, the hotel and motel industry, and national aquatic organizations, the advisory panel rendered invaluable information to the project. On two separate occasions the panel met for two days to review the project design, critique study procedures and survey instruments, identify related resources, and discuss access issues revealed in the study findings. The advisory panel also reviewed all of the project documents, including drafts of the literature review and project report.

Near the end of the project, a two-phase Modified Delphi Technique was conducted with the advisory panel. Once the study findings had been analyzed, a draft project report with recommendations was mailed to the panel. Based on a review of the draft report, panel members were asked to a rate the degree to which they agreed or disagreed with each recommendation using a 10-point

Likert-type scale (1 Strongly Disagree - 10 Strongly Agree). The results of the panel ratings were calculated to determine the amount of consensus among panel members. The revised recommendations and rationales were then sent to the advisory panel a second time. The results of the Delphi process (Appendix A) revealed significant consensus among panel members. Each of the 76 recommendations received a mean rating greater than 7.0, indicating strong agreement. In contrast, there were nine recommendations in the first round that received mean ratings of less than 7.0. Given the diversity of the advisory panel, the strength of the consensus was significant.

neither case should transfer steps obstruct access to the stairs for ambulatory persons.

As transfer steps are a continuation of the configuration of the pool stairs, the specifications of stairs discussed previously would apply to transfer steps as well. Transfer steps would continue to rise to a platform from which someone could easily transfer to a wheelchair. The recommended height of the platform has varied between 14 and 19 inches (Illinois Department of Conservation, 1978; Indiana Department of Natural Resources, 1981; Mace; 1993; Osinski, 1993; Popke, 1994). Mace (1993) has recommended the transfer platform be a minimum of 24 inches square, to provide ample space for side transfers. Popke (1994) has recommended a platform 24 inches wide and 14 inches deep.

Osinski (1993) recommended that handrails be placed to allow either left or right handed access. Parks Canada (1994) recommended that one continuous railing be placed along the back of the platform and along the side opposite the transfer space. The recommended heights of handrails for transfer steps have been consistent with those for stairs.

Pool Lifts

Pool lifts are mechanical devices that move a person into or out of the water. A variety of lifts are currently available; some are permanently installed others are portable, placed in a deck mounting or rolled into place when needed. Lifts may require a transfer from a wheelchair to the lift seat or may have a sling seat that moves the person directly from a wheelchair to the water. Some lifts are power operated and others are operated manually; some can be operated independently by the user, while others require assistance.

There are very few specifications for pool lifts mentioned in the literature. Osinski (1993) suggested a seat height of 19 inches above the deck to facilitate transfers to and from wheelchairs. She recommended that lifts be placed such that they lower users into "shallow or standing depth water." Osinski also recommended lifts be constructed with corrosion-resistant materials to protect them from water and pool chemicals, that they be sturdy and lightweight, and that they be securely anchored and bolted into the deck.

Lifts are both useful for "people with severe disabilities who cannot use other methods to enter the pool and for those with minor mobility impairments who may find lifts easier to use" (Mace, 1993, p. 36). For some large individuals with severe disabilities, lifts may provide the only viable means of access. In pool facilities where space limitations prohibit the use of ramps or steps, lifts provide an effective and relatively inexpensive alternative.

Though lifts provide pool access regardless of the user's physical limitations, lifts have not received universal acceptance. Without explanation, Parks Canada (1994, p. 57) referred to lifts as the "least desirable form of pool entry." Lifts, often do require an available power source, but the most frequently used power source, water, is usually readily available at pools. As with any mechanical device, lifts must be kept in good working order to ensure that a pool facility is always accessible. In some situations, trained personnel will be needed to operate the lift (Mace, 1993).

The issue of independent operation of lifts is a controversial one. Osinski stated that, "The best lifts are those that can be operated by the individual with little or no assistance" (Osinski, 1993, p. 18). Conversely, Popke (1994, p.40) reported that manual lifts, which require assistance, 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." Though few would argue that anyone, including someone with a disability, should swim alone, disability should not be the discriminating factor to determine who can participate independently.

Moving Pool Floors

Moving pool floors allow the entire pool floor, or just a section of the floor, to be raised or lowered to any depth or to a desired slope (Kacius, 1990). Hydraulic pistons are used to move the reinforced concrete or fiberglass sub-floor. If the floor is not perforated or slotted, a PVC grill around the perimeter of the floor allows water to circulate both above and below the floor. When the floor is raised to deck level, participants can either walk or roll their wheelchairs onto the pool floor and be lowered to the desired water depth "at a rate of approximately one foot per minute" (Osinski, 1993, p. 18). In 1994, the average cost of movable floors was reported to be $300,000 (Nianiatus, 1994).

The movable floor concept has been called "one of the greatest swimming pool innovations" (Priest, 1991, p. 9). An advantage of the movable floor is that it provides easy access to nearly anyone, while adding great flexibility to a facility. Competitive pools must be a uniform 6 to 9 feet deep (Kacius, 1990), much too deep for novice swimmers, young children, water aerobic programs, and some people with disabilities. The movable floor can be raised to any depth to accommodate these varied needs (American School & University, 1977). Raising the floor to deck level also provides a large multi-purpose space (Mace, 1993). In addition, multiple swimmers with disabilities can be moved into and out of the pool at one time. The disadvantages of the movable floor are 1) the relatively high initial cost for equipment and installation, 2) the time it takes to move into and out of the pool, 3) the general disruption of pool activities when the floor is moved, 4) the dependency on others for a person with a disability to move into and out of the water.

indicated that technical specifications would be necessary to ensure compliance or reduce confusion. Others cautioned against mandating particular technologies or methods of access, preferring to leave open the "opportunity to explore additional means of access more freely."

Most of the comments agreed that none of the proposed solutions provided fully independent access to the water. Several comments noted the benefits of zero depth entry pools to many users. Other comments suggested a method not discussed in the report: a transfer wall around the pool edge, with the pool water height actually above the deck level[2]. Two comments proposed a maximum ramp slope of 1:20 for ramps into and under water, to counteract the buoyancy of individuals in water. They noted the difficulty of pushing a wheelchair underwater and the tendency of chairs to tip over backwards when going up a ramp under water.

Design/Device Costs

Through searches of Abledata, disability and aquatic journals, and vendor literature; discussions with vendors at the National Recreation and Park Association National Congress; contacts with product manufacturers; and referrals by the project advisory panel, a comprehensive list of existing products and their costs were compiled (Appendix B). Construction estimates for designs of a dry ramp/transfer wall and a wet ramp (Appendix B) were developed by Mr. Tom Begley, Bradford Woods Facility Engineer. The following discussion is based on the findings of those efforts.

The majority of the removable or portable means of pool access were comparable in price, generally ranging from $2,000 to $6,000. Of all of the identified means of pool access, lifts provided the largest number of options from which to choose and the widest range in cost. There were 16 power operated lifts identified, ranging in price from $1,980 to $25,000 (Product Table, Appendix B) with a mean cost of $5,576. The least expensive model was water-powered, but it could not be operated independently by the user. Four removable ramps were identified, with prices ranging from $4,600 to $6,331. The most expensive of the ramps was 15-feet long, made of stainless steel and custom designed for each pool's gutter or perimeter profile. The least expensive ramp, nearly $2,000 cheaper, was also 15-feet long and made of stainless steel. There were also four types of portable stairs available. Prices for the stairs ranged from $972 for a four-step stainless steel model to $3,000 for a five-step stainless steel model. Only two transfer steps could be identified--one at $864 and the other at $2,450. The less expensive transfer steps provided a transfer point 16 to 20 inches above the deck

[2]Several comments referred to this as an "Australian pool," but the American National Red Cross' 1977 book Adapted Aquatics refers to this as a "New Zealand type pool."

National Center on Accessibility
Swimming Pool Accessibility

Telephone Survey of Swimmers with Disabilities

Purpose

The purpose of this study was to to determine the needs and preferences of people with diverse disabilities and functioning levels, representing all regions of the U.S. and a wide range of ages regarding effective access to swimming pools. Data were collected regarding subject characteristics; pool behavior including frequency, purpose and type of pool used; preferences and problems associated with various means used to access swimming pools.

Procedures

The survey instrument (Appendix C) was developed by project staff in cooperation with the project advisory panel and the Indiana University Center for Survey Research. The survey was pretested April 10 - 14, 1996 using 25 people with disabilities identified in the original sample pool. After revision of the survey instrument, data collection was conducted from April 25, 1996 - July 16, 1996. The survey was administered by the Indiana University Center for Survey Research in Bloomington. The average interview length was 29.5 minutes. Data were collected by telephone using the University of California Computer Assisted Survey Methods software (CASES). Interviews were conducted from: 9:00 AM - 9:30 PM, Monday - Friday; 11:00 AM - 5:00 PM, Saturday; 1:00 PM - 9:30 PM, Sunday.

The data collection staff included 5 supervisors, 7 senior interviewers, and 29 interviewers. All interviewers received at least 20 hours of training in interviewing techniques before production interviewing. Interviewers received two hours of specific training on the questionnaire. Interviewers were instructed to read questions and response categories at a 2-words-per-second pace. Interviewers were also trained to use neutral probes and feedback phrases.

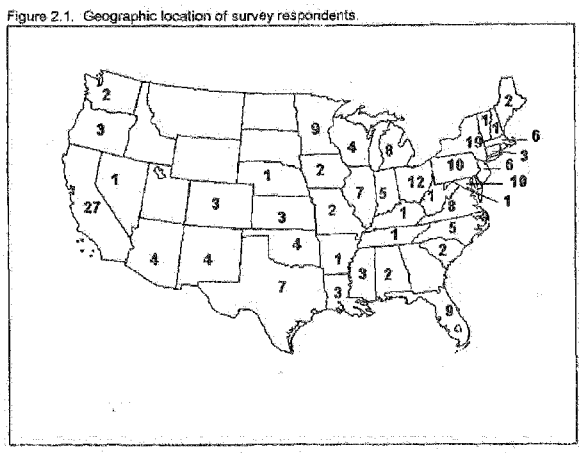
Audio and visual monitoring was regularly conducted by the telephone survey supervisors using the CSR facilities, which do not allow the interviewers to know they are being monitored. Monitoring was conducted randomly, with each interviewer being monitored at least once during each 4-hour shift.

Sample

Prior to pilot testing of the telephone survey, an introductory letter was mailed to 2,900 people with disabilities in the NCA subject database. The letter explained the purpose of the project and requested volunteers for participation in the project. Subjects were recruited through messages to internet disability- related list servers; announcements in disability related newsletters and magazines; and news releases to newspapers.

A total of 449 people volunteered to participate in the survey. An initial sample of 300 people were randomly selected to participate in the study. Of those, 205 (68%) persons with disabilities completed a telephone interview; 12 refused to be interviewed (after 2 attempts); 11 were consistently unavailable after multiple callbacks; 13 were away during the survey period or had an illness; 64 reported they didn't have a disability (replaced in the sample pool); 19 had non-working numbers or problems on the line; and 20 never answered after at least eight attempted calls with at least two attempts in each of four time periods (weekday morning, afternoon, evening, weekend). The geographic locations of respondents are depicted in Figure 2.1.

Figure 2.1. Geographic location of survey respondents.



Results

Sample Characteristics

The subjects interviewed in the study reported a wide range of disabilities (Table 2.1). There were 13 major disability categories represented, with spinal cord injury the most frequently reported disability.

Table 2.1. Subjects' disabilities.

	N	%
Amputee	10	5
Arthritis	6	3
Cardiovascular Accident	2	1
Cerebral Palsy	16	8
Multiple Sclerosis	30	15
Muscular Dystrophy	29	14
Orthopedic Impairment	9	4
Neuromuscular Impairment	12	6
Post Polio	15	7
Spina Bifida	5	2
Spinal Cord Injury	47	23
Visual Impairment	13	6
Other	10	5

Of the 205 subjects interviewed, there were 107 females (52%) and 98 (48%) males (Table 2.2). They ranged in age from 8 to 89 years with a mean age of 47.3 years. They had been disabled for an average of 25.6 years with 2 years the shortest time since disability onset and 64 years the longest. Seventy of the subjects (34%) were identified as ambulatory, which for the purpose of this study indicated the individual did not use an assistive device for mobility or used an assistive device that enabled them to walk (e.g., cane, crutches, walker, prosthesis). There were 132 subjects (64%%) who were non-ambulatory.

Only 9 (13%) of the ramp users reported any problems with ramps. Steep slopes, needing assistance pushing out of the water, and slipperiness were most frequently mentioned as problems. Slipperiness was mentioned by both ambulatory and non-ambulatory individuals.

Lifts. Of those respondents who had used a pool since the onset of their disability, 78 (41%) had used a lift to enter or exit a pool. Most of those individuals (78%) had used a pool lift in the past five years, 50% in the past two years. The majority of those lifts were power operated (68%), had a seat (65%), and were not perceived by the users as portable (68%). Of the 18 people who had most recently used a portable lift, seven (30%) had to request the lift be set up. They had to wait from 1 to 20 minutes to have the lift set up, with a mean wait of 6.12 minutes.

Though less than half of the pool lift users (48%) were able to transfer to and from the lift by themselves, the majority (70%) found it easy to transfer to and from the lift. A further analysis indicated a significant difference in the perceived ease of transferring between those who could transfer independently and those who could not (χ^2=20.35, p<.01). The difference could not be attributed to those non-ambulatory users who usually needed assistance to and from their wheelchairs, as there was no significant difference in perceived ease of transfer between ambulatory and non-ambulatory lift users. Analysis of user comments revealed two factors that may have contributed to the difference: the type of lift seat and location of the lift seat. Several users experienced difficulties when transferring onto stretchers and sling seats. One user stated, "I felt like a whale." Comparing ease of transfer by the type of lift seat revealed a significant difference between lift stretcher seats and both formed plastic and sling lift seats (χ^2=7.67, p=.02). There was no statistical difference in ease of transfer between the formed plastic and sling seats. Several users also commented that the location of the lift seat made it difficult to transfer. Proximity to the water's edge, height of the seat, and interference from other objects were common problems.

Fifty-three of the pool lift users (70%) were not able to operate the lift by themselves. At least part of that could be attributed to the type of lift used, as manual lifts were used by 25 (33%) of the pool users. When only power lifts were considered, there were still 29 (59%) of the power lift users who could not operate the lift. Physical ability did not seem to be a major factor, as there were no significant differences among ambulatory and non-ambulatory power lift users. Examination of the lift user comments revealed that the location of the controls was most frequently cited as the reason for not being able to operate the lift. Seventeen of the power lift users (59%) noted that they could not reach or operate the lift controls. A second reason commonly cited as a reason for not being able to operate the lift was pool policies that prohibited independent

operation. There were 13 power lift users (45%) who expressed this reason. Physical limitations were noted by five (17%) of the users.

Pool lift users reported that lifts were comfortable (81%) and very safe (53%). There were no significant differences between power and manual lift users nor between ambulatory and non-ambulatory users for either comfort or safety. Pool lifts received moderate satisfaction ratings, with a mean rating of 3.77 out of a possible score of five. There were no significant differences on satisfaction between type of lifts nor between user mobility.

There were 18 users (23%) who reported problems with lifts. The most commonly cited problems were difficulties with transfers (5), a lack of independence or control (5), and safety concerns. Three pool lift users reported injuries from the lifts, one because the lift fell over on the person.

Zero Depth Entry. Thirty-two respondents, 35% of all those who used pools since the onset of their disabilities, indicated they used a zero depth pool. Most of those individuals (64%) had used a zero depth entry pool in the previous five years. Only 27% of the zero depth entry pools had handrails, and only a third of the users at those pools actually used the handrails while entering and exiting the pool. Assistance in using zero depth entry pools was required by 27% of the users. There was no significant difference in need for assistance between ambulatory and non-ambulatory users (χ^2=0.02, p=.89).

Zero depth entry users found them to be easy to use (80%), comfortable (82%), and somewhat safe (55%). There were no significant differences between ambulatory and non-ambulatory users on any of those factors. Zero depth entry received high satisfaction ratings, with a mean rating of 4.0 out of a possible score of five. There were no significant differences between ambulatory and non-ambulatory users in their satisfaction ratings.

Problems were reported by 18% of the zero depth entry users. Unsure footing, difficulty pushing out of the water, and rough surface were the problems noted. One wheelchair user entered the pool by transferring out of the wheelchair and onto the zero depth entry surface, which was rough and uncomfortable.

Movable Floors. Only 8 respondents, 4% of those who had used a pool since the onset of their disability, had used a movable floor to enter a pool. Only 25% of those individuals had used a movable floor in the past five years. Most pools (67%) were likely to have only a portion of the floor move, which took from 2 to 5 minutes to be raised or lowered, with a mean time of 3.5 minutes. Typically, the floor would have to be cleared of other users when it was being raised or lowered (100%). Most movable floor users (67%) entered the pool

National Center on Accessibility
Swimming Pool Accessibility

Aquatic Professionals Survey

Purpose

The purpose of this study was to determine the current practices of pool operations related to entering and exiting swimming pools by people with disabilities. Specifically, the study was designed to examine the prevalence of designs and devices used to provide pool access, related policies and procedures, as well as safety and maintenance concerns of aquatic professionals.

Procedures

The survey instrument (Appendix D) was developed by project staff in cooperation with the project advisory panel and the Indiana University Center for Survey Research (CSR). The survey was conducted by the CSR from July 3, 1996 to August 1, 1996. The average interview length was 26 minutes. Data were collected by telephone using the University of California Computer Assisted Survey Methods software (CASES). Interviews were conducted from: 9:00 AM - 9:30 PM, Monday - Friday; 11:00 AM -5:00 PM, Saturday; 1:00 PM - 9:30 PM, Sunday.

The data collection staff included 5 supervisors, 7 senior interviewers, and 29 interviewers. All interviewers received at least 20 hours of training in interviewing techniques before production interviewing. Interviewers received two hours of specific training on the questionnaire. Interviewers were instructed to read questions and response categories at a 2-words-per-second pace. Interviewers were also trained to use neutral probes and feedback phrases.

Audio and visual monitoring was regularly conducted by the telephone survey supervisors using the CSR facilities, which do not allow the interviewers to know they are being monitored. Monitoring was conducted randomly, with each interviewer being monitored at least once during each 4-hour shift.

Respondents who indicated their pools had one or more of the identified means of entering and exiting pools were requested to complete a follow-up questionnaire. Questionnaires specific to each device (Appendix D) were mailed to the respondents and faxed or mailed back to the investigators. These questionnaires requested information on the specific models, dimensions, configurations, and costs of the devices.

Results

Pool Characteristics

The majority of the pools represented in the survey were operated by municipal recreation departments (56%) with significantly fewer from YMCA/YWCAs, hospitals, universities, water parks, and hotels (Table 3.1). For all but water parks, the most common type of pool was the multipurpose pool. Wading pools (5) were the type of pools most often identified in the 'Other' category.

Of the 103 agencies represented in the study, 72 (70%) collected data on the number of users of their facilities (Table 3.2). The agencies reported a mean of 116,206 users of their facilities in 1995, though there was significant variability in the number of users within each type of agency and among the types of agencies. There were 26 agencies that collected data on the number of pool users with disabilities. For all agencies, the mean number of pool users with disabilities in 1995 was 3,713, which accounted for 14% of the total pool users for those agencies.

Accessible Designs and Devices

Overall, 73% of the agencies reported having "at least one way for people with disabilities to enter and exit the water" and 48% reported having more than one means of access for people with disabilities (Table 3.3). Of those agencies reporting at least one means of access, pool lifts were used by the largest number of agencies (55%). Lifts were the dominant method for each type of agency except water parks, where zero depth entry pools were most often found (100%). Ramps (36%) and zero depth entry (29%) were the other commonly used means of access, though there was great variability among agencies.

Lifts. The 57 aquatic professionals that reported using lifts at their pools were asked how often the lifts were used by people with disabilities in the previous 12 months. Nearly half of the respondents (49%) reported that lifts were used two or more times a week and 47 (62%) reported that lifts were used three or more times a month. There were 8 (15%) agencies that reported the lifts were "never used."

Of the lifts used, 34 (63%) were power operated lifts (hydraulic or electric) and 13 (37%) were manual lifts. Though a majority of the pools were power operated, only 20 (36%) agencies reported their lifts were "constructed in a way that allows people with disabilities to use it independently." There were also 4 (11%) agencies that would not allow their lifts to be operated without staff assistance even though the lifts were capable of being operated independently.

Related to the independent use of lifts was the issue of lift portability. Portable or removable lifts were used by 45 (81%) of the agencies that operated lifts. The vast majority of those agencies (73%) did not have the lift in place at all times. People with disabilities had to request the lifts be set in place before they could be used. A variety of reasons for not having the lifts in place at all times were given by respondents. Safety and liability, low demand for its use, interference with pool competition, and limited deck space were most often cited as reasons for not keeping lifts in place at all times.

Location of the lift seat in relationship to the water's edge required a specific measurement and could not be accurately determined via telephone interviews. Aquatic professional, who reported having a lift, were asked in the follow-up survey to measure the distance from the front edge of the lift seat to the edge of the pool. Measurements were received from 23 of the 25 follow-up agencies with pool lifts. Distances ranged from 3 inches to 36 inches with a mean distance of 15.6 inches.

Respondents were also asked to identify the advantages of their lifts. The advantage mentioned by nearly all respondents was that lifts enabled people with disabilities to readily access the water. Minimal staff assistance and durability were also frequently mentioned as advantages.

There were also a number of disadvantages associated with lifts. The most commonly noted disadvantages related to the program interference of lifts. Respondents expressed concern with the amount of deck space used, staff time required to operate or set up the lift, and interference during swimming competition. There were also safety concerns expressed. Numerous respondents mentioned the maximum weight limitations of the devices and the potential danger for heavy people. One respondent indicated the lift shaft had actually bent while someone was using it. Respondents also cited the lift as a hazard in the lowered position when no one was using the lift. Finally, concern was expressed for the dignity of people with disabilities. Respondents noted that lifts draw attention to users, and in doing so "takes away their dignity." Lifts were rated high for effectiveness and convenience (Table 3.4) and only moderately for maintenance.

Ramps. There were 37 aquatic professionals who reported having wet ramps at their pools (Table 3.3). Of those professionals, 28 (76%) reported the ramps were used by people with disabilities two or more times a week and 31 (84%) reported the ramps were used at least three times a month. Only 2 (5%) of the respondents indicated their ramps were never used by people with disabilities. All agencies with ramps indicated the ramps were also used by people who could walk.

ambulatory subjects. Subjects repeatedly mentioned the "floppy," "flimsy," and "wobbly" handrails as a problem.

Lifts

Lifts may be classified by their configuration (platform or seat) as well as the means by which they are operated (manual or power). Though platform lifts for pools do exist, they are less common then seat lifts and only seat lifts were tested in this study. Both manual and power operated lifts were tested.

Seat positioning. The position of the lift seat was important to the ease and safety with which subjects used a lift. Seat height and its location in relationship to the edge of the pool were particularly important. In order to facilitate safe transfers, ADAAG requires seat height of 17 to 19 inches for both shower stalls (4.21.3) and water closets (4.16.3). It would be reasonable to apply the same standard to pool lifts with seats. Yet, lifts with seats as high as 22 inches were found in this study (Figure 4.5). Seats higher than 19 inches were very difficult for those transferring from wheelchairs.

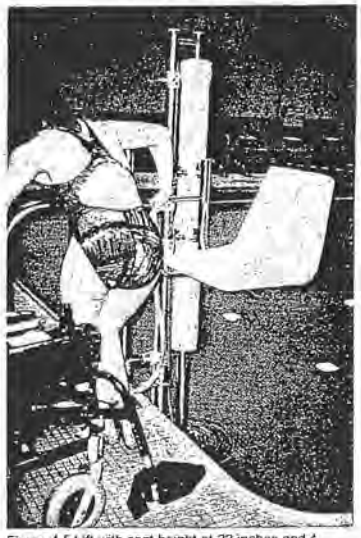


Figure 4.5 Lift with seat height at 22 inches and 4 inches from edge of pool deck.

A more troubling problem was created by lift seats located too close to or over the water. In addition to being 22 inches above the deck, the front edge of the seat for the lift shown in Figure 4.5 was also four inches beyond the pool deck. Users needed to locate their wheelchairs at deck edge and transfer

Figure 4.6 Lift that rotates 180°

four inches over water to the seat. Another pool tested had a gutter 11 inches wide and six inches below the pool deck. In the raised position, the front edge of the lift seat was two inches beyond the deck edge. Again, a wheelchair had to be located precariously close to the deck edge and never immediately adjacent to the lift seat, which made transfers difficult and unsafe for many users. However, the lift pictured in Figure 4.6 rotated 180°, which moved the lift seat away from the pool edge and allowed a safe and comfortable transfer.

Clear deck space. Adequate clear space is needed adjacent to the lift seat to allow for a side transfer by someone using a wheelchair. In the present study, obstructions or obstacles were often observed within deck space immediately surrounding the lifts. These obstacles were often created by the lifts. A lift with deck braces used to support the lift is depicted in Figure 4.7. The location of the braces interfered with the transfer of some users. In another situation, the lift was improperly installed and the water supply hose created a potential tripping hazard (Figure 4.8).

Independent operation. Lifts operated manually cannot be used independently, as they require someone other than the person using the lift to ate the crank to raise and lower the lift. Power operated lifts, however, offer the the possibility of the person using a lift to also operate it independently. In order for lifts to be operated independently, at least two factors must be present: controls that are accessible and controls that are operational from both raised and lowered positions.

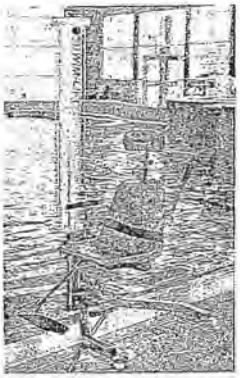


Figure 4.7 Lift deck braces limit clear width space

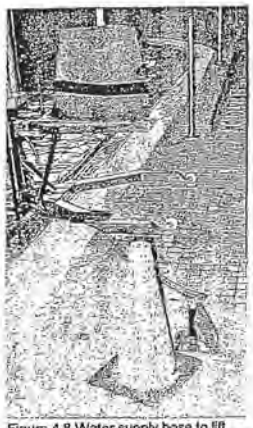


Figure 4.8 Water supply hose to lift created a potential tripping hazard

For controls to be accessible, they must be located where they can be easily reached, be operable with one hand and not require tight grasping, pinching, or twisting of the wrist (ADAAG 4.27.4). Also, the force required to activate controls must be no greater than 5 lbf (22.2 N). Each of the power lifts tested had controls that could be operated with one hand without tight grasping, pinching or twisting of the wrist. However, not one of the lifts had controls that could be easily reached by someone seated on the lift. The lift depicted in Figure 4.9 required the user to place his or her hand through the handrail to reach the control. When the lift was activated, the person's hand could be easily pinched or caught between the lift and the seat. The controls on the lift pictured in Figure 4.10 were located on the pedestal and above the elbow of the person seated on the lift, which was awkward for most users and impossible for others.

Power operated lifts also need to be operable from both the raised and lowered positions. Once a person has used the lift to enter the pool, he or she must be able to raise the lift in order to exit. If more than one swimmer needs the lift, it

may be in the position opposite of that needed at a particular time. Thus, a swimmer who is in the pool may find the lift in the raised position and need to lower the lift.

Figure 4.9 Control mechanism required user to place hand through handrail

Figure 4.10 Control mechanism located on pedestal

Transfer Wall

Only four subjects were available to test the transfer wall used in this study, which made meaningful statistical analysis impossible. Nevertheless, the observed behaviors and comments of users provided significant insights. Factors of interest with the transfer wall included clear deck space adjacent to the transfer wall, the height of the wall from the deck to the top surface, the depth of the top surface, the distance from the water to the top surface of the wall, and handrails on the top surface.

On the pool tested, the deck area adjacent to the transfer wall was level and 60 inches by 60 inches, which provided ample space for persons to transfer from a wheelchair, with or without assistance. The height of the wall from the deck to the top of the surface was 19 inches. This height was effective for both

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Recommendations

Based on a review of the literature and findings of the three studies completed as part of this project, the following recommendations are proposed. These recommendations are intended for new construction of pools unless otherwise noted. These recommendations do not apply to pools used exclusively as part of an amusement ride.

General

1.0. At least one accessible means of water entry/exit shall be provided for each swimming pool and shall be located on an accessible route.

Rationale: Results of this project indicate that people with disabilities frequent pools with some regularity despite the many barriers noted by Mace (1993), Osinski (1993), Popke (1994) and others. The telephone survey of people with disabilities indicated that 60% of those surveyed had used a pool during the previous year, and most commonly once a month. Also, the pool facility survey found that those pools for which attendance data were collected averaged 3,713 visitors with disabilities during the past year. People with disabilities accounted for an average of 14% of the total visitors for those pools.

The importance to people with disabilities of providing accessible means of entering and exiting pools was clearly demonstrated in the survey of people with disabilities. Of those individuals surveyed, 99% indicated that one or more means of access should be required at each pool.

The feasibility of this recommendation was supported in the findings of the pool facility survey. At least one means of access for people with disabilities was already being provided at each pool operated by 73% of the respondents. The prevalence of accessible means of access was found across all types of agencies.

1.1. Swimming pools with more than 300 linear feet of pool wall shall provide at least two accessible means of water entry/exit located on accessible routes.

Rationale: Recognizing the need to provide multiple access points for all users, ANSI/NSPI-1 standard 5.2 requires at least two means of entry/exit for all pools "so as to serve both ends of the pool." In addition, standard 5.2.4. requires a means of entry/exit "a minimum of every seventy-five (75) linear feet of pool wall or fraction thereof." Multiple access points provided for greater safety and convenience to users, allowing them to exit a pool easily when they become tired or in danger, as well as to enter and exit a pool near an area of interest (e.g., shallow end or deep end).

ramps by many respondents in the telephone survey was due to the need for an aquatic chair.

Pool Lifts

Pool lifts are mechanical devices that move a person into or out of the water. Some lifts are permanently installed others are portable, placed in a deck mounting or rolled into place when needed.

When provided, pool lifts should meet the following specifications:

3.1. Pool lifts shall facilitate unassisted operation.

Rationale: Consistent with the ADAAG standard for platform lifts (4.11.3), this recommendation would provide comparable access to pool lifts. There are limitations in assuring independent transfer to and from pool lifts, therefore, the requirement for unassisted entry and exit to platform lifts is not included in this recommendation. This recommendation is supported by findings of the telephone survey of people with disabilities in which 81% of the respondents indicated the ability to use a design/device without assistance was important or very important. Also, 57% of the pool facility staff indicated it was important or very important that a device or design be used without pool staff assistance.

3.2. Clear space: A minimum clear deck space of at least 60 x 56 inches to one side and to the front of the lift seat must be provided. The space under the lift seat could be included as part of the clear space as long as the area is unobstructed.

Rationale: In order to safely transfer from a wheelchair to the lift seat, a wheelchair user must have sufficient room to place the wheelchair next to the lift seat. As the optimum positioning will vary according to the user's functional abilities, clear space is needed at both the front and side of the lift seat. Again, ADAAG (4.17.3) standards for toilet stalls provide a parallel situation from which to draw. The standard toilet stall provides a clear space on one side of the water closet to enable persons who use wheelchairs to perform a side or diagonal transfer from the wheelchair to the water closet.

3.3. Seat location: In the raised position the lift seat edge used for transfers must be located over the pool deck at least 12 inches inside the deck edge.

Rationale: The requirement of a minimum of 12 inches from the seat edge to the deck edge is necessary to allow for a transfer away from the water. There were several lifts tested, including lifts installed less than one year prior to use in this study, for which the nearest seat edge was at the deck edge or over the water surface. The danger to users in those situations was both real and perceived. Also, seat location was identified as a problem by respondents in the telephone survey of people with disabilities.

3.4. Seat height: Lift seats should be located 17 inches from the deck to the top of the seat surface.

Rationale: This height range is needed to allow easy transfer from wheelchairs to the raised edge. The height is consistent with the seat height ranges for water closets in ADAAG (4.16.3) and at the upper range of the Access Board's recommendations for fourth graders (9 years old) in children's environments (1992, Chapter 5, p. 12). It may be advisable for the lift seat to be readily adjustable to other heights to accommodate users with seats of varying heights, however, the seat must have the capability of stopping in the transfer position at a height of 17 inches.

3.5. Seat width: The lift seat width should be a minimum of 19 inches wide.

Rationale: Each of the tested seats met or exceeded this width and no problems were observed.

3.6. Footrest: A footrest should be attached to the lift seat.

Rationale: For many adults, their legs will extend beyond the 17 inches distance below the lift seat. Without a footrest, the user's feet will drag across the deck, which may cause an injury to the individual. The on-site testing provided evidence of the problem.

3.7. Armrests should be located on both sides of the lift seat. The armrest located next to the clear deck space should be capable of moving away from the transfer area.

Rationale: For stability purposes, subjects in the telephone survey and on-site testing indicated both a need and strong preference for armrests on both sides of lifts. A movable armrest is needed next to the clear deck space to allow for transfers.

3.8. Controls and operating mechanisms: Controls and operating mechanisms at both the deck level and water level positions should be operable from the front edge of the lift seat and unobstructed by any other component of the lift. Controls and operating mechanisms shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate controls shall be no greater than 5 lbf (22.2 N).

Rationale: The mechanism for operation of the lift should allow for safe, independent operation by the user. Several lifts used in the onsite testing had lift operating mechanisms located in areas that required the user to quickly move his/her hand when the lift began to move. Most of the mechanisms were difficult to reach for someone seated in the lift seat. Typically, they were located too close to the seat back and on the outside of the armrests, making them difficult and/or dangerous to use.

3.9. Lifts shall be operable from both the deck level and water level.

Rationale: This recommendation would assure that a person in the pool would always have access to the pool lift, while also providing access to other potential users. Each of the power operated lifts used in the on-site testing had this capability.

3.10. Vertical travel: The vertical travel of the lift should allow the lift seat to be submerged 18 inches to 20 inches below the water level.

Rationale: In order to facilitate a person transferring onto and off of the lift seat while in the water. Based on the buoyancy data of the on-site testing, a water depth of 18-20 inches would provide sufficient buoyancy for most users to enter and exit the water from the lift seat.

3.11. Minimum lifting capacity: A minimum weight of 300 lbs. is required for all single person lifts. The lift should also be capable of sustaining a static load of at least three times the rated load.

Rationale: ANSI A.17.1 Rule Number 2002.7A requires a minimum weight capacity of 250 lbs. for single seat lifts. However, there were several indicators during this project that the 250 lbs. may be insufficient. Lifts at two of the facilities used for on-site testing had been replaced because of weight damage. Breakdowns and injuries due to insufficient weight capacity were cited in the telephone surveys of pool facility staff and people with disabilities.

Zero Depth Entry (Beach Entry)

Zero depth entry pools provide an end of the pool where the pool bottom begins at the deck level and gradually slopes to a deeper level. This creates an entry similar to that of a beach. When zero depth entry is provided it should meet the following specifications:

4.1. Surface: The surface shall be firm, stable and slip resistant.

Rationale: ANSI/NSPI-1 1991 (p.50) defines a slip resisting surface as one "that has been so treated or constructed as to significantly reduce the chance of a user slipping. The surface should not be an abrasion hazard." The findings of this project provide further evidence that both slipping and abrasion are potential hazards for pools. Slipping was observed by the investigators in the on-site testing and both slipping and abrasion were mentioned as problems in the telephone survey of people with disabilities.

4.2. Slope: Zero depth entry pools are typically designed with very slight slopes. The maximum slope of a zero depth entry should not exceed 1:12 continuing to a minimum depth of 30 inches. For pools less than 30 inches deep, the slope should continue to the depth of the pool. Whenever the slope exceeds 1:20, it shall be considered a ramp and all recommendations for a ramp would apply.

Rationale: The findings of this project indicate that submerged slopes greater than 1:12 are not only very difficult for many non-ambulatory users but can also be hazardous for non-ambulatory and ambulatory users. Though wheelchairs were more difficult to control when wet, there was no evidence that would indicate that the maximum slope should be reduced or increased from that required of buildings and facilities in ADAAG 4.8.2.

Three items received mean ratings below 8.0: 1) The maximum rise for any run on a ramp should be 30 inches ($\bar{x}$=7.75, s=3.14). 2) Whenever the slope of a zero depth entry exceeds 1:20, two handrails should be required 36 inches apart ($\bar{x}$=7.25, s=2.98). 3) Whenever the slope of a zero depth entry exceeds 1:20, handrails shall have top handrail gripping surfaces mounted at 34 inches to 38 inches and a second handrail mounted between 16 inches and 26 inches ($\bar{x}$=7.58, s=2.81). They were also the items with the greatest standard deviations, indicating greater disagreement within the advisory panel. Even with those items, however, there was substantial agreement with the recommendations, and there was no evidence to suggest a change in the recommendations.

Areas for Further Research

1. Due to limitations posed by the available sites and resources, maximum ramp slope could only be tested at 8.3% and 17%. Additional research is needed to determine the maximum slope on wet ramps.

2. The scope of this study was restricted to entering and exiting swimming pools. The pool entry and exit needs of people with visual impairments (e.g., handrails, uniform riser heights, etc.) were addressed, however, there were additional concerns not addressed. Specifically, the issue of tactile warnings at the pool edge, around ladders, diving boards, sliding boards, lifts and transfer steps were not addressed. Also, the need for tactile warnings for overhead or protruding objects, such as lifeguard platforms, sliding boards, and diving boards was not addressed.

3. The need for heat resistant surfaces on designs and devices on which there might be skin contact was not addressed in this study. As the majority of the testing was done indoors, surface temperature was not a factor and therefore not addressed in the recommendations.

4. Concern was expressed regarding what constitutes a "reasonable time" to put in place portable or removable devices. Respondents in the telephone survey of people with disabilities who had waited for a device to be put in place had waited from 1 to 20 minutes.

5. As electric wheelchairs will not be used in pools and it is recommended that aquatic chairs be required at pools with ramps or zero depth entries, the need for a 36-inch clear width for ramps may be excessive. Also, a more narrow distance between handrails may be more effective for both ambulatory and non-ambulatory pool users. Additional research is needed to determine the most effective handrail distance on wet ramps.

ATTACHMENT C

United States Access Board

SWIMMING POOL ACCESSIBILITY

Executive Summary

U.S. Architectural and Transportation Barriers Compliance Board
(Access Board)
1331 F Street, NW, Suite 1000
Washington, DC 20004-1111

Swimming Pool Accessibility Project

September 1996

Executive Summary

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NATIONAL CENTER ON ACCESSIBILITY

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This project was conducted for the U.S. Architecture and Transportation Barriers Compliance Board to identify and evaluate methods and standards related to enabling access to swimming pools by people with disabilities. It focused on the appropriateness, independent use, degree of consistency with existing building standards, level of safety; and impact on pool design.

With the assistance of a national advisory panel, four principal activities were undertaken: a comprehensive review of literature; a national telephone survey of people with disabilities; a national telephone survey of swimming pool operators, managers, aquatic directors, and adaptive aquatic instructors; and actual pool testing of identified designs and devices by people with disabilities.

A comprehensive review of the literature was organized into four areas. The first area was a review of the published literature of the past 35 years. Seven means of pool access were identified: ramps, lifts, stairs, transfer steps; lifts, zero depth entry, movable floors, and transfer walls. The second area reviewed was the state building codes related to swimming pools. Relevant standards from each state code were presented in table format. The third area examined was the existing standards for public swimming pools and spas, ANSI/NSPI-1 1991 and ANSI/NSPI-2 1992. Finally, the fourth area analyzed the report of the Recreation Access Advisory Committee (1994). The recommendations of each of the sub-committee reports that dealt with swimming pools, sports facilities, places of amusement, and developed outdoor recreation areas, were analyzed separately. Though minor differences in technical specifications were found, there was general agreement among the various sources.

A national telephone survey of 300 people with disabilities was conducted to determine their needs and preferences relative to the effective access to swimming pools.

Telephone interviews were completed with 205 subjects, 69% of the sample. Data were collected regarding subject characteristics; pool behavior including frequency, purpose and type of pool used; preferences and problems associated with various means used to access swimming pools. The findings indicated that people with disabilities do use swimming pools with some regularity. There was nearly unanimous agreement that at least one accessible means of entry and exit should be provided at all pools, and most believed that more than one accessible means should be provided. Subjects also clearly indicated that the ability to use a design or device independently was important to them. Although no one means of access was preferred by a majority of subjects, the means of access most often preferred were lifts, ramps stairs, and zero depth entry. Stairs however were only preferred by those who were ambulatory. Similarly, ramps, zero depth entry, movable floors and lifts were the means of access most subjects would be willing to use at a pool. Yet, most of those who had previously used a movable floor would not be willing to use one again.

A national telephone survey of 150 professionals involved with swimming pool operation was conducted. The sample included swimming pool operators, pool managers, aquatic directors, adaptive aquatics instructors, and aquatic therapists. The purpose of this study was to determine the current practices of pool operations related to entering and exiting swimming pools by people with disabilities. Specifically, the study was designed to examine the prevalence of designs and devices used to provide pool access, related policies and procedures, as well as safety and maintenance concerns of aquatic professionals. The results supported the finding of the earlier survey that people with disabilities do frequent pools. People with disabilities account for 14% of pool users at those pools that collect data on pool users with disabilities. Seventy-three percent of the respondents indicated that each of the pools operated by their agencies had a least one accessible means of entry for people with disabilities and 48% reported more than one. Stairs, lifts, ramps, and zero depth entry were the means of access most frequently found at pools. Respondents reported on the safety and maintenance concerns for each of the devices or designs.

On-site testing of the identified means of pool access was conducted to examine the appropriateness, independent use, and safety of the identified means of pool access by people with diverse disabilities. This was accomplished by observing 84 people with disabilities using the identified means of providing access to swimming pools. Subjects' buoyancy points ($\bar{x}$=34.6 in.) and their perceptions of design/device strengths and weaknesses were presented. Entering was perceived as easier than exiting swimming pools using each of the identified means of water access. There were significant differences between ambulatory and non-ambulatory subjects in the perceived difficulty of the designs and devices. Most of the designs and devices were significantly easier to use by ambulatory subjects than they were for non-ambulatory subjects. Only lifts and transfer steps were easier for non-ambulatory subjects, although non-ambulatory subjects who required assistance in transfers were unable to use the transfer steps. Specific problems with each of the designs and devices were reported.

A full print copy of the Swimming Pool Accessibility Project final report (#PB97-124317) may be obtained by contacting the National Technical Information Service (NTIS): 5285 Port Royal Road, Springfield, VA 22161; (703) 487-4650 (voice) or 703-487-4639 (tty). A fee of $49.00 will be charged for each copy.

Recommendations

Based on the findings of the review of literature and three research studies, the following recommendations were presented:

General

1.1. At least one accessible means of water entry/exit shall be provided for each swimming pool and shall be located on an accessible route.

1.2. Swimming pools with more than 300 linear feet of pool wall shall provide at least two accessible means of water entry/exit located on accessible routes.

1.3. When only one accessible means of water entry is provided, it shall be a swimming pool lift, wet ramp, or zero depth entry.

1.4. When a second accessible means of water entry/exit is provided, it shall be a transfer wall, transfer steps, movable floor, stairs, swimming pool lift, wet ramp, or zero depth entry. Lifts, wet ramps, and zero depth entry may not be used as a second accessible means of water entry/exit if the same means is used as the first accessible means of water entry/exit.

1.5. When a second accessible means of water entry/exit is provided, it must be located so that in combination with the first accessible means of water entry/exit to serve both ends and sides of the pool.

Ramps

When pool ramps are provided, they should meet the following specifications:

2.1. Surface: The surface of pool ramps must be firm, stable, and slip resistant.

2.2. Slope: The least possible slope should be used for a pool ramp. The maximum slope of a pool ramp shall be 1:12.

2.3. The maximum rise for any run shall be 30 inches.

2.4. The minimum clear width of a pool ramp shall be 36 inches.

2.5. Landings: Level landings must be located at the bottom and top of each ramp and each ramp run. At least one level landing must be located between 24 inches and 30 inches below the stationary water level. The landings must:

- 2.5.1. be at least as wide as the ramp run leading to it;
- 2.5.2. have a minimum length of 60 inches clear;
- 2.5.3. have a minimum of size of 60 inches by 60 inches if the ramp changes direction.

2.6. Handrails: Handrails should be required on all ramps. Ramp handrails should include the following:

- 2.6.1. Two handrails shall be provided and located 32 to 36 inches apart.
- 2.6.2. In addition to a top handrail gripping surface mounted at 34 inches to 38 inches above the ramp surface, a second handrail should be mounted between 16 inches and 26 inches.
- 2.6.3. Handrails should not be required to extend beyond the base of stairs or the base of a ramp where such would protrude into a lane or otherwise programmable area.
- 2.6.4. Handrails must be affixed so as to not allow movement in any direction.
- 2.6.5. Handrail diameter should be 1.25 inches to 1.5 inches.
- 2.6.6. If handrails are mounted adjacent to the pool wall, the space between the wall and the handrail shall be 1.5 inches.

2.7. Aquatic chairs: Facilities that provide ramps must also provide an aquatic chair that meets recommendations 12.1 to 12.5.

Pool Lifts

When provided, pool lifts should meet the following specifications:

3.1. Pool lifts shall facilitate unassisted operation.

3.2. Clear space: A minimum clear deck space of at least 60 x 56 inches to one side and to the front of the lift seat must be provided. The space under the lift seat could be included as part of the clear space as long as the area is unobstructed.
3.3. Seat location: In the raised position the lift seat edge used for transfers must be located over the pool deck at least 12 inches inside the deck edge.
3.4. Seat height: Lift seats should be located 17 inches from the deck to the top of the seat surface.
3.5. Seat width: The lift seat width should be a minimum of 19 inches wide.
3.6. Footrest: A footrest should be attached to the lift seat.
3.7. Armrests should be located on both sides of the lift seat. The armrest located next to the clear deck space should be capable of moving away from the transfer area.
3.8. Controls and operating mechanisms: Controls and operating mechanisms at both the deck level and water level positions should be operable from the front edge of the lift seat and unobstructed by any other component of the lift. Controls and operating mechanisms shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate controls shall be no greater than 5 lbf (22.2 N).
3.9. Lifts shall be operable from both the deck level and water level.
3.10. Vertical travel: The vertical travel of the lift should allow the lift seat to be submerged 18 inches to 20 inches below the water level.
3.11. Minimum lifting capacity: A minimum weight of 300 lbs. is required for all single person lifts. The lift should also be capable of sustaining a static load of at least three times the rated load.

Zero Depth Entry (Beach Entry)

When zero depth entry is provided it should meet the following specifications:
4.1. Surface: The surface shall be firm, stable and slip resistant.
4.2. Slope: Zero depth entry pools are typically designed with very slight slopes. The maximum slope of a zero depth entry should not exceed 1:12 continuing to a minimum depth of 30 inches. For pools less than 30 inches deep, the slope should continue to the depth of the pool. Whenever the slope exceeds 1:20, it shall be considered a ramp and all recommendations for a ramp would apply.
4.3. Vertical rise: Whenever a zero depth entry slope exceeds 1:20, a maximum rise for any run should be 30 inches.
4.4. Landings: For zero depth entry slopes that exceed 1:20, at least one level landing must be located between 24 inches and 30 inches below the stationary water level. The landings must have a minimum length of 60 inches and a minimum width of 36 inches
4.5. Handrails: Whenever the slope of a zero depth entry exceeds 1:20, two handrails should be required 36 inches apart.
4.6. Whenever the slope of a zero depth entry exceeds 1:20, handrails shall have a top handrail gripping surface mounted at 34 inches to 38 inches and a second handrail mounted between 16 inches and 26 inches.
4.7. Handrails must be affixed so as to not allow movement in any direction.
4.8. Aquatic chairs: Facilities that provide zero depth entry must provide an aquatic chair that meets recommendations 12.1 to 12.5.

Transfer Wall

When a transfer wall is provided, it should meet the following specifications:
5.1. Clear deck space: Clear deck space of 60 inches by 60 inches should be required at the transfer wall.
5.2. Wall height: The wall height should be 17 inches above the pool deck.
5.3. Wall depth: The transfer wall should be 12 inches to 15 inches deep.
5.4. Wall surface: The transfer wall surface must be non-abrasive and without any sharp edges.
5.5. Handrails: A minimum of one handrail should be located perpendicular to the pool wall, 4 to 6 inches above the transfer wall and with a minimum of 22 inches clearance on either side of the handrail.
5.6. Dry ramp: If a dry ramp is used to achieve the transfer wall, all of the

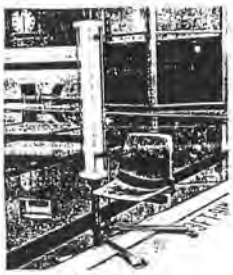
APPENDIX A

Designs & Devices for Swimming Pool Access

National Center on Accessibility
Designs & Devices for Swimming Pool Access

There have been many approaches taken to assist people in entering and exiting pools. Some are very common, others are not often seen. Some designs and devices are known by several different names. The information below is intended to familiarize you with the designs and devices and the terms by which we have chosen to refer to them. Please take a few minutes to review the various approaches and have this handy if your are interviewed.

Lifts



Hydraulic Lift
(Spectrum's Swim-Lift II)

Pool lifts are mechanical devices that move a person into or out of the water. Some lifts are permanently installed others are portable, placed in a deck mounting or rolled into place when needed. Lifts may require a transfer from a wheelchair to the lift seat or may have a sling seat that moves the person directly from a wheelchair to the water. Some lifts are power operated and others are operated manually; some can be operated independently by the user, while others require assistance.

Manual Lift
(Spectrum's Econo Lift)

Movable Pool Floors

Movable pool floors allow the entire pool floor or just a section of the floor to be raised or lowered to any depth or to a desired slope. Hydraulic pistons are used to slowly move the floor. When the floor is raised to deck level, participants can either walk or roll their wheelchairs on to the pool floor and be lowered to the desired water depth.

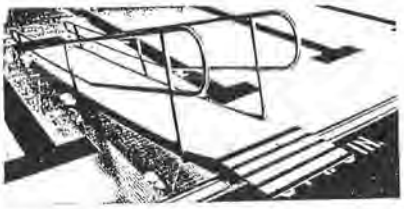
Raised Pool Coping

Raised Coping & Dry Ramp

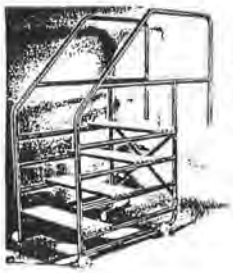
Two similar pool designs have been used to create a transfer surface at the pool's edge: the raised pool coping and the dry ramp. With the raised coping design, the edge of the pool is raised above the level of the deck, forming a small wall around the outside of the pool. The level of the pool water is actually above the deck of the pool. With the dry ramp, a descending ramp is built into the pool deck along the outside of the pool. This lowers the pool deck to a level transfer point at wheelchair height. Both the raised coping and the dry ramp are designed to form a transfer point above the pool deck and even with the water level.

Ramps

Pool ramps typically begin at the pool's deck level and provide an even sloped surface into the water. They may be constructed as part of the pool or may be portable or removable equipment. Ramps may be located either in the primary pool area or in a swimout area that leads into the primary pool area.



Portable Ramp *(Spectrum's Therapy Ramp)*

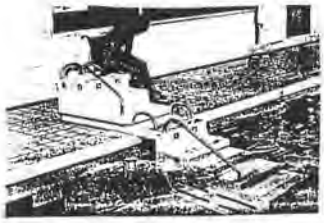


Portable Stairs
(Spectrum's Therapy Steps)

Stairs

Unlike ladders, stairs provide gradual steps into the pool. They may be a permanent part of the pool, built into the pool tank or into the wall of the pool, or be removable and portable. Stairs may be narrow or wide.

Built-in stairs



Transfer Steps *(Triad's Transfer Tiers)*

Transfer Steps

Transfer steps continue the pool stairs to a transfer surface on the pool deck. The transfer surface will be seat height, allowing someone to transfer from a wheelchair and move to and from the water, one step at a time. They can be either permanent or movable.

Zero Depth Entry

Zero depth entry pools provide an end of the pool where the pool bottom begins at the deck level and gradually slopes to a deeper level. This creates an entry similar to that of a beach.

ATTACHMENT D

U.S. Department of Justice
Civil Rights Division

Disability Rights Section - NYA
950 Pennsylvania Ave. NW
Washington, DC 20530

VIA FIRST CLASS MAIL, FACSIMILE, AND E-MAIL

February 21, 2012

Mr. Kevin L. Maher
Senior Vice President for Governmental Affairs
American Hotel and Lodging Association
1201 New York Avenue, NW
Suite 600
Washington, DC 20005

Dear Mr. Maher:

It was a pleasure to meet with you and representatives of the American Hotel & Lodging Association (AH&LA) recently to hear AH&LA thoughts and concerns with respect to the application of the ADA requirements for accessible entry and exit for swimming pools and spas, given the approach of the March 15, 2012 compliance date for the 2010 ADA Standards. We appreciate your statement that AH&LA members are committed to compliance with the Americans with Disabilities Act and to ensuring that their facilities are accessible to individuals with disabilities.

As we understood from your remarks at the outset of the February 8, 2012 meeting, AH&LA members continue to have questions regarding their obligations to remove architectural barriers in existing facilities, particularly as those obligations pertain to swimming pools and spas. In particular, you requested guidance for AH&LA members about the effect of the March 15, 2012 effective date for the 2010 ADA Standards for Accessible Design (2010 Standards) with respect to readily achievable barrier removal obligations in swimming pools and spas; whether installation of a portable lift at poolside would ever satisfy an entity's readily achievable barrier removal obligations; and whether safety considerations can be taken into account in determining whether barrier removal in existing pools and spas is readily achievable. We hope that our discussion last week was helpful to AH&LA, and, toward that end, we write to memorialize that discussion with respect to the major issues raised in the meeting.

As you know, the Department of Justice published its revised final regulations implementing the ADA for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010. See 75 FR 56163. The revised ADA rules are the result of a six-year process to update the Department's regulations. As part of this process, the Department sought extensive public comment, issuing an Advance

Notice of Proposed Rulemaking (ANPRM) on September 30, 2004, 69 FR 58768 and two Notices of Proposed Rulemaking (NPRM) on June 17, 2008, 73 FR 34466 (title II) and 73 FR 34508, (title III). The Department also held a public hearing on the NPRMs and during the comment period received over 4,435 written public comments.

The revised regulations update the general nondiscrimination provisions implementing the ADA; with some exceptions, revisions to these general nondiscrimination provisions have been in effect since March 2011. The revised regulations also adopt revised design requirements for new construction and alterations, known as the 2010 ADA Standards for Accessible Design. The 2010 Standards update requirements for accessible fixed or built-in elements that were originally covered in the 1991 ADA Accessibility Guidelines (1991 Standards) and also establish new ("supplemental") requirements for a variety of recreational facilities, including requirements for accessible means of entry and exit for swimming pools and spas. New construction and alterations started on or after March 15, 2012 are generally required to comply with the 2010 Standards. In addition, effective March 15, 2012 the 2010 Standards must be used while meeting ongoing barrier removal obligations, which are discussed in more detail below.

Public accommodations must undertake readily achievable barrier removal.

Title III of the ADA requires that public accommodations (e.g., owners, operators, lessors and lessees of hotels, resorts, swim clubs, and sites of events open to the public) remove physical barriers in each existing building or facility to the extent that it is readily achievable to do so (i.e., easily accomplishable and able to be carried out without much difficulty or expense). Known as readily achievable barrier removal, this requirement has been in effect since January 26, 1992, and public accommodations since that date have been required to engage in barrier removal in existing buildings and facilities on an ongoing basis. The regulation implementing the ADA barrier removal obligation recognizes that it is not always readily achievable to remove all architectural barriers in an existing building at the outset, and, as discussed further below, sets forth priorities for removal of barriers over time.

As discussed above, the 2010 Standards add supplemental requirements to the ongoing barrier removal obligation, including requirements for accessible means of entry and exit for pools, spas, and wading pools. These requirements are found at sections 242 and 1009 of the 2010 Standards. If a hotel or motel has more than one pool, it must remove barriers, to the extent that it is readily achievable, at each pool. If is not readily achievable to immediately provide an accessible means of entry and exit at every pool, then the covered entity must remove barriers to the extent that it is readily achievable to do so. It is important to note that the barrier removal obligation is a continuing one, and it is expected that a business will take steps to improve accessibility over time.

To determine whether it is readily achievable to provide an accessible means of entry to an existing pool, public accommodations should consider the following factors:

- The nature and cost of the action;

- Overall resources of the site or sites involved, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, including crime prevention measures, or the impact otherwise of the action upon the operation of the site;
- The geographic separateness and relationship of the site(s) to any parent corporation or entity;
- The overall resources of any parent corporation or entity, if applicable; and
- The type of operation or operations of any parent corporation or entity, if applicable.

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 achievable accessible means of entry, such as a transfer wall or pool stairs. However, the 2010 Standards' emphasis on the provision of a lift or a sloped entry recognizes the fact that many people with mobility disabilities rely more heavily on these means to independently enter and exit a pool.

When selecting equipment, the public accommodation should factor in the staff and financial resources needed to keep the pool equipment available and in working condition at poolside. Once provided, a pool lift or other accessible means of entry must remain in place and be operational during all times that the pool is open to guests. Accessible features are only required to be available for use when the facility is available to the public. Thus, pool lifts or other accessible means of entry may be stored away from the pool while the pool is closed. For example, if a pool is closed during the winter months, the public accommodation is free to remove the lift from the pool deck and store it.

Determining what is readily achievable requires a fact-specific analysis.

During our meeting, you asked us to provide definitive answers to several broad questions pertaining to readily achievable barrier removal. As we explained, while we

understand your desire for definitive answers, such questions cannot be answered in the abstract. The ADA clearly requires places of public accommodation to remove existing barriers that are structural in nature to the extent that it is readily achievable to do so. However, the Department's regulation does not establish a "quantifiable connection" or other mathematical formula to determine if barrier removal is "readily achievable."

When the original title III regulation was being drafted, the Department considered – but ultimately rejected – the idea of trying to establish a mathematical formula because it is virtually impossible to devise a specific ceiling on compliance costs that would adequately take into account the vast diversity of enterprises covered by the ADA's public accommodations requirement, and the economic situation that any particular entity would find itself in at any moment. Therefore, the regulation requires 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.

If the place of public accommodation is a facility that is owned or operated by a parent entity that conducts operations at many different sites, the public accommodation must consider the resources of both the local facility and the parent entity to determine if required barrier removal is "readily achievable." The administrative and fiscal relationship between the local facility and the parent entity must also be considered in evaluating what resources are available for any particular act of barrier removal.

In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate concerns of businesses and other private entities, the ADA has always allowed for "legitimate safety requirements" to be taken into account in determining whether an action is readily achievable. *See* 28 C.F.R. § 36.104 (definition of "readily achievable"). As explained in the preamble to the 1991 regulation, a public accommodation may consider legitimate safety requirements in its assessment of whether barrier removal is readily achievable, "so long as the requirements are based on actual risks and are necessary for safe operation of the public accommodation." *See id.* pt. 36, App. C, p. 885 (2011). Speculation or unsubstantiated generalizations about safety concerns or risks cannot form the basis of a legitimate safety requirement.

With respect to safety concerns expressed during the meeting about pool lifts in unattended pools, we note that the Access Board addressed this very issue in September 2002 in conjunction with its promulgation of its final rule adopting its ADA/ABA Accessibility Guidelines for Recreation Facilities. *See* 67 FR 56352 (September 3, 2002). These guidelines were incorporated into the Access Board's 2004 ADA/ABA Accessibility Guidelines which were subsequently adopted by the Department as part of the 2010 Standards:

> *Comment.* A few commenters expressed safety concerns where pool lifts are provided in pools that are unattended.

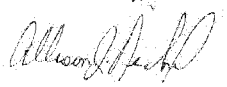
> *Response.* Pool lifts have been commercially available for over 20 years. While the Board recognizes that inappropriate use of pool lifts may result in accident or injury, the Board is not aware of any incidents of injury or accidents involving pool lifts. The Board is also not aware of any evidence that shows that pool lifts are any less safe than other components of a pool facility, such as other means of pool entry, when they are used inappropriately. Manufacturers are also incorporating features which are intended to discourage inappropriate use, such as fold-up seats and covers.

See 67 FR at 56379. The Board's discussion is wholly consistent with the Department's regulatory approach which permits consideration of legitimate safety requirements to inform the readily achievable analysis but insists that such requirements be based on *actual* risks and be *necessary* for safe operation of the public accommodation.

In closing, we believe that it is important to reemphasize that determining whether removal of a particular barrier is readily achievable requires a case-by-case assessment that may vary from business to business and sometimes from one year to the next for the same business. If a public accommodation determines that its facilities have barriers that should be removed pursuant to the ADA, but it is not readily achievable to undertake all of the modifications immediately, the Department recommends, as it has for many years, that the public accommodation develop an implementation plan designed to achieve compliance with the ADA's barrier removal requirements over time. Indeed, the March 15, 2012 effective date for the 2010 Standards reflects an 18-month delay in implementation of the revised requirements, which delay was provided, in part, to allow businesses sufficient time to consider the new requirements while developing plans to meet their on-going barrier removal obligations. Such a plan, if appropriately designed and diligently executed, may well serve as evidence of a good faith effort to comply with the ADA's barrier removal requirements.

We hope that this information is helpful. Please do not hesitate to contact the Department if we may be of assistance with this or any other matter.

Sincerely,



Allison Nichol
Chief
Disability Rights Section

cc: Minh N. Vu, Esq., Seyfarth Shaw LLP

ATTACHMENT E

1201 New York Avenue, NW, #600 • Washington, DC 20005-3931
Tel. (202) 289-3120 • Fax (202) 289-3156 • www.ahla.com

February 27, 2012

BY FAX AND FEDERAL EXPRESS

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

The Honorable Thomas Perez
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: New ADA Title III Requirements for Accessible Pool and Spa Entries

Dear Attorney General Holder and Assistant Attorney General Perez:

The American Hotel & Lodging Association (AH&LA) is a membership organization that represents the interests of hotel, motel, and other lodging facility owners and operators throughout the United States. We are writing on a very urgent matter on behalf of our members. On January 31, 2012, the U.S. Department of Justice's (the "Department") Civil Rights Division (CRT) published a document entitled "ADA 2010 Revised Requirements: Accessible Pools Means of Entry and Exit" (the "Requirements Document") (Attachment A). This Requirements Document -- issued only six weeks before the March 15, 2012 compliance date (the "Compliance Date") -- purports to state the obligations of lodging facilities and other public accommodations to provide accessible entries and exits at existing and new swimming pools as set forth in the Final Rule issued by the Department under Title III of the Americans with Disabilities Act (ADA) on September 15, 2010. *See* 73 Fed. Reg. 56,236 (Sept. 15, 2010) (the "Final Rule"). In fact, the Requirements Document sets forth arbitrary and capricious *new* requirements -- beyond those contained in the Final Rule -- that violate the Administrative Procedures Act's (APA) notice and comment procedures. These new requirements significantly change the compliance obligations of our members six weeks before the Compliance Date, making compliance a virtual impossibility.

We urge you to exercise your discretion under 5 U.S.C. § 705 to stay the Compliance Date, rescind the new requirements stated in the Requirements Document, and engage in the required notice and comment rulemaking process to determine if these new requirements should

be adopted. These new requirements essentially *double* the cost of compliance on tens of thousands of businesses in America for no apparent benefit. In the present economic environment, it is especially important for federal agencies to consider less burdensome regulatory alternatives that will achieve the same or comparable results. A year ago, President Obama issued an Executive Order calling for a government-wide review of regulations to "reduce costs" and "eliminate unnecessary burdens." Staying the Compliance Date for existing swimming pools and spas in order to comply with the notice and comment process required under the APA would be consistent with this mandate.

We would appreciate a response to this letter by March 9, 2012.

The 2010 Standards Requirements for Swimming Pools and Spas. Under the Final Rule, public accommodations are required to provide one accessible means of entry at small swimming pools, which must either be a sloped entry or a pool lift. Larger pools must have *two* means of accessible entry, and one of those means must be a pool lift or sloped entry. The Final Rule also requires that at least one accessible means of entry must be provided for spas (*i.e.*, hot tubs). The acceptable entry options for spas are a pool lift, transfer wall, or transfer system. These requirements and the specifications for each of the types of accessible entries are contained in Sections 242 and 1009 of the 2010 Standards for Accessible Design ("2010 Standards") which were adopted by the Final Rule.

The Department decided in the Final Rule that existing swimming pools and spas would not be exempt from complying with the 2010 Standards. Instead, they must comply with the 2010 Standards by the Compliance Date unless a business can show that it is not "readily achievable" to comply. It is virtually impossible for a business to interpret this vague and ambiguous standard because it involves the application of many factors, including cost, feasibility, and a business' resources, all of which must be considered on a case-by-case basis. In a February 21, 2012 letter to the AH&LA following up on a February 8, 2012 in person meeting, the CRT stated that "the determination of 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." February 21, 2012 Letter from A. Nichols to K. Maher of the American Hotel & Lodging Assn. (Attachment B); *see also* Requirements Document at 3. The Department is essentially saying that businesses, large and small, must hire lawyers and consultants at substantial expense to help them apply this multi-factor, case-by-case test or risk the threat of an enforcement lawsuit by the Department or a private plaintiff.[1] The reality is that even experienced ADA lawyers and consultants cannot give a definitive opinion on this issue, rendering the defense useless for most businesses.

Lodging Industry Compliance Efforts. After the Department issued the Final Rule on September 15, 2010, our members diligently moved forward with assessing existing conditions

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[1] Additionally, the Department has failed to recognize the disparate impact the new requirements have on smaller hotels and lodging facilities, which make up the majority of our members, and which do not have the financial or personnel resources required for implementation of the new requirements, let alone legal and other opinions.

at their existing swimming pools and spas and investigating compliance options. According to the Department's Final Regulatory Impact Analysis for the Final Rule (the "RIA"), there are more than 35,000 existing swimming pools at hotels and motels and at least 15,000 existing spas.[2] Based on the requirements stated in the 2010 Standards, most of our members planned to purchase portable pool lifts that meet the requirements of Section 1009 of the 2010 Standards. These portable pool lifts can be wheeled into position and locked in place during use. Our members assumed that the lift could be brought out upon request so as to minimize the risk of lift-related injuries, both to the individuals requesting use of the lift as well as to other guests, including children who use hotel pools. Bringing out the lift upon request would reduce the likelihood of lift-related injuries and minimize the opportunity for misuse by children and other persons who are not intended users. Our members also believed that if there is a pool and a spa in the same location that they could be served by the same portable lift. As discussed below, these were reasonable interpretations of the requirements of the 2010 Standards as well as the past practice at swimming pools that provided pool lifts. Pool lift manufacturers also had the same interpretation and vigorously urged our members to purchase portable pool lifts, claiming that they were compliant with the 2010 Standards.

The January 31, 2012 Requirements Document. Much to our members' surprise and dismay, on January 31, 2012, the Department issued the Requirements Document which states:

1. Pool lifts must be "fixed" and cannot be "portable." At existing swimming pools, portable lifts can only be used if the installation of a fixed lift is not readily achievable (the "Fixed Lift Requirement"). In the February 8, 2012 meeting with AH&LA representatives, 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, it would not fall off the deck. The CRT later confirmed this in the February 21 Letter.
2. Pool lifts must be at poolside and ready for use at all times when the pool is open to guests (the "Poolside Requirement"). The Requirements Document considers this requirement to be a part of a facility's obligation to maintain its accessible features.
3. A pool lift may not be shared between two pools in the same location in state and local facilities covered by Title II of the ADA. At the February 8 meeting, CRT representatives stated that this rule would also apply to swimming pools and spas located in public accommodations such as lodging facilities (the "No Sharing Requirement").

As we explain below, these new requirements are highly problematic for three reasons:

- The new requirements go far beyond the Final Rule to impose new obligations that are not the product of a lawful and well-reasoned agency decision-making process. The Department has not provided interested parties with the opportunity to comment on these new requirements as required by 5 U.S.C. § 553, nor has it ever explained

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[2] The RIA states that there are 15,111 hotels and 21,017 motels in the United states. *See* RIA at 187. The RIA assumed that each hotel would have at least one swimming pool and spa. *Id.* at 208, 212. The RIA further assumed that each motel would have a swimming pool. *Id.* at 212.

the rationale for adopting these rules. The Department's failure to follow the required rulemaking process will not only impose unnecessary costs on businesses for no apparent benefit but may also pose an unjustified danger to guests of lodging facilities – dangers that the Department should have carefully studied but did not.

- The Department has not provided a reasoned explanation of why it has adopted these new requirements which appear facially irrational and unreasonable and are contradicted by data available and known to the Department. Thus, the requirements are arbitrary and capricious.
- Because the Department did not announce these new requirements until January 31, 2012, it is not reasonable or feasible for AH&LA's members, other public accommodations, or state and local governments to comply by the Compliance Date. The manufacturing capacity of compliant pool lift makers and the additional work and permitting that will be required to install fixed lifts make it literally impossible for lodging owners and operators to outfit by the Compliance Date their more than 35,000 existing swimming pools and 15,000 spas. In fact, the 18-month transition period originally provided by the Department for compliance before it changed the requirements would not have been enough time for compliance. Again, the rulemaking record does not indicate any effort by the Department to determine how many types of compliant pool lifts are commercially available, how quickly they can be manufactured, or how many pool lift installers are available to install these fixed lifts.

The Department Failed to Go Through Proper Notice and Comment Procedures Required by 5 U.S.C. § 704 Before Issuing the New Requirements. The D.C. Circuit has 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).

Simply put, the Fixed Lift, Poolside, and No Sharing Requirements cannot be found anywhere in the Final Rule. 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, that it must be poolside at all times during pool hours, or that it cannot be shared between two pools or a pool and a spa at the same location.

When AH&LA asked CRT representatives at their February 8, 2012 meeting where the "fixed" lift requirement appears in the Final Rule, CRT stated that all elements in the 2010 Standards are supposed to be "fixed." However, that statement is not factually accurate. 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, when the Department wanted to make equipment or 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 that must be "*affixed* to the wall." *There is no such stated similar "fixed" requirement for pool lifts.* In short, the Department cannot claim that the Final Rule included a requirement that pool lifts be fixed based on the incorrect assertion that all items covered under the 2010 Standards are fixed --they are not. When fixed was intended, it was noted as such.

There is no question that the Department intends to treat the new requirements as binding legal requirements. The Requirements Document itself is called: "ADA 2010 Revised Requirements: Accessible Pools Means of Entry and Exit." Thus, the title of the document announces that it is stating "Requirements," not just policy statements. With respect to the Poolside Requirement, the Requirements Document states:

> Accessible pool features *must* be maintained in operable, working condition so that persons with disabilities have access to the pool whenever the pool is open to others. For example, a portable pool lift may be stored when the pool is closed but it *must* be at poolside and fully operational during all open pool hours.

Requirements Document at 5 (emphasis added).

The language setting forth the Fixed Lift Requirement is only slightly more flexible:

> For an existing pool, removing barriers may involve installation of a fixed pool lift with independent operation by the user or other accessible means of entry that complies with the 2010 Standards to the extent that it is readily achievable to do so. If installation of a fixed lift is not readily achievable, the public accommodation may then consider alternatives such as use of a portable pool lift that complies with the 2010 Standards. It is important to note that the barrier removal obligation is a continuing one, and it is expected that a business will take steps to improve accessibility over time.

Id. at 3.[3]

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[3] The use of the term "may" does not make the statement any less binding. It was likely used because a facility can choose to remove the barrier by installing a sloped entry instead of a lift (assuming the pool is large enough for this option). Thus, the term "may" reflects the

With respect to the No Sharing Requirement, the Requirements Document states: "Sharing accessible equipment between pools is not permitted, unless it would result in undue burdens to provide equipment at each one." *Id.* at 3. While this pronouncement concerned pools at state and local government facilities, CRT representatives made clear in their February 21 Letter that this principle also applies to public accommodations facilities. The letter states: "If a hotel or motel has more than one pool, it must remove barriers, to the extent that it is readily achievable, at each pool." February 21 Letter at 2.

In sum, the Fixed Lift, Poolside, and No Sharing Requirements are binding new rules that the Department issued without affording the public an opportunity to comment on their impact. The Department's failure to follow the proper procedures is alone sufficient to warrant a stay of the requirements while the Department engages in the required process. However, even if the Department believes that these requirements are not new and binding, they must still be set aside as arbitrary and capricious because the Department failed to explain the basis for its decision-making and ignored relevant facts in the record concerning public safety that should have been studied.

The New Requirements Are Arbitrary and Capricious. The Supreme Court has explained that, in issuing binding rules, an "agency must examine the relevant data and articulate a satisfactory explanation for action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency's decision must be "based on a consideration of the relevant factors" and cannot be "a clear error of judgment." *Id.* In addition, "an agency rule would be arbitrary and capricious if an agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. . . ." *Id.* The Supreme Court has also stated that a court reviewing an agency action "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*[4]

The rulemaking record for the Final Rule does not contain any discussion about why pool lifts must be fixed, why they must always be poolside during pool hours, or why they cannot be shared between two pools or a pool and a spa in the same location. The absence of an explanation from the Department as to why it adopted these new requirements is especially

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availability of other entry options such as a sloped entry, not any uncertainty on the part of DOJ that having a fixed lift is a requirement.

[4] *See also Sierra Club v. EPA*, 167 F.3d 658, 663 (D.C. Cir. 1999) (remanding agency rule for explanation of the basis for its rule under arbitrary and capricious standard of review); *Int'l Ladies' Garment Workers Union v. Donovan*, 722 F.2d 795, 822-23 (D.C. Cir. 1983) (invalidating rescission of rules regulating homework of knitted outerwear workers because agency failed to adequately explain the basis of its decision and did not consider the relevant factors); *Fox Tel. Stations v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002) (invalidating rule because the agency could not produce a "valid reason" to support it).

problematic in this rulemaking where the only substantive study on the use of pool lifts in the rulemaking record contradicts the Department's new requirements. The arbitrariness of the Department's positions with regard to pool accessibility is best demonstrated by the Department's opinion that if there are two identical pools at a hotel (*e.g.*, both outside, both the same configuration, both the same, exact qualities) both must have fixed pool lifts. There is no logic or rational basis for such a position.

In 1995, the United States Access Board (the "Board") commissioned the National Center on Accessibility to conduct a study of accessible methods for entering and exiting pools and to make recommendations to the Board as to the requirements that it should adopt as guidelines under the ADA.[5] *See* National Center on Accessibility, *Swimming Pool Accessibility* (September 1996) (the "NCA Pool Study") (Attachment C). The NCA Pool Study found 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. *Id.* at 51. Despite its consideration of portable lifts, the NCA Pool Study made no distinction between portable and fixed lifts in terms of benefits to the user and produced no recommendations calling for a "fixed" lift or a requirement that the lift be left out at all times the pool is open. *Id.* at 84-86. *To the contrary, the NCA Pool Study defined the term "pool lift" as including lifts that are "portable."*[6]

The NCA Pool Study also provided data to support the conclusion that leaving the pool lift out is *not* required to ensure equal access. Based on interviews with individuals with disabilities who had to request pool lifts, the NCA found that *the average wait was only 6.1 minutes*. *Id.* at 40. Consider, please, the logical approach of a hotel providing access by ensuring that the public knew that a lift could be and would be placed at a water feature upon request – eliminating the risks and potential liabilities associated with leaving the lift poolside at shallow water at all times.

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5 Title III of the ADA empowers the U.S. 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 the Department has the authority to issue binding regulations under Title III of the ADA. The ADA requires the Department to adopt accessibility standards that are "consistent with" the guidelines issued by the Board. *Id.*

6 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 specific requirements for pool lifts. None of these eleven requirements includes a requirement that the pool lift be "fixed" or permanent. In addition, none of the eleven requirements includes the need to leave the pool lift out at poolside, ready for use, at all times when the pool is open. In short, the NCA did not view this as a necessary requirement even though it was well aware that 73% of aquatic centers did not leave their lifts out at poolside. *Id.* at 84-86.

The NCA Pool Study further reported that three people with disabilities who were interviewed had been injured while using a pool lift, and 17% of respondents could not use pool lifts by themselves due to their physical limitations. *Id.* at 41. These data should have at least caused the Department to consider whether requiring a pool lift to be available at all times at unattended pools (the vast majority of swimming pools at lodging facilities are unattended) would pose an undue risk to individuals with disabilities who may encounter problems while using a pool lift. This situation could be quite dangerous if the person is alone at the pool. The Department should have at least considered whether an alternate approach of having pool lifts brought out by a lodging employee who could then provide assistance and/or instruction on how to use the lift would eliminate or minimize this risk.

The NCA Pool Study also reported that a number of aquatic professionals 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.* at 51. These findings go directly to public safety. The Department should have considered and weighed them against the benefits of having the lift poolside at all times during pool hours. There is no evidence in the record that the Department ever reviewed or considered this study.

Another point relating to pool lift safety must be mentioned: By requiring that pool lifts be out at poolside at all times when the pool is open, the Department has failed to consider the risk that children may use the pool lift seat as a diving platform into the shallow end of the pool where the lift must be positioned. 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. In light of this well-documented danger, the Department had a responsibility to study -- not to dismiss out of hand -- the question of whether leaving a pool lift out all of the time when a pool is open, and in most cases without the presence of a lifeguard, would encourage dangerous diving activities or otherwise pose a safety hazard to the public.

In its February 21, 2012 Letter, the CRT dismissed AH&LA members' concerns about safety as being "speculation or unsubstantiated generalizations" -- completely ignoring the NCA Pool Study findings commissioned by the Board.[7] The CRT's position ignores the obvious explanation for why there is no data on this issue at this time: As shown by the NCA Pool Study, the vast majority of pools have used portable lifts that have been brought out upon request. Thus, there is no safety data concerning the use or misuse of unattended pool lifts.

The Department's position that the pool lifts must poolside be ready for use at all times when the pool is open also contradicts the Access Board's understanding of its own rule about the availability of pool lifts. As the Department reports in its February 21, 2012 Letter, the

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[7] The Board also ignored the safety-related portions of the NCA Pool Lift Study that it had commissioned. This is apparent from the Board's comments in the 2002 Final Rule -- relied upon by the CRT to support its view that there are no safety issues -- that it was "not aware of any incidents of injury or accidents involving pool lifts." February 21 Letter at 5.

Board actually stated in its Final Rule that the "[m]anufacturers are also incorporating features which are intended to discourage inappropriate use, such as . . . covers." This statement shows that the Board contemplated that covers could be placed over the lifts during pool hours of operation. If covers can be used, then the pool lift is not immediately available for use because someone has to remove the cover. If that is the case, then why would it not be just as reasonable to have a hotel employee bring out a portable lift in the same amount of time it would take for that employee to come and remove the cover from the lift? What is clear is that the Department, in issuing these arbitrary and capricious requirements, had neither examined the record, meaningfully considered the issues, or explained its decision.

The No Sharing Rule is arbitrary and capricious because the Department has failed to explain why it adopted this requirement. The unreasonableness of this rule is especially obvious in the context of existing spa facilities where the installation of a fixed lift will dominate and take up a substantial portion of the deck space around a typical hot tub, making the use of the hot tub less accessible for guests without disabilities. Again, the Department has not explained why a lift that is promptly brought out upon request would not ensure equal access while balancing the legitimate interests of other users.

The March 15, 2012 Compliance Date Is Unreasonable and Arbitrary. As stated above, the Department changed the rules for pool lifts on January 31, 2012. The Department went from a rule that would have allowed the purchase of a portable lift to a rule that requires our members to hire qualified pool contractors to demolish parts of their pool decks, electrically bond the fixed pool lift to the equipment grounding conductor embedded beneath the existing pool deck, and reconstruct the pool deck.[8] *See* Attachment D (excerpts from the National Electrical Code). This work requires permits and inspections because of the electrical and structural work involved. Our members had not planned on doing this work.

In addition, based on their discussions with manufacturers of compliant fixed pool lifts and installers, our members believe that there are not enough fixed pool lifts to retrofit 50,000 swimming pools and spas in 18 months, let alone in the six weeks between the issuance of the Requirements Document and the Compliance Date. Two major pool lift distributors have told our members that the three manufacturers of fixed lifts (S.R. Smith, Aqua Creek, and Global Lifts) cannot start delivering any fixed pool lifts before 5-10 weeks out. One manufacturer informed a member that it can only produce 50 lifts per week after a substantial lead time. Assuming there are four qualified manufacturers of compliant fixed lifts that can each make 50 lifts per week, it would take 4.8 years to retrofit 50,000 existing pools and spas.

It does not appear that the Department ever considered any of these issues in setting and retaining the Compliance Date.

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[8] When AH&LA pointed out to CRT representatives all of the steps needed to install a "fixed" lift, ***CRT representatives stated that they had never heard of the electrical bonding requirements for swimming pools and spas*** set forth in the National Electrical Code. *See* http://ecmweb.com/nec/top2008neccxs_021909/ for an explanation of the requirements.

In closing, AH&LA's members wish to reiterate that they are committed to ensuring that individuals with disabilities have access to their swimming pool and spa facilities. However, the rules must be the product of a thorough and reasonable rulemaking process that considers and weighs obvious and important issues such as public safety, cost, and accessibility. The Fixed Lift, Poolside, and No Sharing Requirements did not go through this required process. These new requirements are based on unexplained and unsupported assumptions that fixed lifts are somehow better than portable lifts, unattended lifts at poolside do not present an increased risk of injury, and that operators of pools and spas are not capable of providing lifts in a prompt manner when needed. We urge the Department to stay the Compliance Date for swimming pools and spas until it has conducted the rulemaking process required by the APA.

Thank you for your consideration. We look forward to your response.

Sincerely,

Kevin Maher
Senior Vice President for Governmental Affairs

cc: Allison Nichols, Esq.
Chief, Disability Rights Section
Civil Rights Division

Inez Moore Tenenbaum
Chairman, Consumer Products Safety Commission

Robert Adler
Commissioner, Consumer Product Safety Commission

Nancy Nord
Commissioner, Consumer Product Safety Commission

Anne Northrup
Commissioner, Consumer Product Safety Commission

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ATTACHMENT F

MAR/09/2012/FRI 05:39 PM DOJ/CRD/OFC OF AAG FAX No. 2025140293 P. 002

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAR 0 9 2012

Via First Class Mail and Facsimile

March 9, 2012

Mr. Kevin L. Maher
Senior Vice President for Governmental Affairs
American Hotel and Lodging Association
1201 New York Avenue, NW, Suite 600
Washington, DC 20005

Dear Mr. Maher:

This letter is in response to your letter on behalf of the American Hotel & Lodging Association (AH&LA), dated February 27, 2012, to Attorney General Eric Holder and myself regarding the requirements of the Americans with Disabilities Act (ADA) to remove architectural barriers in existing swimming pools and spas. We appreciate hearing your views, as well as your affirmation of AH&LA members' commitment to ensuring that individuals with disabilities have equal access to hotel and resort swimming pools and spas.

Your letter raised a number of issues regarding the ADA regulation that was published 18 months ago, including the 2010 ADA Standards for Accessible Design (2010 Standards) that go into effect on March 15, 2012. Many of your concerns were previously addressed in a February 8 meeting between the Department and representatives of AH&LA, as well as in a letter sent to you on February 21, 2012 by Allison Nichol, Section Chief of the Disability Rights Section, memorializing that meeting.

Your current letter relays AH&LA's view that the Department's January 31, 2012 Technical Assistance document, entitled "ADA 2010 Revised Requirements: Accessible Pools--Means of Entry and Exit," contains new requirements that were not addressed in the 2010 revisions to the title III ADA regulation and that these "new requirements" significantly change the compliance obligations of AH&LA's members. Specifically, you contend that, contrary to the description of the requirements in the Technical Assistance document, the 2010 regulation did not require swimming pool lifts to be fixed or built-in, and, rather, permitted portable pool lifts; that the 2010 regulation permitted such portable pool lifts to be shared among multiple pools; and that the 2010 regulation permitted public accommodations to store their portable lifts and make them available only upon request. Based on this view, you requested that the

Department rescind the Technical Assistance document, stay the March 15, 2012 effective date for the 2010 regulation as applied to pools, and engage in new rulemaking on this issue. In addition, you asserted that the Department failed to adequately explain the basis for the title III requirements as they relate to pool lifts or to consider the evidence in the rulemaking record on this issue.

In the Technical Assistance document the Department reiterated its longstanding position, explicitly codified in the revised regulation, that the ADA Standards for new construction and alterations apply to fixed or built-in elements, including, as of the March 15 effective date, accessible means of entry into swimming pools, such as pool lifts. For existing facilities, including hotels with swimming pools, removal of architectural barriers need only be done if it is readily achievable, i.e., easily accomplished without significant difficulty or expense. Thus, although the ADA Standards provide the benchmark for barrier removal at existing facilities, portable lifts can be used at existing pools if affixing the portable lift or installing a fixed lift is not readily achievable. Should it become readily achievable to affix a portable lift to the pool deck at a future time, we would expect that the entity would take steps to do that as part of its ongoing barrier removal obligation. In response to your specific questions, we also affirmed that equal opportunity and independent access for people with disabilities require that the lift must be at poolside and operational at all times the pool is open. Finally, we confirmed that legitimate safety requirements are, and always have been, appropriate considerations in determining whether barrier removal is readily achievable. As noted in our letter of February 21, 2012, however, the U.S. Access Board, in adopting the Guidelines on which the Department's 2010 Standards are based, did not find evidence of safety risks from fixed pool lifts. I hope this information was helpful to AH&LA members. AH&LA members may obtain additional technical assistance from the Department's ADA Information Line at (800) 514-0301 (voice), (800) 514-0383 (TTY). ADA specialists are available Monday through Friday from 9:30 AM until 5:30 PM (eastern time) except on Thursday when the hours are 12:30 PM until 5:30 PM.

The revised ADA regulation is the result of a six year process to update the Department's ADA regulations, including the ADA Standards for Accessible Design. As part of this process, the Department sought extensive public comment, resulting in the receipt of over 4000 public comments, and held a public hearing. The Department carefully considered the evidence in the rulemaking record (including the comments provided by AH&LA) and made a reasoned decision to adopt the U.S. Access Board's revised technical and scoping requirements for access to pools, a decision that took into account the concerns and comments provided by the full range of commenters who said they would be affected by the proposed rule. In addition, we are confident that the Department's revised regulation, which is grounded in longstanding and well-established ADA barrier removal principles, provides public accommodations, including hotels and motels, with the information they need to meet their ADA obligations. The regulation provides such entities flexibility to evaluate whether and how to remove architectural barriers to access, and to take only those actions that are "readily achievable." Public accommodations, including hotels and motels, have been applying that standard for nearly 20 years.

This regulatory balance is reflected in the Department's Technical Assistance document on accessible pool entry and exit, which, contrary to your characterization, imposes no new requirements on covered entities. Rather, the document explains and reiterates the duties of

public accommodations with respect to swimming pools and spas as set forth in the regulation. Therefore, the Department does not intend to withdraw the Technical Assistance document or delay the effective date for the 2010 regulation beyond March 15, 2012.

Thank you for contacting the Department on this matter. Please do not hesitate to contact the Department if we may be of assistance with this or any other matter.

Sincerely,

Thomas E. Perez
Assistant Attorney General
Civil Rights Division

ATTACHMENT G

PROFESSIONAL OPINION AND ANALYSIS

2010 ADA REQUIREMENTS: ACCESSIBLE POOLS & SPAS MEANS OF ENTRY AND EXIT

Prepared for:

American Hotel & Lodging Association

1201 New York Avenue, N.W.

Suite 600

Washington D.C. 20005

Submitted by:

Michael Oostman

Oostman Aquatic Safety Consulting, Inc.

04/02/2012

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SUBJECT MATTER

The following composition reflects my professional analysis and opinions regarding the Department of Justice's position that, when used to provide an accessible means of entry into swimming pools and spas, pool lifts must be "fixed" and positioned next to the pool or spa whenever the facilities are open to the public. I have prepared this report in response to a request by the American Hotel and Lodging Association (AH&LA) to analyze whether additional study is warranted to determine the potential impact of these pool lift requirements on pool user safety.

BACKGROUND

I am an aquatic safety expert with over 19 years experience in evaluating aquatic facility operations domestically as well as internationally. Throughout this time, I have actively evaluated lifeguarding, non-lifeguarding and water park attractions as well as the overall facility to insure proper compliance with standard of care and applicable codes. In addition, from 1998-2004 I was the in-house aquatic safety consultant to Walt Disney World in Orlando, Florida. My responsibilities included the aquatic safety consulting of all the resort swimming pools, both guarded and non-guarded, water parks, Disney Cruise Line and the Disney Vacation Club properties.

Additionally, I have physically personally investigated over 650 drowning and near-drowning events. Through this forensic process one of the goals is to establish the contributing factors which lead to the submersion event as well as to creating a risk management strategy to mitigate the associated risks. Along with submersion events I also investigate spinal cord injury accidents.

I have visited thousands of swimming pools in my work as an aquatic safety expert, as a lifeguard, as a competitive swimmer, and as a parent of three children. During these visits, among many other things, I have learned and observed certain behavioral traits of pool users, especially children and adolescents.

My CV is attached to provide additional background qualifications and experience.

HISTORY

The Department of Justice published revised final regulations implementing the Americans with Disability Act (ADA) for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010.

The 2010 Standards establish two categories of pools: large pools with 300 or more linear feet of pool wall and smaller pools with less than 300 linear feet of wall. Large pools must have two accessible means of entry, with at least one being a pool lift or sloped entry; smaller pools are only required to have one accessible means of entry, provided that it is either a pool lift or a sloped entry.

Under the 2010 Standards, every spa must also have an accessible means of entry (there are special rules for clusters of spas). One of the accessible entry options for a spa is a pool lift.

Title III Readily Achievable Barrier Removal

Title III of the ADA requires that places of public accommodation (e.g. hotels, resorts, swim clubs, and sites of events open to the public) remove physical barriers in existing pools to the extent that it is readily achievable to do so.

For an existing pool, removing barriers may involve installation of a fixed pool lift with independent operation by the user or other accessible means of entry that complies with the 2010 standards.

Compliance dates were originally set at March 15, 2012; however, the DOJ extended the deadline to May 21, 2012.

PROFESSIONAL ANALYSIS AND OPINIONS

Fixed Pool Lift Specifications

Pursuant to my review of the specifications as promulgated in section 1009 of the 2010 Standards, the DOJ's pool lift guidance dated January 31, 2012, and my review of the various pool lift models by *SR Smith, AquaCreek* and *Spectrum*, it is my understanding that an ADA-compliant pool lift would have the following attributes:

1. All pool lifts require a seat which must be positioned 16-19" above the deck.
2. The centerline position of the seat must be within 16" from the edge of the pool.
3. The seat must be 16" wide minimum.
4. Pool lift must be located where the water level does not exceed 48".
5. The pool lift must be capable of unassisted operation from both the deck and the water levels.
6. The lift must be designed so that the seat will submerge to a water depth of 18" minimum below the stationary water level.

Fixed Lift Requirement

The DOJ's requirement that a pool lift must be "fixed" and positioned next to the pool or spa whenever the facility is open at all Title III swimming pools/spas is one that I feel was reached without proper consideration of all safety concerns. It is my position that this requirement raises serious safety concerns warranting additional study.

Non-lifeguarded swimming Facilities

Risk of Catastrophic Injuries-Jumping or Diving

The 2010 Standards require that the lift seat be 16"-19" above the pool deck. They further require that the lift be installed in shallow water (maximum water depth of 48").[1] It is my professional opinion that the lift becomes a device which children and other guests will climb onto, jump and possibly dive from, into the shallow water. This situation would create a large risk exposure for catastrophic injuries. In legal terms the lift could become "an attractive nuisance" which creates a higher legal standard of care by the owner/operator.

As previously stated, I have observed and studied the behavior of both children and adults in swimming pool settings for over 19 years as a lifeguard, aquatic safety expert, and father of three children. The majority of the accidents I investigated and continue to investigate involve children. Children are naturally curious and they lack the experience to appreciate the risk involved with dangerous behaviors.

Risk of Entrapment

The 2010 Standards require that the pool lift seat be capable of being brought down to at least 18" below the static waterline.

When the seat is in the "down" position, which is required to be a minimum of 18" below the static waterline, created here is an inherent risk of entrapment when swimmers attempt to swim under or around the device. Although this applies to both guarded and non-guarded swimming facilities it is particularly concerning where there is no active staff member surveilling the swimming pool looking for signs of distress.

Equipment Failure

A fixed lift that is next to the pool or spa ready for use at all times when the facilities are open will result in individuals with disabilities using the fixed lift at times when no one is present or aware of their use of the lift. This situation will place the user in greater peril because there will be no one to provide assistance if there is a lift failure or if the user is unable to operate the lift.

Lifts are not manufactured to endure the Environmental Conditions

Many of the lifts on the market are not specifically manufactured to endure continual assault from the environment, both outdoor and indoor. Additionally, there are specifications in the many of the manufactures owner manuals to "Rinse seat and seatbelt/stability vest with fresh water between each use..;"[2] Owner/operators cannot implement these procedures if they are unaware when the lift is in use.

---

1 1009.2.1 Pool Lift Location.

2 SR Smith Splash Lift User Manual

Foreseeable Extension of Risk

When an owner/operator has the fixed lift out and ready for use at the unsupervised swimming pool or spa and a guest becomes injured as a result of their proper or improper use of the device, it will be necessary to expend significant amounts of time, money and psychological investment to deal with the inevitable litigation which will stem from these injuries.

Lifeguarded Swimming Facilities

The risks set forth above also exist at lifeguarded facilities though possibly to a lesser extent. In addition to the analysis provided above to non-guarded swimming facilities, the presence of fixed pool lifts at swimming pools and spas could negatively impact lifeguarding duties in the following ways:

Visual Occlusions

Lifeguarding is a profession with an almost unilateral expectation; swimmer protection. This is accomplished in large part to the lifeguard's identified zone of protection and their ability to scan all aspects of said zone within a short window of time.[3]

In order to scan all areas of the zone there must not be any blind-spots, which are commonly caused by environmental considerations (sun, glare, surface agitation etc) and physical considerations (people, pool shape etc).

When a fixed lift is installed at the edge of a swimming pool, blind spots are created. Additionally, when the lift is in the down position, more blind spots are created further challenging and compromising the safety of the swimming pool.

Path of Travel Hinderance

In many swimming pools, lifeguards are encouraged to guard from a mobile position. Fixed lifts will force lifeguards to walk around the lift, taking their attention off the swimming pool and the swimmers.

Insufficient Data of Reported Incidents

It is my understanding that an argument has been made that there is no, or little, evidence of injuries relating to pool lift use or misuse and that fixed lifts left out at the pool or spa must therefore be safe. This argument analysis is flawed due in large part to the few swimming pools or spas, either guarded or unguarded, with fixed pool lifts positioned beside the element whenever the facility is open. Said another way, we do not have a sample size which is remotely significant to determine this safety concern to the swimming public.

I hesitate to provide an numerical value to the number of swimming pools I have been to, which are unguarded, and have a fixed pool lift; however, I would say that the number is extremely remote. By virtue of the almost negligible number of unguarded swimming pools with fixed lifts, it is my opinion that any analysis of injury to use is inappropriate and the application of such an analysis would be negligent. Thus, the absence of

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3 Jeff Ellis & Associates, Inc. have the 10/20 Rule (10 seconds to scan zone)
YMCA of the USA have the 10/20 Rule (10 seconds to scan zone)

injury reports does not necessarily mean that the fixed pool lifts do not pose safety concerns. In addition, the reporting of injuries at non-lifeguarded pools may be unreliable.

CONCLUSION

I firmly support the goals of the 2010 Standards to provide individuals with disabilities access to swimming pools and spas. However access must be provided in a manner that ensures public safety. In my professional opinion having investigated the human factors and conditions that contributed to more than 600 accident, requiring pool lifts to be fixed and next to the pools and spas at all times when the facilities are open raises serious safety concerns that must be studied.

Respectfully Submitted,

Michael A. Oostman

CURRICULUM VITAE

MICHAEL A. OOSTMAN

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EDUCATION

Northern Illinois University- DeKalb, Illinois
Bachelor of Science, Major-Health Administration, Minor-Community Heath
1994

PERSONAL

Date of Birth: February 21, 1971
Married, three children; Rowan (February 21, 2006), Kyla (March 13, 2008), Maeve (June 28, 2010)

BUSINESS INFORMATION

Oostman Aquatic Safety Consulting, Inc.
Business Address: 210 Elm Street North Reading, Massachusetts 01864
Business Phone: (978) 207-3113
Mobile Phone: (407) 497-9311
Website: www.aquaticsafetyconsulting.com
Email: michael@aquaticsafetyconsulting.com

AREAS OF SPECIALIZATION

1.Lifeguarding

1.1.Scanning Procedures
1.2.Scanning Vigilance
1.3.Training Curriculums
1.4.Inservice Training
1.5.Application of Skills
1.6.Water Park, Swimming Pool, Lakes, & Ocean

2.Drowning/Near Drowning

2.1.Lifeguarded
2.2.Non-Lifeguarded

3.Accident Investigations
3.1.Lifeguarded Accidents
3.2.Non-Lifeguarded Accidents

4.Non-Lifeguarded Aquatic Operations
4.1.State Code Compliance
4.2.Industry Standards/Guidelines
4.3.Operational Practices

5.Warnings and Signage
5.1.Appropriateness
5.2.Positioning and Visibility

6.Diving/Spinal Accidents
6.1.Swimming Pool
6.2.Open Water

7.Water Slide Accidents
7.1.Dispatching Procedures
7.2.Slide Ride-ability

8.Analysis of Surveillance Footage

LITIGATION SUPPORT SERVICES

1.Initial Consultation

2.Site Inspection

2.1.Evaluate Property
2.2.Photograph and Secure Appropriate Measurements
2.3.Review Signage, Equipment, etc...
2.4.Review Line-of-Sight Issues

3.Accident Reconstruction

3.1.Replicate Event
3.2.Video and Still Shot
3.3.Hypothesis Regarding Chain of Events
3.4.Review of Contributing Factors

4.Assistance Throughout Discovery Phase

4.1.Assist with Interrogatories
4.2.Assist with Deposition Questions
4.3.Assist with Strategies and Theories

5.Author Reports and Opinions

6.Application of Standard of Care to Fact Pattern

7.Provide Expert Testimony

7.1.Deposition
7.2.Trial
7.3.Create Exhibits for Trial

PROFESSIONAL EXPERIENCES

2004-Present

Oostman Aquatic Safety Consulting, Inc. -President

1.Litigation Support Services. My aquatic litigation support practice specializes in forensic consulting, investigation and expert witness services to the legal community regarding aquatic accident and death matters. My hands-on experience in serious and/or fatal aquatic accident investigation has provided me the expertise to determine causal factors, recommend corrective action, and implement operational, maintenance and safety training programs to minimize risk exposure. Throughout the litigation process there are different services which may apply; below is a list of those services:

> **1.1.Accident Analysis and Reconstruction.** Utilizing state-of-the-art technology and industry methodology, I will reconstruct the incident for retrospective analysis. This analysis allows for isolation of causal and contributing factors.
>
> **1.2.Standard of Care.** Application and analysis of standard of care, both written and practiced.
>
> **1.3.Products Liability.** Investigation into the products used on or during the incident.
>
> **1.4.Human Factors.** Understanding the properties of human capability in and around aquatic environments and how this influences outcomes and causalities.

2.Accident Investigations (1994-Present). The true measure of determining or predicting future outcomes is to look to the past. Since 1994, I have have conducted over 600 drowning and near-drowning investigations. This experience provides me with both historical data as well as a pragmatic familiarity with the drowning process and the resulting consequences.

> **2.1.Factual Debriefing.** Individually and independently interview all key fact witnesses utilizing a "first person" chronological question and answer format.
>
> **2.2. Stress Debriefing.** Counsel and provide answers and support to the emotional reaction to the event.
>
> **2.3. Recommendations and Risk Management Assessment.** Make recommendations based upon the information collected as well as best practices.

3.Educational Workshops/Public Speaking (1994-Present). Throughout my career I have had been invited to present in many different forums both domestically as well as internationally on various topics regarding aquatic safety. Below is a list of my different presentations, including topics and locations.

1992-2004

Jeff Ellis & Associates, Inc., Kingwood, Texas -Vice President

1. Litigation Support Services (1997-2004).

2. Drowning Investigations (1994-2004).

3. Aquatic Safety Auditing (1992-2004). Performing unannounced evaluations on both lifeguards and the entire operation to ensure compliance with training curriculum and industry standard of care. I have conducted over 800 audits/inspections at water parks, swimming pools, lakes and ocean operations. These audits have been conducted throughout the United States as well as in the countries of: Bahamas, Brazil, Canada, China, Egypt, France, Korea, Mexico, Singapore, Philippines and U.A.E.

4. Education Workshops/Public Speaking (1994-2004).

5. Walt Disney World-Aquatic Safety Consulting-Orlando, Florida (1998-2004). For over six years I was responsible for the training of approximately 1,500-2,000 lifeguards annually and the follow-up and evaluation of said lifeguards. This continual training environment allowed for a pragmatic understanding of the training and responsibilities of lifeguarding. Working with the Disney company afforded the hands-on working experience of many different aquatic environments and attractions. The water parks provided many different water slide, from vehicle ridden to body as well as the many different attractions. To the resorts which had both lifeguarded as well as non-lifeguarded swimming pools. Finally, the off-site resorts as well as the open water ocean lifeguarding operation. The experiences learned during this engagement provided knowledge which is paramount to this practice. The following is a list of the different operations:

Blizzard Beach Water Park, Typhoon Lagoon Water Park, River County Water Park (Closed 2002), Castaway Cay (Disney Cruise Line), Animal Kingdom Lodge, Beach Club, Boardwalk, Contemporary, Grand Floridian, Polynesian, Wilderness Lodge, Yacht Club, Caribbean Beach, Coronado Springs, Port Orleans-French Quarter, Port Orleans-Riverside, All-Star Movies, All-Star Music, All-Star Sports, Pop Century, Boardwalk Villas, Beach Club Villas, and Saratoga Springs.

6. Manikin Study (2001-2006). Working closely with Poseidon Technologies we developed this testing champaign to evaluate lifeguard vigilance. This first of its kind field study, quantified the recognition time, by lifeguards, regarding victim bottom detection. This study subsequently evolved into the VAT (Vigilance Awareness Training) program which Ellis & Associates, Inc. currently uses in their training curriculum.

7. National/International Lifeguard Competition 1996-2004, 2007. In 1996 I created this team formatted competition to challenge the competitors on an objective basis. The competition format utilized a real-life scenario based platform which advanced the top three teams from the seven regional competition to participate in the final International Championship.

8. Lifeguard/Instructor Training 1992-Present. To date, I have trained approximately 15,000 lifeguards and 2,000 instructors in the International Pool and Waterpark Lifeguard Training Program (IPWLTP).

9. Regional Office 1992-1998. As a Director for Ellis & Associates, Inc. I was responsible for the Midwest Operations. This involved managing approximately three hundred clients in the regional.

1987-1992

Naperville Park District/Centennial Beach-Naperville, Illinois

Centennial Beach is a very unique swimming facility; formerly a site for quarry mining, it was converted into the third largest chlorinated body of water in the United States with approximately 7.25 million gallons of water. Centennial Beach employes approximately forty lifeguards and utilizes techniques from traditional lifeguarding as well as open water search and recovery.

1. Supervisor 1991-1992. As a supervisor I was responsible for overseeing the daily operations of the lifeguards. These responsibilities included: staffing, scheduling, training as well as the hiring of the lifeguard team.

2. Head Lifeguard 1989-1991. Head lifeguard responsibilities included the training of the guard team, assisting with scheduling and lifeguarding duties.

3. Lifeguard 1988-1991.

4. Swim Coach 1987-1988. Coached an age-group swim team.

5. Swim Lesson Instructor 1987-1991. Instructed beginner level swim lessons.

CERTIFICATIONS

American Red Cross (ARC)

- Lifeguard 1988-1991
- Lifeguard Instructor 1991-1995
- Water Safety Instructor (WSI) 1991-1995
- CPR Instructor 1991-1995
- BLS/Basic Life Support 1989-1993
- Standard First Aid 1987-1993

National Pool & Waterpark Lifeguard Training Program (NPWLTP)

- Lifeguard 1991-Present
- Lifeguard Instructor 1991-Present
- Lifeguard Instructor Trainer 1993-Present
- Oxygen Administration Trainer 1995-Present
- Automated External Defibrillator (AED) Trainer 1997-Present
- Aquatic Rescue Professional Instructor Trainer 1998-Present

National Safety Council (NSC)

- CPR 1991-Present
- First Aid 1991-Present
- CPR Instructor Trainer 1993-Present
- First Aid Instructor Trainer 1993-Present

Certified Pool Operator (CPO)

- CPO 1990-1995

National Association of Underwater Instructors (NAUI)

- CPO 1990-1995.

MEMBERSHIPS & COMMITTEES

- ACA American Camping Association 2011.
- ASTM International Standards Worldwide 2009-Present ASTM Committee F24 and subcommittee F24-70 "Amusement Rides and Devices". This committee has jurisdiction of seventeen standards, published in the Annual Book of ASTM Standards, Volume 15.07.
- Waterpark Advisory Board 1998-2004.
- Who's Who in Aquatics 2002 Award.
- Walt Disney World Training and Consistency 1998-2004.
- National Center for Disease Control (CDC) 1997.
- Florida Parks & Recreation (FRPA) 1998-2004.
- Illinois Parks & Recreation (IPRA) 1996-1998.

PUBLICATIONS/MANUALS

•Perspective; Journal of the Association of YMCA Professionals-July 2008 "Bridging the exposure gap"

•Aquatics International-September 2007 "Debating the 10/20 Rule".

•World Water Park Magazine-May 2002 "Lifeguards Watch but they don't always see".

•Handbook on Drowning-Prevention/Rescue/Treatment 2006. Contributing Author.

•NPR New-Interview May 11-17, 2003.

•National Pool & Waterpark Lifeguard Training Program- 1999

•Lifeguard/CPR/First Aid. Jones and Bartlett Publishers Boston, MA. ISBN 0-7637-0793-7

•Jeff Ellis & Associates, Inc. Aquatic Rescue Professional Training Program-Lake Patrol. 1999

•Jeff Ellis & Associates, Inc. Lifeguard Competition. 1996

•Jeff Ellis & Associates, Inc. Inservice Training Manual. 1999

CASE LISTING-PAST AND PRESENT

Defense (103)

1.Armand v. Broward County
2.Bircher v. City of Ephrata
3.Broadneaux v. Lincoln Apartments
4.Frownfelter v. YMCA
5.Nagib v. Renaissance Orlando Resort
6.Ozuna v. Greenpointe
7.The Queen v. Daniel Lewis Philips (British, Criminal)
8.David W. Gilbert v. Sta-Right Industries, Inc.
9.Susan Bell v. Kwik Tek
10.Theus v. Georgetown
11.Williams v. Radisson
12.Dowling v. Wet 'n Wild (Orlando)
13.Carolyn Lewis v. City of Orlando
14.Laurie Collins v. Water County Inc.
15.Kim v. De La Salle Academy

16.Hicks v. Recreation Development Corporation
17.Johnson Taylor v. Bass Hotels & Resorts
18.Farrakhan v. CC & H Productions
19.Ellen Jones v. Ram Singh dba Sunset Motel
20.Breeding v. Trident Hospitality
21.Mooney v. Land of Make Believe
22.Joseph Rockson v. Creative Management Company
23.Baeley Scott v. Salem YMCA
24.Kiana Appleby v. Westchase Community
25.Shannon Wright-O'Polka v. Hurricane Harbor LP, Six Flags Theme Parks, Inc.
26.Holly Gordon v. Hurricane Harbor LP, Six Flags Theme Parks, Inc.
27.Jason Williams v. Hurricane Harbor LP, Six Flags Theme Parks, Inc.
28.Lamb v. Amelia Island Plantation
29.Briane Pagel v. Milwaukee City Center
30.Swanson v. City of Tempe
31.Johnson v. Popkum Waterslides Ltd.
32.Faith Wiens-McLean v. Cultus Lakes Waterpark Ltd.
33.McFadyen v. Cultus Lakes Waterpark Ltd.
34.Underwood v. Cultus Lakes Waterpark Ltd.
35.Choi v. Swim Metro Management
36.Edery v. Kalahari
37.Phipps v. Float Rite
38.Beyon v. Kalahari
39.Greene v. Silverwood Inc.
40.Schroeder v. Valleyfair Family Amusement Park
41.Ayre v. Ritz Camera Centers dba Boater's World
42.Vallejo v. Cambridge Heights Owners Association
43.Libby v. White Water Industries
44.Green v. City of Tukwila
45.Bowman v. Wheeling Park Commission
46.Guzman-Gonzales v. Ramada Fountain Park
47.Kibirrah Stephens v. YMCA of Voorhees
48.Mojamel v. YMCA of Metro Detroit
49.Nolasco v. Splish Splash Waterpark
50.Marston v. White Water Industries
51.Scott v. Valetudo
52.Olmo v. Griffin
53.Cordovano v. Thundering Surf Waterpark
54.Gordon v. YMCA of Middle Tennessee
55.Shetty v. Mountain Creek Waterpark

56.Dronet v. Cody Pools Inc.
57.McDowell v. YMCA
58.Emanuel Colon v. Mountain Creek Waterpark
59.Aquino v. Mountain Creek Waterpark
60.Tiburcio v. Golf Village of Kendall, Inc.
61.Gottesman v. COAC
62.Giner v. Four Seasons Hotels, Inc.
63.Mayes v. MorEquity
64.McCabe v. Luxor Resorts
65.Bentancourt v. Wet 'n Wild (El Paso)
66.Mendez v. Evangelical Church of North America
67.Amoako v. Century Pool Management
68.Noel v. Silverwood Inc.
69.Nolan v. Primo Pools
70.Mattich v. Sun Lakes Resort
71.Blanson v. East Bay Regional Park
72.Humphrey v. Kalahari
73.Orisoro v. Carolina Pool Management
74.Tsimonjela v. YMCA of Wichita
75.Zang v. YMCA
76.Strother v. Carolina Pool Management
77.Guo/Yu v. Columbia Basin Fitness Club
78.Reno v. Lake Compounce
79.Murphy v. Golfland
80.Truchan v. Mountain Creek
81.Murray v. Boys & Girls Club of Greater Waterbury
82.Mendez v. East Vancouver Community Church
83.Caldwell v. Plantation House Apartments
84.Edquiban v. Mountain Creek Water Park
85.Keith v. Oakland County
86.Fishchbacher v. YMCA
87.Dale v. O'Brien & Rush Enterprises
88.Malone v. San Jacinto Baptist Association
89.Bobb v. Splish Splash Water Park
90.Bove v. Splish Splash Water Park
91.Kharel v. Alvernon Hacienda
92.Hernandez-Myers v. Pembrooke Apartments
93.Palovchik v. Mountain Creek Water Park
94.Sawyer v. Mountain Creek Water Park
95.Oshimo v. City Hill (Guam)

96. Reyes v. Wenatchee School District
97. Dawson v. YMCA
98. Grover v. Gold Medal Swim School
99. Grigg v. Splish Splash Water Park
100. Beresford v. Lakeview Golf Resort & Spa
101. Mohn v. Whitewater
102. Jones v. Festival Fun Parks LLC
103. Lemons v. Great Wolf Lodge

Plaintiff (13)

104. Lewis v. Quaker Heights Association
105. Titus v. Central Florida YMCA
106. Maglagang v. MASC Austin Properties
107. Chesla v. Post Apartment Homes, L.P.
108. Kirkpatrick v. Boy Scouts of America
109. Lonergan v. Caribe Hilton & Casino
110. Zimmerman v. Connecticut College
111. Marcial v. AON Properties
112. Pattison v. City of Chelan
113. Aguilar v. Brentworth Apartments
114. Livingston v. Euclid High School
115. McLaughlin v. City of Ocean Shores
116. Arrendondo v. Recreation Management

SPEAKING ENGAGEMENTS

1. **Illinois Parks & Recreation (IPRA)** January 27, 2012. 8:00am-10:00am. Chicago, Illinois. Topic-Drowning-I never thought it would happen to me.
2. **Pool Management Group (PMG)** November 9 & 10, 2011 Las Vegas, Nevada. Topic-Aquatic Risk Management.
3. **YMCA of Greater Boston** June 18, 2011 Boston, Massachusetts. Topic-Lifeguard preparedness. Four hour training session to approximately 150 lifeguards.
4. **Carolina Pool Management-Raleigh (CPM)** May 1, 2011 Raleigh, North Carolina. Topic-Pre-season lifeguard workshop.
5. **Pool Management Group (PMG)** December 1 & 2, 2010 Las Vegas, Nevada. Topic-Aquatic Risk Management.
6. **YMCA of Greater Boston** October 28, 2010 Boston, Massachusetts. Topic-Aquatic Leadership Training. Four hour training session with approximately 80 executive level staff members.

7. **Carolina Pool Management-Raleigh (CPM)** May 2, 2010 Raleigh, North Carolina. Topic-Pre-season workshop.

8. **Pool Management Group (PMG)** December 2 & 3, 2009 Las Vegas, Nevada. Topic-Lifeguards watch but they don't always see.

9. **Tampa Metro Area YMCA** July 30, 2009 Tampa, Florida. Topic Aquatic Leadership Training. Three hours session with approximately 90 executive level staff members dealing with aquatic safety issues.

10. **Northern California Area Aquatic Training for YMCA's and JCC's** April 23, 2009-San Francisco, California. Topic Aquatic Leadership Training. This six hour session addressed the issues of Who is at risk, Why are they at risk and What can be done to mitigate the risk.

11. **Southern California Area Aquatic Training for YMCA's and JCC's** April 22, 2009-Irvine, California. Topic Aquatic Leadership Training. This six hour session addressed the issues of Who is at risk, Why are they at risk and What can be done to mitigate the risk.

12. **Seattle Area Aquatic Training for YMCA's and JCC's** April 20, 2009-Mercer Island, Washington. Topic Aquatic Leadership Training. This six hour session addressed the issues of Who is at risk, Why are they at risk and What can be done to mitigate the risk.

13. **Greater Charlotte Area YMCA** April 13, 2009-Charlotte, North Carolina. Topic Aquatic Leadership Training. This six hour session addressed the issues of Who is at risk, Why are they at risk and What can be done to mitigate the risk.

14. **Michigan Aquatic Training for YMCA's and JCC's** July 17, 2008-Grand Rapids, Michigan. Topic-2007 Aquatic Incident Review. This two hour session dealt with a review of approximately thirty investigations, the contributing factors and practical solutions.

15. **North Carolina Training for YMCA's and JCC's** june 5, 2008 Charlotte, North Carolina. Topic-2007 Aquatic Incident Review. This two hour session dealt with a review of approximately thirty investigations, the contributing factors and practical solutions.

16. **Tri State Aquatic Training for YMCA's and JCC's** May 21, 2008-Tenafly, New Jersey. Topic-2007 Aquatic Incident Review. This two hour session dealt with a review of approximately thirty investigations, the contributing factors and practical solutions.

17. **Metro Boston Aquatic Training for YMCA's and JCC's** January 30, 2008-Boston, Massachusetts. Topic-2007 Aquatic Incident Review. This two hour session dealt with a review of approximately thirty investigations, the contributing factors and practical solutions.

18. **International Aquatic Safety School (IASS)** January 09, 2008- Phoenix, Arizona. Presented trends strategies for drowning prevention.

19. **World Aquatic Health Conference** October 4, 2007-Cincinnati, Ohio. Topic-Guarding: The Life-Threatening Problems.

20. **Innovatiedag Lifeguard, National Platform Zwembaden (NPZ)** October 10, 2006-Nieuwegein, Holland. Topic-Lifeguarding trends in America

15. **National Aquatic Safety School (NASS)** January 15 2005-Phoenix, Arizona. Presented 2004 vigilance study data.

16. **National Recreation & Parks Association (NRPA) Congress** October 12 2004 Reno, Nevada. Topic-Managing Risk-Understanding factors that effect lifeguard vigilance.

17. **Virginia Parks & Recreation** September 25 2004-Alexandria, Virginia. Topic-Lifeguard Vigilance

18. **Korea Aquatic Symposium** February 19 2004-Seoul, Korea. Topic-Risk management practice and techniques.

19. **National Aquatic Safety School (NASS)** Jan 13 2004-Phoenix, Arizona. Presented 2003 vigilance study data.

20. **Missouri Insurance Risk Management Agency (MIRMA)** October 2003-Kansas City, Missouri. Topic-Scanning and drowning risk factors.

21. **Florida Parks & Recreation (FRPA)** April 29 2003-Broward County, Florida. Topic-4 hour workshop regarding aquatic risk management.

22. **Aquatic Coalition Meeting** April 3 2003-Washington D.C. Topic-Vigilance data presentation.

23. **International Health, Racquet & Sports Club Association (IHRSA)** February 27 2003-San Francisco, California. Topic-Vigilance, what do your lifeguards see?

24. **National Aquatic Safety School (NASS)** Janurary 12 2003-Phoenix, Arizona. Topic- 2002 statistical overview for drowning and near drowning victims.

25. **Piscine 2002**-November 14 2002-Lyon, France. Topic-Data from Vigilance testing campaign 2001-2002.

26. **World Waterpark Association (WWA)** October 9 2002-Las Vegas, Nevada. Topic-Your Lifeguards scan&but do they really see?

27. **Expolazer 2nd ADIBRA Brazilian Safety Conference** August 29 2002 São Paulo, Brazil. Topic- Risk management strategies for drowning prevention.

28. **World Congress on Drowning** June 22 2002-Amsterdam, Holland. Topic-Your lifeguards scan&but do they really see?

29. **Amusement Park Safety & Security** March 20 2002-Lake Buena Vista, Florida. Topic-Risk management in the aquatic environment.

30. **National Recreation and Parks Association (NRPA) aquatics conference** March 11 2002-Palm Springs, California. Topic-Your lifeguards scan...but do they really see?

31. **National Aquatic Safety School (NASS)** January 10 2002-Indianapolis, Indiana. Topic-Statistics for aquatic environments.

32. **World Waterpark Association (WWA)** Fall 2001-Las Vegas, Nevada. Topic- Scanning are we really seeing what is out there?

33. **Illinois Parks and Recreations Association (IPRA)** January 2000-Chicago, Illinois. Topic-Drowning prevention.

34. **New England Association of Amusement Parks & Attractions**-Spring 1998- Framingham, Massachusetts. Topic-Drowning prevention.

35. **Minnesota Parks & Recreation (MRPA)** spring 1998-Minneapolis, Minnesota. Topic-Drowning: an aquatic manager's worst nightmare.

36. **Missouri Parks & Recreation (MRPA)** spring 1998. Topic- Drowning: an aquatic manager's worst nightmare.

37. **Connecticut Recreation & Parks Association (CRPA)** spring 1998. Topic- Drowning: an aquatic manager's worst nightmare.

38. **Michigan Parks & Recreation Association (MPRA)** spring 1998. Topic- Drowning: an aquatic manager's worst nightmare.

39. **World Waterpark Association (WWA) aquatic management school**-spring 1998-Las Vegas, Nevada. Topic-Creating a risk management program for your waterpark.

40. **Illinois Parks Association Risk Services (IPARKS)** spring 1998 Topic-Aquatic facility risk management.

41. **Georgia Parks & Recreation Association (GPRA)** winter 1997. Topic-Jeff Ellis & Association risk management.

42. **Iowa Parks & Recreation Association (IPRA)** fall 1997. Topic-Drowning: A departmental nightmare.

43. **Athletic Business**-fall 1997-Orlando, Florida. Topics-Risk Management & Drowning prevention.

44. **Center for Disease Control and Prevention (CDC)** winter 1997-Atlanta, Georgia. Symposium empanelled to discuss lifeguard efficacy in the prevention of drowning accidents.

45. **Minnesota Parks & Recreation Association (MRPA)** fall 1997. Topic-Drowning prevention.

46. **National Recreation & Parks Association (NRPA) National Congress**-fall 1997-Salt Lake City, Utah. Topic-Drowning prevention and risk management.

47. **Illinois Parks Association Risk Services (IPARKS)** spring 1997. Topics-Risk management for aquatic facilities.

48. **Utah Risk Management Mutual Associates (URMMA)** spring 1996. Eight hour workshop covering aquatic risk management principles.

49. **Illinois Department of Public Health**-spring 1996-Chicago, Illinois. Topic-four two hour presentations to operators and maintenance personnel regarding liability factors around water.

50. **Park District Risk Management Agency (PDRMA)** fall 1995-Lisle, Illinois. Topic- Discussed risk management with members.

51. **Minnesota Parks & Recreation**-Aquatic Division-Spring 1995. Topic-Risk management for aquatic facilities.

ATTACHMENT H

inside the fountain measured from the outside edges of the fountain.

(2) Portable. A portable electric sign shall not be placed within a pool or fountain or within 1.5 m (5 ft) measured horizontally from the inside walls of the fountain.

(D) Disconnect. A sign shall have a local disconnecting means in accordance with 600.6 and 680.12.

(E) Bonding and Grounding. A sign shall be grounded and bonded in accordance with 600.7.

680.58 GFCI Protection for Adjacent Receptacle Outlets. All 15- or 20-ampere, single-phase 125-volt through 250-volt receptacles located within 6.0 m (20 ft) of a fountain edge shall be provided with GFCI protection.

VI. Pools and Tubs for Therapeutic Use

680.60 General. The provisions of Part I and Part VI of this article shall apply to pools and tubs for therapeutic use in health care facilities, gymnasiums, athletic training rooms, and similar areas. Portable therapeutic appliances shall comply with Parts II and III of Article 422.

FPN: See 517.2 for definition of health care facilities.

680.61 Permanently Installed Therapeutic Pools. Therapeutic pools that are constructed in the ground, on the ground, or in a building in such a manner that the pool cannot be readily disassembled shall comply with Parts I and II of this article.

Exception: The limitations of 680.22(C)(1) through (C)(4) shall not apply where all luminaires are of the totally enclosed type.

680.62 Therapeutic Tubs (Hydrotherapeutic Tanks). Therapeutic tubs, used for the submersion and treatment of patients, that are not easily moved from one place to another in normal use or that are fastened or otherwise secured at a specific location, including associated piping systems, shall conform to Part VI.

(A) Protection. Except as otherwise provided in this section, the outlet(s) that supplies a self-contained therapeutic tub or hydrotherapeutic tank, a packaged therapeutic tub or hydrotherapeutic tank, or a field-assembled therapeutic tub or hydrotherapeutic tank shall be protected by a ground-fault circuit interrupter.

(1) Listed Units. If so marked, a listed self-contained unit or listed packaged equipment assembly that includes integral ground-fault circuit-interrupter protection for all electrical parts within the unit or assembly (pumps, air blowers, heaters, lights, controls, sanitizer generators, wiring, and so forth) shall be permitted without additional GFCI protection.

(2) Other Units. A therapeutic tub or hydrotherapeutic tank rated 3 phase or rated over 250 volts or with a heater load of more than 50 amperes shall not require the supply to be protected by a ground-fault circuit interrupter.

(B) Bonding. The following parts shall be bonded together:

(1) All metal fittings within or attached to the tub structure

(2) Metal parts of electrical equipment associated with the tub water circulating system, including pump motors

(3) Metal-sheathed cables and raceways and metal piping that are within 1.5 m (5 ft) of the inside walls of the tub and not separated from the tub by a permanent barrier

(4) All metal surfaces that are within 1.5 m (5 ft) of the inside walls of the tub and not separated from the tub area by a permanent barrier

(5) Electrical devices and controls that are not associated with the therapeutic tubs and located within 1.5 m (5 ft) from such units.

(C) Methods of Bonding. All metal parts required to be bonded by this section shall be bonded by any of the following methods:

(1) The interconnection of threaded metal piping and fittings

(2) Metal-to-metal mounting on a common frame or base

(3) Connections by suitable metal clamps

(4) By the provisions of a solid copper bonding jumper, insulated, covered, or bare, not smaller than 8 AWG

(D) Grounding.

(1) Fixed or Stationary Equipment. The equipment specified in (a) and (b) shall be connected to the equipment grounding conductor.

(a) *Location.* All electrical equipment located within 1.5 m (5 ft) of the inside wall of the tub shall be connected to the equipment grounding conductor.

(b) *Circulation System.* All electrical equipment associated with the circulating system of the tub shall be connected to the equipment grounding conductor.

(2) Portable Equipment. Portable therapeutic appliances shall meet the grounding requirements in 250.114.

(E) Receptacles. All receptacles within 1.83 m (6 ft) of a therapeutic tub shall be protected by a ground-fault circuit interrupter.

(F) Luminaires. All luminaires used in therapeutic tub areas shall be of the totally enclosed type.

VII. Hydromassage Bathtubs

680.70 General. Hydromassage bathtubs as defined in 680.2 shall comply with Part VII of this article. They shall not be required to comply with other parts of this article.

(3) **Metallic Components.** All metallic parts of the pool structure, including reinforcing metal not addressed in 680.26(B)(1)(a), shall be bonded. Where reinforcing steel is encapsulated with a nonconductive compound, the reinforcing steel shall not be required to be bonded.

(4) **Underwater Lighting.** All metal forming shells and mounting brackets of no-niche luminaires shall be bonded.

Exception: Listed low-voltage lighting systems with nonmetallic forming shells shall not require bonding.

(5) **Metal Fittings.** All metal fittings within or attached to the pool structure shall be bonded. Isolated parts that are not over 100 mm (4 in.) in any dimension and do not penetrate into the pool structure more than 25 mm (1 in.) shall not require bonding.

(6) **Electrical Equipment.** Metal parts of electrical equipment associated with the pool water circulating system, including pump motors and metal parts of equipment associated with pool covers, including electric motors, shall be bonded.

Exception: Metal parts of listed equipment incorporating an approved system of double insulation shall not be bonded.

(a) *Double-Insulated Water Pump Motors.* Where a double-insulated water pump motor is installed under the provisions of this rule, a solid 8 AWG copper conductor of sufficient length to make a bonding connection to a replacement motor shall be extended from the bonding grid to an accessible point in the vicinity of the pool pump motor. Where there is no connection between the swimming pool bonding grid and the equipment grounding system for the premises, this bonding conductor shall be connected to the equipment grounding conductor of the motor circuit.

(b) *Pool Water Heaters.* For pool water heaters rated at more than 50 amperes and having specific instructions regarding bonding and grounding, only those parts designated to be bonded shall be bonded and only those parts designated to be grounded shall be grounded.

(7) **Metal Wiring Methods and Equipment.** Metal-sheathed cables and raceways, metal piping, and all fixed metal parts shall be bonded.

Exception No. 1: Those separated from the pool by a permanent barrier shall not be required to be bonded.

Exception No. 2: Those greater than 1.5 m (5 ft) horizontally of the inside walls of the pool shall not be required to be bonded.

Exception No. 3: Those greater than 3.7 m (12 ft) measured vertically above the maximum water level of the pool, or as measured vertically above any observation stands, towers, or platforms, or any diving structures, shall not be required to be bonded.

(C) Pool Water. An intentional bond of a minimum conductive surface area of 5806 mm^2 (9 in.^{2}) shall be installed in contact with the pool water. This bond shall be permitted to consist of parts that are required to be bonded in 680.26(B).

680.27 Specialized Pool Equipment.

(A) Underwater Audio Equipment. All underwater audio equipment shall be identified for the purpose.

(1) Speakers. Each speaker shall be mounted in an approved metal forming shell, the front of which is enclosed by a captive metal screen, or equivalent, that is bonded to, and secured to, the forming shell by a positive locking device that ensures a low-resistance contact and requires a tool to open for installation or servicing of the speaker. The forming shell shall be installed in a recess in the wall or floor of the pool.

(2) Wiring Methods. Rigid metal conduit of brass or other identified corrosion-resistant metal, liquidtight flexible nonmetallic conduit (LFNC-B), rigid polyvinyl chloride conduit, or reinforced thermosetting resin conduit shall extend from the forming shell to a listed junction box or other enclosure as provided in 680.24. Where rigid polyvinyl chloride conduit, reinforced thermosetting resin conduit, or liquidtight flexible nonmetallic conduit is used, an 8 AWG insulated solid or stranded copper bonding jumper shall be installed in this conduit. The bonding jumper shall be terminated in the forming shell and the junction box. The termination of the 8 AWG bonding jumper in the forming shell shall be covered with, or encapsulated in, a listed potting compound to protect such connection from the possible deteriorating effect of pool water.

(3) Forming Shell and Metal Screen. The forming shell and metal screen shall be of brass or other approved corrosion-resistant metal. All forming shells shall include provisions for terminating an 8 AWG copper conductor.

(B) Electrically Operated Pool Covers.

(1) Motors and Controllers. The electric motors, controllers, and wiring shall be located not less than 1.5 m (5 ft) from the inside wall of the pool unless separated from the pool by a wall, cover, or other permanent barrier. Electric motors installed below grade level shall be of the totally enclosed type. The device that controls the operation of the motor for an electrically operated pool cover shall be located such that the operator has full view of the pool.

FPN No. 1: For cabinets installed in damp and wet locations, see 312.2.

FPN No. 2: For switches or circuit breakers installed in wet locations, see 404.4.

FPN No. 3: For protection against liquids, see 430.11.

(A) Wiring Methods. Feeders shall be installed in rigid metal conduit, intermediate metal conduit, liquidtight flexible nonmetallic conduit, rigid polyvinyl chloride conduit, or reinforced thermosetting resin conduit. Electrical metallic tubing shall be permitted where installed on or within a building, and electrical nonmetallic tubing shall be permitted where installed within a building. Aluminum conduits shall not be permitted in the pool area where subject to corrosion.

Exception: An existing feeder between an existing remote panelboard and service equipment shall be permitted to run in flexible metal conduit or an approved cable assembly that includes an equipment grounding conductor within its outer sheath. The equipment grounding conductor shall comply with 250.24(A)(5).

(B) Grounding. An equipment grounding conductor shall be installed with the feeder conductors between the grounding terminal of the pool equipment panelboard and the grounding terminal of the applicable service equipment or source of a separately derived system. For other than (1) existing feeders covered in 680.25(A), Exception, or (2) feeders to separate buildings that do not utilize an insulated equipment grounding conductor in accordance with 680.25(B)(2), this equipment grounding conductor shall be insulated.

(1) Size. This conductor shall be sized in accordance with 250.122 but not smaller than 12 AWG. On separately derived systems, this conductor shall be sized in accordance with Table 250.66 but not smaller than 8 AWG.

(2) Separate Buildings. A feeder to a separate building or structure shall be permitted to supply swimming pool equipment branch circuits, or feeders supplying swimming pool equipment branch circuits, if the grounding arrangements in the separate building meet the requirements in 250.32(B)(1). Where installed in other than existing feeders covered in 680.25(A), Exception, a separate equipment grounding conductor shall be an insulated conductor.

680.26 Equipotential Bonding.

(A) Performance. The equipotential bonding required by this section shall be installed to reduce voltage gradients in the pool area.

(B) Bonded Parts. The parts specified in 680.28(B)(1) through (B)(7) shall be bonded together using solid copper conductors, insulated covered, or bare, not smaller than 8 AWG or with rigid metal conduit of brass or other identified corrosion-resistant metal. Connections to bonded parts shall be made in accordance with 250.8. An 8 AWG or larger solid copper bonding conductor provided to reduce voltage gradients in the pool area shall not be required to be extended or attached to remote panelboards, service equipment, or electrodes.

(1) Conductive Pool Shells. Bonding to conductive pool shells shall be provided as specified in 680.26(B)(1)(a) or (B)(1)(b). Poured concrete, pneumatically applied or sprayed concrete, and concrete block with painted or plastered coatings shall all be considered conductive materials due to water permeability and porosity. Vinyl liners and fiberglass composite shells shall be considered to be nonconductive materials.

(a) *Structural Reinforcing Steel.* Unencapsulated structural reinforcing steel shall be bonded together by steel tie wires or the equivalent. Where structural reinforcing steel is encapsulated in a nonconductive compound, a copper conductor grid shall be installed in accordance with 680.26(B)(1)(b).

(b) *Copper Conductor Grid.* A copper conductor grid shall be provided and shall comply with (b)(1) through (b)(4).

(1) Be constructed of minimum 8 AWG bare solid copper conductors bonded to each other at all points of crossing
(2) Conform to the contour of the pool and the pool deck
(3) Be arranged in a 300-mm (12-in.) by 300-mm (12-in.) network of conductors in a uniformly spaced perpendicular grid pattern with a tolerance of 100 mm (4 in.)
(4) Be secured within or under the pool no more than 150 mm (6 in.) from the outer contour of the pool shell

(2) Perimeter Surfaces. The perimeter surface shall extend for 1 m (3 ft) horizontally beyond the inside walls of the pool and shall include unpaved surfaces as well as poured concrete and other types of paving. Bonding to perimeter surfaces shall be provided as specified in 680.26(B)(2)(a) or (2)(b) and shall be attached to the pool reinforcing steel or copper conductor grid at a minimum of four (4) points uniformly spaced around the perimeter of the pool. For nonconductive pool shells, bonding at four points shall not be required.

(a) *Structural Reinforcing Steel.* Structural reinforcing steel shall be bonded in accordance with 680.26(B)(1)(a).

(b) *Alternate Means.* Where structural reinforcing steel is not available or is encapsulated in a nonconductive compound, a copper conductor(s) shall be utilized where the following requirements are met:

(1) At least one minimum 8 AWG bare solid copper conductor shall be provided.
(2) The conductors shall follow the contour of the perimeter surfaces.
(3) Only listed splices shall be permitted.
(4) The required conductor shall be 450 to 600 mm (18 to 24 in.) from the inside walls of the pool.
(5) The required conductor shall be secured within or under the perimeter surface 100 mm to 150 mm (4 in. to 6 in.) below the subgrade.

ATTACHMENT I

ATTACHMENT I						
Number of Existing Swimming Pools and Spas requiring pool lifts based on DOJ Regulatory Impact Analysis						
	Hotel	Motel	Secondary Private Schools	Undergraduate and Post Graduate Private Schools	Aquatic centers and swimming pools	Exercise Facilities
Number of facilities assumed by RIA	15165	21092	23388	1792	12368	1196
Number of existing pools assumed by RIA at each facility	1	1	1	1	1	0
Number of existing spas assumed by RIA at each facility	1	0	0	1	1	1
Total number of pools and spas at each facility	2	1	1	2	2	1
Total number of pool and spas at each facility type	30330	21092	23388	3584	24736	1196
Total number of pools and spas at all facilty types	104326					
Notes: Number of elements per typical facility are stated on pages 200-221 of the RIA. Number of establishments by facility group are stated on page 37 of the RIA.						

DEPARTMENT OF JUSTICE: DISABILITY RIGHTS SECTION OF THE CIVIL RIGHTS DIVISION

FINAL REGULATORY IMPACT ANALYSIS OF THE FINAL REVISED REGULATIONS IMPLEMENTING TITLES II AND III OF THE ADA, INCLUDING REVISED ADA STANDARDS FOR ACCESSIBLE DESIGN

FINAL REPORT

Prepared By:

HDR HLB DECISION ECONOMICS INC.
8403 Colesville Road, Suite 910
Silver Spring, MD 20910

July 23, 2010

Table 3: Number of Establishments in 2010 by Facility Group

A	Inns	16,953
B	Hotels	15,165
C	Motels	21,092
D	Restaurants	566,856
E	Motion picture house	4,971
F	Theatre / Concert Hall	9,348
G	Stadiums	444
H	Auditoriums	2,676
I	Convention Centers	174
J	Single Level Stores	812,456
K	Shopping Malls	10,092
L	Indoor Service Establishments	3,857,022
M	Offices of Health Care Providers	549,803
N	Hospitals	3,915
O	Nursing Homes	15,014
P	Terminal (private airports)	14,321
Q	Depots	307
R	Museums, Historical Sites & Libraries	4,766
S	Parks or zoos	1,327
T	Amusement Parks	543
U	Nursery schools - Daycare	76,398
V	Elementary Private Schools	18,275
W	Secondary private schools	2,841
X	Undergraduate and Postgraduate Private Schools	2,574
Y	Ski Facilities	403
Z	Homeless shelter	8,715
AA	Food Banks	4,357
AB	Social Service Establishments	66,236
AC	Exercise Facilities	32,609
AD	Aquatic Centers / Swimming pools	12,368
AE	Bowling Alleys	4,688
AF	Golf Courses (private with public access)	9,485
AG	Golf Courses (private only)	4,645
AH	Miniature golf courses	9,475
AI	Recreational Boating Facilities	5,198
AJ	Fishing Piers and Platforms	1,714
AK	Shooting Facilities	5,095
AM	Office Buildings	743,816
AN	Elementary Public Schools	68,781
AO	Secondary Public Schools	23,388
AP	Undergraduate, postgraduate public schools	1,792
AQ	Public Housing	27,767
AR	State and Local Judicial Facilities (courthouses)	9,458
AS	State and Local Detention Facilities (jails)	3,499
AT	State and Local Correctional Facilities (prisons)	1,244
AU	Parking Garages	13,377
AV	Self Service Storage Facilities	14,418
AW	Theatre / Concert halls (public)	6
AX	Stadiums (public)	1,333
AY	Auditoriums (public)	144
BA	Convention Centers (public)	260
BB	Hospitals (public)	1,113
BC	Nursing Homes (public)	1,229
BD	Museums, Historical Sites & Libraries (public)	9,673
BE	Parks or zoos (public)	120,224
BF	Homeless shelter (public)	1,302
BG	Exercise Facilities (public)	1,196
BH	Social Service Establishments (public)	26,940
BI	Aquatic Centers / Swimming pools (public)	1,773
BJ	Miniature golf courses (public)	947
BK	Recreational Boating Facilities (public)	7,797
BL	Fishing Piers and Platforms (public)	1,714
BM	Office Buildings (public)	74,846
BN	Parking Garages (public)	122
BO	Golf Courses (public)	2,640
BP	Restaurants (public)	7
BQ	Amusement Parks (public)	11

E. Number of Elements Per Typical Facility

This table shows the most likely values of the estimated number of elements in a typical facility that are likely to be impacted by the requirement. The high and the low values are assumed to be plus and minus 20 percent of the most likely value.

3E1: Number of Elements per Typical Private Facility

#	Requirement	Inns	Hotels	Motels	Restaurants	Motion Picture House	Theatre / Concert Hall	Stadiums	Auditoriums	Convention Centers	Single Level Stores	Shopping Malls	Indoor Service Establishments	Offices of Health Care Providers	Hospitals	Nursing Homes	Terminal (private airport)	Depot	Museums, Historical Sites & Libraries	Parks or zoos	Amusement Parks	Nursery schools, Daycare
1	Public Entrances							1				5										
2	Maneuvering Clearance at Manually Operated Accessible Doors									2						2						
3	Automatic Door Bands Obstructing Clearance		4	2											8		48					
4	Thresholds & Clearance	1	7	3																		
5	Door and Gate Surfaces	1	4	2		5	8	13	5	9	5	14	1	2	8	4		4	4	6	2	2
6	Location of Accessible Routes																					

		Inns	Hotels	Motels	Recreation	Motion Picture House	Theatre / Concert Hall	Stadium	Auditoriums	Convention Centers	Single Family Stores	Shopping Malls	Indoor Service Establishments	Offices of Health Care Providers	Hospitals	Nursing Homes	Terminal (private airports)	Depot	Museums, Historical Sites & Libraries	Parks or Zoos	Amusement Rides	Nursery Schools - Daycare
76	Accessible Dressing Rooms, Fitting Rooms, or Locker Rooms																					
77	Water Sink Spigots or Taps at Lower Seating Area																					
78	Accessible Route to Tower Stairways																					
79	Accessible Route to Stairways																					
80	Accessible Means of Egress																					
81	Accessible Means of Egress to Pools (NCAUT)																					
82	Accessible Means of Egress to Waiting Pools																					
83	Accessible Means of Egress to Spas																					

		Inns	Hotels	Motels	Restaurants	Motion Picture Houses	Theatre / Concert Hall	Stadiums	Auditoriums	Convention Centers	Single Level Stores	Shopping Malls	Indoor Service Establishments	Offices of Health Care Providers	Hospitals	Nursing Homes	Terminal (private airports)	Depot	Museums, Historical Sites & Libraries	Parks or zoos	Amusement Parks	Nursery schools - Daycare
	Accessible Pick Up/Drop Off AND Port Authority Airport Access Share Over 15%				1 (small)							1 (small)								1 (large)	1 (medium)	1 (small)
105	Mobility Accessible Phone Call																					
107	Communication Access C.A.R.																					
108	Social Service Broker Services – Transport																					
109	Access 311 Social Services																					
110	Tax Information & Place Power Vehicle Inside Bldg.																					
111	Vr. rental Sales Incl. Special Brokers																					
112	Accessible Means of Entry to Pools (ER)																					

HDR | HLB DECISION ECONOMICS INC. 212

3E2: Number of Elements per Typical Public Facility

#	Requirement	Elementary Private Schools	Secondary Private Schools	Undergraduate and Postgraduate Private Schools	Ski Facilities	Homeless Shelter	Food Banks	Social Service Establishments	Exercise Facilities	Aquatic centers /Swimming Pools	Bowling Alleys	Golf Courses (private public access)	Golf Courses (private only)	Miniature golf courses	Recreational Boating Facilities	Hiking Paths and Platforms	Shooting Facilities	Office Buildings	Parking Garages	Self Service Storage Facilities
1	Public Entrances																			
2	Maneuvering Clearance or Standby Power for Automatic Doors																			
3	Automatic Door Break-Out Openings																			
4	Thresholds at Doorways																			
5	Door and Gate Surfaces	[illegible]	8	48	4	2	[illegible]	[illegible]	6	[illegible]	4	[illegible]	[illegible]				[illegible]	4		[illegible]
6	Location of Accessible Routes																			
7	Maintain The Circulation Path in Employee Work Areas																			
8	Accessible Means of Egress																			
9	Stairs (NC)			48														6	6	2
10	Stairs (ALTER)			48														[illegible]	6	[illegible]
11	Handrails Along Walkways																			
12	Handrails		8	48					4	4				1				18	12	4
13	Accessible Routes Approaches Area of Refuge and Walkway Slope											[illegible]	[illegible]		[illegible]		[illegible]		[illegible]	[illegible]
14	Standby Power for Platform Lifts																			
15	Power-Operated Doors for Platform Lifts																	3		1
16	Alterations to Existing Elevators			[illegible]																

		Elementary Private Schools	Secondary Private Schools	Interpretative and Participatory Private Schools	Ski Facilities	Homeless Shelter	Food Banks	Social Service Establishments	Exercise Facilities	Aquatic centers /Swimming Pools	Bowling Alleys	Golf Courses (private public access)	Golf Courses (private only)	Miniature golf courses	Recreational Boating Facilities	Fishing Piers and Platforms	Shooting Facilities	Office Buildings	Parking Garages	Self Service Storage Facilities
75	Wheelchair Spaces in Theatre Places Seating Assembly																			
76	Accessible Route of Exterior Sports Facilities														1					
77	Accessible Route to Spectating Lanes										1									
78	Allowance for Accessible Parking Spaces																1			
79	Fairway Accessible Means of Entry to Ponds (NC) (ALT)			2	2					2										
80	Accessible Entry to Pools (NC) (ALT)									1										
81	Accessible Means of Entry to Spas									2										
82	Accessible Route to Bowling Pins (NC) (ALT)			1											2					
83	Accessible Bowling Pins (NC)														2					
84	Accessible Bowling Pins (ALT) (BB)														2					
85	Accessible Boat Slips (NC)														5					
86	Accessible Boat Slips (Alt-GB)														4					
87	Accessible Route of Fishing Piers															1				
88	Accessible Fishing Piers (alt) Shooting															1				
89	Accessible Route to Golf Course											2								

		Elementary Private Schools	Secondary Private Schools	Undergraduate and Postgraduate Private Schools	Ski Facilities	Homeless Shelter	Food Banks	Social Service Establishments	Exercise Facilities	Aquatic centers/Swimming Pools	Bowling Alleys	Golf Courses (private public access)	Golf Courses (private only)	Miniature golf courses	Recreational Boating Facilities	Fishing Piers and Platforms	Shooting Facilities	Office Buildings	Parking Garages	Self Service Storage Facilities
104	Accessible Play Components (NC, [1])	1 (med.)																		
106	Post-Secondary School Multi-Stall Dorm Facility																			
107	Mobility Accessible Prison Cell																			
108	Communication Accessible Video Cell																			
109	Social Service Establishments – Elevator Access (NC)					1														
113	Social Service Establishments - Clear Floor Space around Beds					1														
111	Accessible Saunas and Steam Rooms (ALT/BR)			1					1	1										
112	Private Accessible Means of Entry to Pools (BR)		1	1						1										
114	Accessible Places of Entertainment (Kitchen Theatre Stage)			18																
114	Accessible Places of Entertainment (Kitchen Theatre Seating)			18																
115	Secondary Accessible Means of Entry into Pools (NC/ALT)		1	1																
115	Secondary Accessible Means of Entry into Pools (BR)		1	1																
117	Social Service Establishments – Roll-in Shower																			

[1] See Footnote 81.

I

112TH CONGRESS
2D SESSION

H. R. 4256

To direct the Attorney General to revise certain rules under titles II and III of the Americans with Disabilities Act of 1990 relating to accessible means of entry to pools.

IN THE HOUSE OF REPRESENTATIVES

MARCH 26, 2012

Mr. MULVANEY (for himself, Mr. SCHWEIKERT, Mr. JONES, Mr. QUAYLE, Mrs. MYRICK, Mr. COFFMAN of Colorado, Mr. GARDNER, Mr. PENCE, Mr. GRAVES of Missouri, Mrs. HARTZLER, Mr. ROSS of Arkansas, Mr. BURTON of Indiana, Mr. GOWDY, Mr. WILSON of South Carolina, Mr. CAMPBELL, Mr. LATTA, Mr. AMODEI, Mr. BERG, Mr. RIBBLE, Mr. KELLY, Mr. HARRIS, Mr. LONG, Mr. CARTER, Mr. PAUL, Mr. POSEY, Mr. FLAKE, and Mr. LAMBORN) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To direct the Attorney General to revise certain rules under titles II and III of the Americans with Disabilities Act of 1990 relating to accessible means of entry to pools.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Pool Safety and Accessibility for Everyone (Pool SAFE) Act".

SEC. 2. FINDINGS.

Congress finds the following:

(1) One of the purposes of the Americans with Disabilities Act of 1990 is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

(2) The Nation's proper goals regarding individuals with disabilities are to ensure equality of opportunity and full participation for such individuals.

(3) The Department of Justice's revised regulations for titles II and III of the Americans with Disabilities Act of 1990 recognize that places of public accommodation should provide access to their amenities to individuals with disabilities.

(4) It is important for places of public accommodation to provide access to their amenities, including pools, to individuals with disabilities.

(5) Places of public accommodation should provide access to their amenities, including pools, in a reasonable, efficient, and expedient manner that accounts for the interests of individuals with disabilities and also considers other legitimate concerns, such as safety and feasibility.

(6) As they relate to the accessibility of pools at places of public accommodation, the current re-

vised regulations for titles II and III of the Americans with Disabilities Act of 1990 do not reasonably or adequately balance the access needs of individuals with disabilities with other legitimate, and sometimes competing, safety and feasibility concerns.

SEC. 3. REVISION OF RULES.

(a) EXTENSION OF COMPLIANCE DEADLINE.—

(1) IN GENERAL.—No suit may be brought for a violation of the revised regulations for titles II and III of the Americans with Disabilities Act of 1990 regarding the requirements for places of public accommodation and commercial facilities to provide an accessible means of entry to pools (28 CFR 36.101 et seq.) that occurred on or after March 15, 2012, and before the date that is one year after the date of enactment of this Act, nor may the Attorney General investigate, or initiate a compliance review of such an alleged violation.

(2) PENDING PROCEEDINGS DISMISSED.—Beginning on the date of enactment of this Act, any suit against a place of public accommodation or commercial facility for a violation described in paragraph (1) brought on or after March 15, 2012, and before the date of enactment of this Act shall be dismissed.

(b) REVISION OF RULES.—Not later than 60 days after the date of enactment of this Act, the Attorney General shall revise section 36.304 of title 28, Code of Federal Regulations, and any other appropriate rules in part 36 of such title to provide that—

(1) a place of public accommodation or a commercial facility that has a pool and uses a portable pool lift on request shall be in compliance with the requirement under such rules to provide an accessible means of entry to such pool, even if installation of a permanent lift is readily achievable; and

(2) a place of public accommodation or a commercial facility that has more than one pool and uses one portable pool lift on request for all such pools shall be in compliance with the requirement under such rules to provide an accessible means of entry to each such pool.

(c) POOL DEFINED.—The term "pool" means a swimming pool, wading pool, sauna, steam room, spa, wave pool, lazy river, sand bottom pool, other water amusement, or any other man-made body of water to which part 36 of title 28, Code of Federal Regulations, requires places of public accommodation and commercial facilities to provide an accessible means of entry.

○

Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution

IAAPA

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April 4, 2012

Allison Nichol, Chief
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Submitted electronically via regulations.gov

Re: CRT Docket No. 123; AG Order No. 3327–2012

Dear Ms. Nichol:

The International Association of Amusement Parks and Attractions (IAAPA) is the largest trade association for permanently situated amusement facilities and attractions. IAAPA represents more than 4,000 facility, supplier, and individual members in the U.S. Member facilities include amusement and theme parks, waterparks, attractions, family-entertainment centers, arcades, zoos, aquariums, museums, science centers, resorts, and casinos. Our membership ranges from very large, multi-location facilities to small, single-site, family-owned operations.

The attractions industry strives to provide safe and accessible entertainment to all guests. For more than a decade, IAAPA has provided industry viewpoints to the U.S. Access Board and Department of Justice on the ADA Accessibility Guidelines (ADAAG) and the proposed recreation rules. IAAPA offers the following comments on the Department of Justice's guidance concerning the technical assistance document on accessible means of entry and exit into swimming pools ("TA Document"), and the proposal to extend the compliance deadline for accessible means of entry and exit into swimming pools by 180 days:

Unorthodox Regulatory Process

Throughout the promulgation of the Revised Title III Rules on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities ("Recreation Rules"), the U.S. Access Board and Department of Justice were very open to seeking feedback from industry, advocacy organizations, and the disability community on proposed guidelines and rules. Because of this record of open rulemaking, IAAPA is extremely disappointed the Department chose to essentially promulgate further regulation without seeking input from stakeholders.

The recent DOJ interpretation and TA Document goes beyond the regulations and 2010 Standard in requiring a fixed pool lift for new construction and asserting that installation of a fixed lift was also readily achievable as barrier removal. The interpretation also adds a requirement that all lifts be deployed during all hours that a pool or spa is open to the public. These requirements go beyond the recreation rules published in August 2010, and

introduce safety issues that have not been sufficiently addressed. We are extremely disappointed the Department did not provide an opportunity for comments on the technical assistance document prior to its issuance.

Additionally, we are disappointed the Department is only seeking public comment on the compliance date extension for this change, and not on the change itself. The ADA recreation rules were issued after lengthy deliberations, including the issuance of proposed rules, invitation for public comments, consideration of those comments, and public hearings. The rules were changed without any opportunity for stakeholder input.

Technical Assistance Document
In addition to its disappointment with the Department's unorthodox rulemaking, IAAPA has serious concerns with requiring fixed lifts in waterpark facilities. Pools found in waterparks are not the same as pools in other public accommodations. Waterpark pools tend to be large and/or serve a purpose other than recreational bathing. Furthermore, the vast majority of the pools found in waterparks are guarded by trained lifeguards and have pool attendants to assist guests. We believe the Access Board and Department of Justice understood this difference, which is why they applied special treatment to waterpark elements such as waterslide catch pools, lazy rivers, and wave pools.

Due to the unique pools found in waterparks, IAAPA believes waterpark operators should be able to use a portable lift to create accessible entry or exit from a waterpark pool. Portable lifts offer guests the opportunity to enter the pool in a place operators feel would be most easily and safely achieved. Pool use and guest traffic patterns in waterpark environments is not always predictable, especially when special programming is involved or when the waterpark is at peak capacity. Pool lifts may need to be placed in areas that allow for safe use away from traffic areas, but they may also need to be moved easily when traffic patterns change, for pool cleaning, or equipment access.

Pools that are clustered and attended pools should be able to share a portable lift. In clustered pools, pool deck space may be limited. Having one lift that can be repositioned to accommodate guests in multiple pools would allow operators to maximize the pool deck space between clustered pools for transfers to/from mobility devices, and lifeguard and maintenance access. If a pool is attended, the attendant will be able to reposition or deploy the pool lift "on-demand".

Fixed lifts present serious safety concerns. In a waterpark environment, where there are many fun water attractions, children may see a fixed pool lift as another attraction. Misuse of a fixed pool lift that is always deployed presents a significant risk to the safety of others.

We understand the Department does not want to consider comments on the rules or the TA Document, but we hope it will reverse its decision and consider the special circumstances of swimming pools in waterparks.

Extension of Compliance Deadline
Arguably, swimming pool operators have had years to make their accessibility plans. IAAPA has conducted education seminars and answered member questions on the ADAAG for nearly ten years. Our good-faith advice to members prior to the 2010 recreation rules mirrored that of the U.S. Access Board: to follow the Accessibility Guidelines when building or improving accessibility.

Members will now have approximately three months to comply with the TA Document and Department's new regulations concerning pool lifts. For many operators, and in the months leading up to peak season, this is simply not enough time. For this reason, IAAPA supports the Department's proposal to extend the compliance date for accessible entry and exit into swimming

pools until September 17, 2012. The TA Document created confusion in the aquatics industry and demand quickly shifted from portable pool lifts to fixed ones.

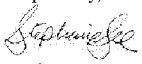
Existing facilities fulfilling their barrier removal obligations will have to quickly revise their accessibility plans, including soliciting bids on both the purchase and installation of fixed lifts, to determine what is readily achievable. If they choose to install a fixed lift, construction will have to be scheduled. There is simply not time for operators to do this before the start of the season (traditionally Memorial Day).

Facilities that are building new swimming pools have already developed building plans and obtained the necessary permits for elements that comply with the Department's 2010 recreation rule. For the reasons stated above, some operators may have planned for a portable lift. At this point, construction plans will need to be modified, which in some jurisdictions may lead to additional permitting, which will delay construction.

There is also the problem of supply: IAAPA members have been told there are simply not enough lifts currently available on the market, and operators may not receive their lifts until May or June.

In conclusion, IAAPA is concerned with the disregard for the Administrative Procedure Act the Department demonstrated by not consulting stakeholders before making regulatory changes that will have real financial and potential safety impacts for the waterpark industry. In light of these concerns, we request the Department extend the compliance date for 180 days until September 17, 2012, retract the current Technical Assistance Document and begin proper rulemaking to address the issues raised.

Respectfully,



Stephanie See
Director, Safety & Advocacy

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April 24, 2012

U.S. House of Representatives
Judiciary Committee
Subcommittee on the Constitution
H2-362 Ford H.O.B.
Washington, DC 20515

Dear Chairman Franks:

The International Association of Amusement Parks and Attractions (IAAPA) is the largest trade association for permanently situated amusement facilities and attractions. IAAPA represents more than 4,000 facility, supplier, and individual members in the U.S. Member facilities include amusement and theme parks, waterparks, attractions, family-entertainment centers, arcades, zoos, aquariums, museums, science centers, resorts, and casinos. Our membership ranges from very large, multi-location facilities to small, single-site, family-owned operations.

IAAPA thanks the subcommittee for holding a hearing on the recent Department of Justice guidance on accessible swimming pools. The attractions industry strives to provide safe and accessible entertainment to all guests. For more than a decade, IAAPA has provided industry viewpoints to the U.S. Access Board and Department of Justice on the ADA Accessibility Guidelines (ADAAG) and the proposed recreation rules.

IAAPA recently submitted public comment in response to DOJ's Notice of Proposed Rulemaking proposal to extend the compliance deadline for accessible means of entry and exit into swimming pools by 180 days. In it, IAAPA requested the Department extend the compliance date for 180 days until September 17, 2012, retract the current Technical Assistance Document and begin proper rulemaking to address the issues raised. Those comments are included in this letter.

To summarize our comments to the DOJ:

1. IAAPA is concerned that the Department of Justice chose to promulgate additional regulation through a sub-regulatory interpretation and Technical Assistance Document, thereby avoiding the notice and comment requirements outlined in the Administrative Procedure Act. Throughout the promulgation of the Revised Title III Rules on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities ("Recreation Rules"), the U.S. Access Board and Department of Justice were very open to seeking feedback from industry, advocacy organizations, and the disability community on proposed guidelines and rules.

   The recent DOJ interpretation and TA Document goes beyond the regulations and 2010 Standard in requiring a fixed pool lift for new construction and asserting that installation of a fixed lift was also readily achievable as barrier removal.

The interpretation also adds a requirement that all lifts be deployed during all hours that a pool or spa is open to the public. These requirements go beyond the recreation rules published in August 2010, and introduce safety issues that have not been sufficiently addressed. We are extremely disappointed the Department did not provide an opportunity for comments on the technical assistance document prior to its issuance.

2. IAAPA has serious concerns with requiring fixed lifts in waterpark facilities. Pools found in waterparks are not the same as pools in other public accommodations. Waterpark pools tend to be large and/or serve a purpose other than recreational bathing. We believe the Access Board and Department of Justice understood this difference, which is why they applied special treatment to waterpark elements such as waterslide catch pools, lazy rivers, and wave pools.

   Fixed lifts present serious safety concerns. In a waterpark environment, where there are many fun water attractions, a fixed pool lift may become an attractive nuisance to children, who may see it as another attraction. Misuse of a fixed pool lift presents a significant risk to the safety of others. Due to the unique pools found in waterparks, IAAPA believes waterpark operators should be able to use a portable lift to create accessible entry or exit from a waterpark pool.

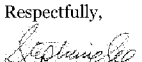
3. Waterpark operators have not been given enough time to comply with the regulatory change. Swimming pool operators have had years to make their accessibility plans. IAAPA has conducted education seminars and answered member questions on the ADAAG for nearly ten years. Our good-faith advice to members prior to the 2010 recreation rules mirrored that of the U.S. Access Board: to follow the Accessibility Guidelines when building or improving accessibility.

   With Memorial Day just around the corner, waterpark operators now have approximately one month to comply with the TA Document and Department's new regulations concerning pool lifts.

   The TA Document created confusion in the aquatics industry and demand quickly shifted from portable pool lifts to fixed ones. There are supply issues: IAAPA members have been told there are simply not enough lifts currently available on the market, and operators may not receive their lifts until May or June.

IAAPA thanks the subcommittee for holding this important hearing, and hopes it can persuade the Department of Justice to reconsider its recent actions, retract the current Technical Assistance Document and begin proper rulemaking to address the issues raised.

Respectfully,



Stephanie See
Director, Safety & Advocacy

Prepared Statement of the National Association of Home Builders

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), we appreciate the opportunity to provide testimony on the Department of Justice's Guidance on Access to Pools and Spas Under the ADA.

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. NAHB helps promote policies that will keep housing a national priority. A federation of more than 800 state and local associations nationwide, NAHB's membership includes over 140,000 members who will construct about 80 percent of the new homes built each year in the United States.

Residential construction is a highly regulated industry and home builders comply with numerous federal, state and local statutes and regulations during the course of operating their businesses. NAHB remains actively engaged on many fronts to ensure that its members receive up to date information and education on changing regulations and laws. As part of its advocacy efforts, NAHB seeks to ensure that proposed federal regulations are promulgated in accordance with all procedural requirements set forth under the Administrative Procedures Act ("APA"). 5 U.S.C. §§ 551 *et seq.*

NAHB's members take their obligations to comply with the Americans with Disabilities Act ("ADA") seriously, and NAHB strongly supports the ADA's goals in removing discriminatory barriers. Accordingly, NAHB welcomes the opportunity to speak out on Delaying the Compliance Dates for Certain Requirements of the Regulations Implementing Titles II and III of the Americans with Disabilities Act dealing with accessible pools and spas. *NPRM,* 77 Fed. Reg. 16196.[1]

NAHB agrees with DOJ that additional time is necessary to ensure consistent application of the rules to existing facilities and urges DOJ to, at a minimum, extend compliance until the proposed September 17, 2012 date. Additionally, for the reasons discussed below, NAHB calls upon members of Congress to urge DOJ to withdraw *Revised ADA Requirements: Accessible Pools—Means of Entry and Exit* (U.S. Dept's of Justice, Jan. 31 2012) (hereinafter "TA Document") or, in the alternative, undertake a regulatory review of the TA Document pursuant to the APA and small business review analysis as required by the Small Business Review and Enforcement Act ("SBREFA").

DOJ's TA Document substantively changes the requirements of the final regulations and the 2010 Standards,[2] and does so without affording the public and regulated community an opportunity to participate fully through the rulemaking process. DOJ describes the TA Document as a means "[t]o help educate pool owners and operators concerning the requirements imposed by the regulations[.]" *NPRM,* 77 Fed. Reg. at 16197. But, it is much more than an educational tool because it changes the regulations by requiring public accommodations choosing pool lifts as a means of removing barriers to install *fixed* pool lifts first, unless "installation of a fixed lift is not readily achievable[.]" *See TA Document* at 3. A public accommodation '*may then* consider alternatives such as use of a portable pool lift that complies with the 2010 Standards." *Id.* (emphasis added). This position contravenes the specific language in the 2010 Standards, which does not require that public accommodations go through that analysis—i.e., a portable pool lift *only after* determining a permanent fixed pool lift is not readily achievable. Moreover, DOJ's newly stated position, encapsulated in the TA Document, is not merely the agency's interpretation of existing requirements, but is itself an "agency statement of general or particular applicability and future effect" from which consequences will flow—compelling property owners and managers subject to the ADA to install fixed lifts at pools and spas—or face the consequences of noncompliance. 5 U.S.C. § 551(4) (APA definition of a "rule").

In letters to hotel pool owners associations, DOJ stated the "2010 Standards apply to a built-in or 'fixed' pool lift or sloped entry that complies with the 2010 Standards[.]" DOJ, *Letter to the Asian American Hotel Owners Association* 2 (Feb. 24, 2012), *available at http://www.ada.gov/aahoa_*letter.htm; DOJ, *Letter to American Hotel and Lodging Association* (Feb. 21, 2012), *available at http://www.ada.gov/ahla_*letter_2_21.htm. However, sections 242 and 1009.2 of the 2010 Standards are silent as to the type of pool lift required and neither differentiates between fixed permanent lifts and portable lifts.

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[1] DOJ published the final rule updating its regulations implementing the Americans with Disabilities Act ("ADA"). *See, e.g., Nondiscrimination on the Basis of Disability in State and Local Government Services,* 75 Fed. Reg. 56163 (Sept. 15, 2010).

[2] Included with its revisions to the regulations, DOJ also adopted the *2010 ADA Standards for Accessible Design* (Nov. 15, 2010) (*available at* www.ada.gov/2010ADAstandards_index.htm).

Moreover, DOJ seeks to circumvent public comment on the TA Document by specifically limiting the scope of the *Notice of Proposed Rule Making* (*NPRM)* and advising the public it will not entertain comments on anything other than the deadline. DOJ states in the *NPRM* that it does not "seek comments related to the merits of the requirements themselves. . . . [DOJ] will deem any such comments on this NPRM out of scope and will not consider them." NPRM, 77 Fed. Reg. at 16197. DOJ's position on the TA Document is contrary to the APA because DOJ never submitted this substantive change through the APA's notice and comment rulemaking process, nor through SBREFA.

DOJ's intention to limit the ability of the public to have notice of and comment on the TA Document's applicability creates an impermissible restriction on the public's due process rights to participate fully in the regulatory process. *See, e.g.,* 5 U.S.C. §§ 551 *et seq.* APA section 553 mandates that agencies must publish a general notice of a proposed rule in the Federal Register at least 30 days before the proposed rule is to take effect. 5 U.S.C. § 553(c). The purpose of affording the public an opportunity to receive notice of proposed rules and allowing time for comments is "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to . . . agencies," and "assure[s] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.'" *American Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1044 (D.C. Cir. 1987) (internal citations omitted).

DOJ has denied the public and affected stakeholders the opportunity to participate fully in the rulemaking process and has circumvented the opportunity to provide information regarding reasonable alternatives, costs associated with compliance, and impacts on small businesses. The TA Document does not qualify as an exception to notice-and-comment rulemaking under the APA governing "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A). That is because the TA Document imposes "substantive rules" from which legal obligations flow. *Batterton v. Marshall,* 648 F.2d 694, 701–02 (D.C. Cir. 1980). In addition, merely because DOJ describes the TA Document as "technical assistance" developed to "help educate pool owners and operators," this is not enough to cure its procedural defects. NPRM, 77 Fed. Reg. at 16197. In fact, the document's title, "ADA 2010 Revised Requirements . . ." puts stakeholders on notice that the agency views these as *required* for compliance. DOJ's own description as "technical assistance" is unavailing as the TA Document purports to bind regulated entities. *Gen. Elec. Co. v. EPA,* 290 F.3d 377, 382–85 (D.C. Cir. 2002).

In conclusion, NAHB supports an extended deadline for compliance with certain requirements of the ADA Title II and III implementing regulations, until September 17, 2012, as noted in the NPRM, for the purpose of rectifying the disparity between the regulations and 2010 Standards, and the TA Document. NAHB urges DOJ to withdraw the 2012 TA Document to ensure compliance with the APA, and consistency with the 2010 regulations and the 2010 Standards. In the alternative, if DOJ does not withdraw the TA Document, NAHB believes the subcommittee should examine DOJ's compliance with the APA and SBREFA.

NAHB appreciates the opportunity to provide this statement to members of the Subcommittee. NAHB looks forward to working further with members of Congress, regulatory agencies and other interested parties to find solutions to these issues.

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The Real Estate Roundtable

April 25, 2012

The Honorable Trent Franks
Chair, Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member, Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
B351 Rayburn HOB
Washington, DC 20515

Re: Hearing on: *"The Department of Justice's Guidance on Access to Pools and Spas Under the ADA"*
Tuesday, April 24, 2012
4:30 PM

Dear Chairman Franks and Ranking Member Nadler:

On behalf of The Real Estate Roundtable (www.rer.org), I appreciate the opportunity to provide this statement for the record of the above-referenced hearing. The Real Estate Roundtable brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms, with the leaders of major national real estate trade associations, to jointly address key national policy issues relating to real estate and the overall economy. Collectively, Roundtable members' portfolios contain over 5 billion square feet of office, retail and industrial properties valued at more than $1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Participating trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

The Roundtable's members seriously heed their ADA compliance obligations. We share the laudable goals of the ADA as enforced by the Department of Justice ("DOJ") for over 20 years, and agree we must continue to remove barriers of discrimination so all persons can participate in our shared American experience.

The hearing concerns a pronouncement by DOJ published on January 31, 2012, entitled *ADA 2010 Revised Requirements: Accessible Pools—Means of Entry and Exit,* as amplified by the letter dated February 21, 2012 from the Civil Rights Division to the American Hotel and Lodging Association (collectively, the "New Pool Standards"). As explained in more detail below, The Roundtable does not believe that the New Pool Standards can have binding regulatory effect until their own terms are subject to:

Market Square West • 801 Pennsylvania Ave., NW • Suite 720 • Washington, DC 20004 • Phone: 202-639-8400 • Fax: 202-639-8442 • www.rer.org

(1) notice and comment rule making proceedings as required by the Administrative Procedure Act ("APA");

(2) small business impact review analysis as required by the Regulatory Flexibility Act, amended by the Small Business Review and Enforcement Act ("SBREFA"); and

(3) the requirements of Executive Order 12866 (Sept. 30, 1993) and Executive Order 13563 (Jan. 18, 2011).

DOJ has thus far bypassed meaningful opportunities for regulated stakeholders to comment on whether the New Pool Standards are themselves legal in the first instance under APA and SBREFA prerequisites. The Department has also circumvented the procedures to improve regulatory review as set forth in the Executive Orders signed by Presidents Obama and Clinton.

The New Pool Standards

On January 31, 2012, DOJ prescribed the New Pool Standards for compliance with the ADA's requirements for accessible pools and spas (available at: http://www.ada.gov/pools_2010.htm). A letter dated February 21, 2012 from DOJ's Civil Rights Division to the American Hotel and Lodging Association (available at http://www.ada.gov/ahla_letter_2_21.htm), further amplified the regulated community's obligations regarding pool and spa accessibility. The Pool Standards are themselves styled as "Revised Requirements." They impose brand new obligations which were never set forth in the "2010 ADA Requirements" published in the Federal Register on September 15, 2010.

Public accommodations have enabled access to pool and spa features for mobility-impaired persons for years, through means such as the availability of so-called "portable lifts." However, the New Pool Standards significantly changed the compliance rules for ADA-regulated properties. Among other things, the New Pool Standards direct affected property owners to install permanent, fixed, hard-wired, and electrically-grounded lifts at pools and spas. The installation of a fixed lift at an existing pool deck requires an assessment of whether the deck can safely anchor a fixed lift, partial demolition of the pool deck, an electrical permit, electrical bonding under the National Electrical Code, deck reconstruction, and installation of the actual lift itself. And, permanent lift installation obviously precludes their efficient use to provide accessible entry for multiple pools and spas at ADA-regulated properties. Permanent lifts are thus considerably more complicated and costly than the prevailing industry practice, which has ensured accessible accommodations through availability of portable lifts. While DOJ's January 31 standards may provide an exception in cases where permanent lift installation is "not readily achievable," there are no clearly articulated guidelines to satisfy this vague criterion.

DOJ initially expected compliance with the New Pool Standards by March 15, 2012. The Department then extended the compliance deadline by 60 days and, through a Federal Register announcement on March 20, 2012, issued a proposed rule to further extend the compliance deadline to install permanent pool lifts until September 17, 2012. At no time, however, has DOJ formally solicited public comment on the underlying substantive requirements for permanent lifts *themselves*.

Not Enough Pool Lifts Even Exist in the United States to
Bring Regulated Properties into ADA Compliance.

There are simply not enough lifts to move to market to enable all ADA-regulated pools and spas across the U.S. to comply with the permanent lift mandate by DOJ's deadlines. According to comments submitted by the Association of Pool and Spa Professionals:[1]

- There are approximately 310,000 public pools in the country. 85,000 of these are classified as "lodging" and 30,000 classified as "clubs."
- Approximately 38,000 of these pools are accompanied by a spa.
- Of these, it is estimated that 153,000 pools and spas likely fall within ADA Title III, and are thus immediately subject to the New Pool Standards.
- Other pools classified as "community" (55,000), "parks and recreation" (27,000), and "schools" (21,000) fall under ADA Title II, and are expected to become subject to the permanent lift requirement at some point.
- At a "war time" capacity level of production, anywhere between 2,000 – 5,000 lifts can be manufactured a month.
- Assuming some existing stockpile in the range of 20,000 lifts could be moved to market right now, ***it would take between 2-5 years for ADA Title III-regulated properties to comply with the new Pool Standards.***
- Once Title II pools are folded into the permanent lift mandate, compliance cannot be achieved for many more years given the dearth of available lifts.

Yet, DOJ expects compliance with the New Pool Standards by May 21, 2012, with a possible extension to September 17. The Department's expectation of compliance this year is evidenced by the two compliance seminars it has scheduled this May (http://www.ada.gov/regs2010/webinar_pools.htm) – even though the New Pool Standards have never been subject to the open and transparent stakeholder processes established by the laws and Executive Orders discussed below.

DOJ has Ignored Procedures Required By Law that Must Accompany all New Regulations.

1. The New Pool Standards are not Merely an Agency Interpretation of Existing Requirements, but are a "Substantive Rule" that Must be Subject to APA Notice and Comment Procedures.

The New Pool Standards themselves were never published in the Federal Register and the public has never been afforded an opportunity to comment on their terms, substance, reasonableness, or economic impact. However, an agency must comply with "procedures laid down" in the APA when it promulgates a "legislative rule." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir.

[1] *See* http://images.magnetmail.net/images/clients/APSP/attach/ADA_Proposal_April_16.pdf. These comments were submitted in response to DOJ's March 20 Federal Register notice, which only sought to extend the compliance deadline by six months.

2002). Key among those procedural requirements is APA section 553, which dictates that agencies must publish a general notice of a proposed rule in the Federal Register at least thirty days before the proposed rule is to take effect. 5 U.S.C. §§ 553(b)-(d). Notice is adequate only if it provides "interested persons an opportunity to participate in the rule making through the submission of written data, views or arguments." 5 U.S.C. § 553(c). The final rule must include a concise general statement of the rule's purpose and basis. *Id.* Public notice and comment opportunities have a dual objective: (1) "'[T]o reintroduce public participation and fairness to affected parties after governmental authority has been delegated to ... agencies'"; and (2) to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.'" *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (citations omitted).

To The Roundtable's knowledge, the New Pool Standards are the first time that DOJ has ever informed the regulated community that the ADA must be satisfied by installation and hard-wiring of permanent lifts (unless such installation is "not readily achievable" – a standardless exemption that provides no clarity for how a property owner may satisfy it). Accordingly, DOJ's January 31 pronouncement and February 21 letter constitute an "agency statement of general or particular applicability and future effect" that, going forward, compels property owners and managers regulated by the ADA to install permanent lifts at pools and spas. 5 U.S.C. § 551(4) (definition of "rule" in the APA).

Notice and comment rulemaking does not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(c). Because of the important values engrained in APA procedures, these exceptions are to be narrowly construed. *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980); *Bowen*, 834 F.2d at 1044. The New Pool Standards do not fall within this narrow exception and cannot be considered mere "interpretations," because they are "substantive rules" that "impose obligations, or produce other significant effects on private interests." *Batterton*, 648 F.2d at 701-02. The requirements DOJ has announced for permanent lifts are a "fundamentally new regulation" and "work substantive changes in prior regulations." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). Moreover, just because an agency decides to style one of its pronouncements as "technical guidance" or "interpretive" is "self-serving[]" and not determinative where it indeed intends to bind parties into compliance. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383-85 (D.C. Cir. 2002). (In any event, it is worth noting that DOJ labels the January 31 issuance as "ADA 2010 Revised *Requirements*.")

The New Pool Standards "change[d] the rules of the game" (*Sprint Corp.*, 315 F.3d at 374) by announcing mandates that had never before been published in any prior ADA regulations or compliance manual. As such, the Pool Standards constitute a "substantive rule" and have no legal force or effect until DOJ subjects them to APA notice and comment procedures.

2. <u>The New Pool Standards are "Final Agency Action" for APA Purposes.</u>

Further driving home the point that Pool Standards are "legislative rules" is that they satisfy the criteria for "final agency action" under the APA.

Last month, a unanimous Supreme Court re-confirmed the established two-part test to determine whether agency action is "final." First, the agency action must determine "rights or obligations" and "legal consequences [must] flow" from it. *Sackett v. EPA*, No. 10-162 (March 21, 2012) (Slip op. at

p. 5) (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). This is the case with the New Pool Standards. The permanent lift requirement is an "obligation" on the regulated community that cannot be satisfied by providing accessibility through a portable device, and failure to install a permanent lift can result in serious "legal consequences" through the ADA's powerful enforcement provisions including fines and DOJ- or citizen-initiated litigation. Second, to be considered "final," the action must also "mark the 'consummation' of the agency's decision making process." *Sackett*, slip op. at pp. 5-6 (quoting *Bennett*, 520 U.S. at 178). This element is satisfied as well in the current situation. The proposed rule published on March 20 only solicits public comment on whether the compliance deadline should be extended for six months – but it is a foregone conclusion that DOJ expects regulated stakeholders to install permanent lifts in the first place, and the Department is already planning compliance webinars for regulated stakeholders. While the ultimate ***date*** of compliance may be open to discussion, the ***terms and substance*** of the Pool Standards are not.

In sum, the permanent pool lift requirements meet the Supreme Court's hallmarks for "final agency action," and must be subject to APA notice and comment procedures.

3. As the New Pool Standards are a *De Facto* APA Rule, They Must Also be Subject to Small Business Impact Review Under SBREFA.

Because the New Pool Standards are substantive rules, they also have no regulatory effect until they have been subject to a SBREFA analysis assessing their economic impacts on small businesses.

Agency action that is an APA "rule" also triggers SBREFA review. 5 U.S.C. § 601(2). See *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272 (D.C. Cir. 2005) (permits found to be APA "rules" also subject to SBREFA review). SBREFA review includes a 4-step process attendant to any rule: (1) the agency must certify whether a proposed rule will have a "significant economic impact on a substantial number of small entities" as a class (5 U.S.C. § 605(b)); (2) if so, the agency must take steps to enhance small entities' ability to participate in the rulemaking process (*id.* § 609(a)); (3) an agency must prepare and make available for public comment an Initial Regulatory Flexibility Analysis (IRFA) of the likely adverse impacts on small entities and alternatives that could reduce those impacts (*id.* § 603)); and (4) after taking comment on the proposed IRFA, proactive assessment by the agency must prepare a Final Regulatory Flexibility Analysis and publish it along with the final rule (*id.* § 604).

DOJ took none of these steps with regard to the New Pool Standards. As a result, the permanent lift requirements cannot take effect (in September or otherwise) until SBREFA has been satisfied.

4. DOJ has Ignored the Directives of Executive Orders 12866 and 13563.

On January 18, 2011, President Obama signed Executive Order 13563, "Improving Regulation and Regulatory Review." It states:

- "Regulations shall be adopted through a process that involves public participation." (Section 2(a))
- "To promote" an "open exchange" of information between affected stakeholders and regulatory officials, each agency "shall endeavor to provide the public with an opportunity to participate

in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." (Section 2(b))

- "Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation." (Section 3))
- "[E]ach agency shall identify and consider regulatory approaches that that reduce burdens and maintain flexibility and freedom of choice for the public." (Section (4)).

DOJ has satisfied neither the letter nor spirit of President Obama's order to make regulatory procedures more transparent. The Department's commandment for permanent lifts evaded a meaningful chance for regulated properties to develop innovative solutions that would fairly accommodate the rights of the disability community and achieve Congress's overriding ADA objectives – while also promoting an open exchange of ideas so all stakeholders could consider and develop appropriate and flexible regulatory solutions.

Moreover, as a watchdog to help ensure fair rule making procedures, through Executive Order 12866 the Clinton Administration vested the Office of Information and Regulatory Affairs (OIRA) (within the Office of Management and Budget) with responsibilities to safeguard "a regulatory system that works" for the American people, that balances health, safety and well-being without imposing unreasonable or unnecessary costs. In this regard, one of OIRA's key responsibilities is to conduct a 90-day review of "draft regulatory action, together with a detailed description of the need for regulatory action" and an "assessment of the potential costs and benefits of the regulatory action ...." Executive Order 12866 §§ 6(a)(3)(B), 6(b)(2)(B) (Sept. 30, 1993). There is nothing to indicate that OIRA ever had the chance to conduct a 90-day review of the New Pool Standards, or that DOJ ever submitted a draft of its permanent lift mandate with supporting documentation to OIRA for review.

5. <u>APA, SBREFA, and Executive Order Processes Would Create a Rulemaking Record to Buttress DOJ's Ultimate Decision.</u>

As the government agency asserting regulatory authority through the New Pool Standards, DOJ has the burden to develop regulations that are not arbitrary, capricious, an abuse of discretion, or taken without observance of procedure required by law. 5 U.S.C. § 706(2)(A). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) (quotation omitted).

The issues at stake in this matter should not be left to unsubstantiated anecdotes. Rather, to benefit the disability community and regulated stakeholders alike, DOJ has an obligation to compile an administrative record to support the ultimate regulatory decision it will make. Commenters should be notified through the Federal Register to provide DOJ with the best available information, facts, studies, and evidence regarding topics including, but not limited to, the following:

(1) Whether there are legitimate safety concerns that may impact children and other guests that arise from the installation of permanent fixed pool lifts, especially for those properties that do not have lifeguards on duty;

(2) Evidence of whether the availability of portable lifts has been shown to interfere with the accessibility needs of the disability community;

(3) Whether there are enough permanent lifts available on the market for immediate compliance with the Pool Standards, and, if not, whether there is manufacturing capacity to move such lifts to market and over what time period;

(4) Whether the hotel and lodging sector can adequately accommodate accessibility needs through alternatives to fixed pool lift installation;

(5) Whether property owners face liability and insurance coverage issues as the result of installing permanent lifts;

(6) The interplay between National Electrical Code and the New Pool Standards requirements for hard-wired permanent lifts near water;

(7) Cost, manpower, and permitting issues associated with reconstructing pool decks to allow for permanent lift installation;

(8) Whether added costs associated with fixed lift installation may drive owners and managers of regulated properties to close pools and spas altogether; and

(9) Impacts to hotel franchisees and other small business entities in complying with the new Pool Standards.

This is not an exhaustive list. But each item raises significant issues that are appropriate for stakeholder comment. It is incumbent on DOJ to carefully consider these and other salient topics to support the New Pool Standards with a rational and informed agency decision buttressed by a fact-based administrative record.

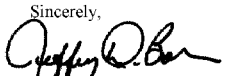
6. The Roundtable Urges Support for H.R. 4256, the Pool Safety and Accessibility for Everyone (Pool SAFE) Act.

Following the issuance of the New Pool Standards – and responding to DOJ's rejection of legal procedures that would collect stakeholder comment on the need to install permanent lifts – Rep. Mick Mulvaney (R-SC) and 52 co-sponsors have supported the Pool SAFE Act. This bill recognizes that places of public accommodation must provide access to pools and other amenities in a reasonable and efficient manner that balances other legitimate concerns such as safety and feasibility. H.R. 4256 would preserve the compliance *status quo* and clarify that regulated properties can meet their ADA obligations by providing accessible means of entry to pools and spas through the use of portable lifts upon request. Given that DOJ has completely failed to compile a rulemaking record to justify its permanent lift mandate, The Roundtable urges Congress to pass the Pool SAFE Act.

In conclusion, the New Pool Standards announced by DOJ are tantamount to a "substantive rule" that imposes obligations on affected property owners to install permanent lifts for pools and spas at public accommodations. Accordingly, the ADA requirements for permanent pool lifts do not have legal force and effect until they are subject to notice and comment requirements under the APA, and are subject to a small business impact analysis under SBREFA. We encourage DOJ to initiate processes to review the New Pool Standards under the APA, SBREFA and the pertinent Executive Orders as soon as possible. As for a legislative response, and particularly in the absence of DOJ's failure to compile a rulemaking record that justifies an ADA mandate for permanent lift installation,

The Roundtable further urges Congress to enact H.R. 4256, the Pool SAFE Act. For questions regarding this statement, please contact Duane J. Desiderio, Vice President and Counsel (ddesiderio@rer.org; (202) 639-8400).

Sincerely,



Jeffrey D. DeBoer
President and Chief Executive Officer

cc: Member of the Constitution Subcommittee, House Judiciary Committee

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The Global Source and Voice for the Recreational Water Industry

House Judiciary Subcommittee on The Constitution
Rayburn Building
Independence Avenue and South Capitol Street
Washington, DC 20003

Re: Hearing on: The Department of Justice's Guidance on Access to Pools and Spas Under the ADA

Chairman Franks, Ranking Member Nadler, and Members of the Subcommittee:

The following statement is submitted by the Association of Pool and Spa Professionals (APSP), along with the National Swimming Pool Foundation, the Northeast Pool and Spa Association, and the leading manufacturers of swimming pools lifts, S.R. Smith LLC., Aquacreek LLC., and Spectrum Aquatics, collectively referred to as the pool and spa industry or "industry," in regard to the hearing scheduled by The House Judiciary Subcommittee on The Constitution on swimming pool accessibility.

The pool and spa industry continues to support accessibility for all new and existing pools and spas in public accommodations. We have long been active participants moving this process forward. For example:

- Members of the Industry served on the Project Advisory Panel for the report produced by the National Center on Accessibility titled, "Swimming Pool Accessibility" (NCA Report) which was commissioned by the Access Board and served as the basis for the Americans with Disabilities Act Accessibility Guidelines for Swimming Pools (ADAAG). This report recognized the prevalence, efficacy and safety of portable lifts.
- Members of the Industry provided comments to the Access Board in the development of ADAAG and introduced the Access Board to ISO10535, the only recognized standard for patient lifts. Knowledge of this Standard allowed the Access Board to improve requirements for pool lifts. This Standard specifically recognized free standing or portable lifts.
- Following the release of ADAAG in 2003, and long before 2010, the Industry embraced the Guidelines and began to fully integrate accessibility provisions into swimming pool operations. The industry provided training programs to explain the requirements to its constituents, produced webinars dealing with swimming pool accessibility, developed new technology to ensure that any type of pool design could be made accessible, and began to make barrier removal modifications to pools consistent with the Guidelines.
- The Industry provided comments to proposals suggested by the Department of Justice (DOJ) in the NPRM that preceded the release of the final regulations in 2008. For example, the DOJ initially proposed that pools under 300 linear feet be exempt from accessibility requirements, based on potential financial hardship. The Industry

commented that approximately 80-90% of the pools in public accommodations fall within this potential exclusion, and therefore exempting such pools would mean that swimming pools were virtually inaccessible for people with disabilities.

- Throughout this process and since the release of the 2010 Revision to the ADA, the Industry has been proactive in providing training and programs to educate and encourage compliance with the Standards.

The regulations as set forth in the 2010 Standards for Accessible Design do not state a preference for fixed lifts. The ADAAG and NPRM each contained numerous specifications for swimming pool lifts. Neither states that the lift should be affixed to the pool deck. While the 2010 Standards require that several methods of access be permanent or affixed, pool lifts are not one of them.

Throughout the process, and in reliance on the plain language in the ADAAG and the Standards, major investments were made by the pool and spa industry in the design, manufacture, sale and installation of portable lifts.

In addition, all of the studies have recognized the efficacy and safety of portable lifts, which are subject to the same rigorous standards as fixed lists and provide equal or superior access for persons with disabilities. These lifts also typically weigh close to a thousand pounds, ensuring that they remain in place until the facilities intend to move them. Portable lifts are essentially patient lifts, and the DOJ continues to recognize that patient lifts may be free standing or portable.

Fixed lifts will also most likely remain in place after hours, when pools are closed to the public. As safety advocates, we are concerned about possible misuse and abuse of these fixed lifts when an outdoor pool is closed and believe that the risk of unsafe misuse, particularly by children and adolescents, is therefore substantially greater for a fixed lift. Similar views and concerns have been expressed by owners and operators of these pools and their representatives. Before the DOJ considers any requirement that lifts be fixed, these issues require thorough study and evaluation by experts in several disciplines, including aquatic safety, human factors and communications and child and adolescent behavior. To our knowledge, such a study has not been conducted.

For these same reasons, fixed lifts are also at far greater risk of vandalism and destruction after hours. The undersigned manufacturers are already aware of several instances where lifts have been vandalized when left unattended or after hours, thereby depriving persons with disabilities from access to the pool until costly repairs could be made.

Allowing portable lifts in all situations also brings compliance within the reach of more facilities, reducing installation costs by eliminating the need to break through the pool deck in order to comply with electrical bonding requirements that eliminate risk of shock.

For these reasons, we strongly urge the DOJ to withdraw its Technical Assistance Document of January 31, 2012, and to specifically state that portable swimming pool lifts may be used wherever a pool lift is chosen. This will eliminate the massive confusion that has ensued,

as well as the costly and unnecessary lawsuits and other disputes that will otherwise occur over what is readily achievable. We also urge the DOJ to extend the compliance date until September.

We thank the Committee for its time and consideration.

SINCERELY

Jennifer Hatfield, Director of Government Relations

Northeast Spa and Pool Association – by Lawrence S. Caniglia s/_____
National Swimming Pool Foundation - by Tom Lachoki s/_____
SR Smith, LLC - by Richard Laitta s/_____
Aqua Creek, LLC - by Brian Goettlich s/_____
Spectrum Aquatics - by Tracy Corens s/_____

Material submitted by the Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution

CONSORTIUM FOR CITIZENS WITH DISABILITIES

April 23, 2012

Dear Representative:

The undersigned members of the Consortium for Citizens with Disabilities (CCD), representing people with disabilities, family members, and professionals in the disability field, write in opposition to any Congressional effort to roll back, or prevent enforcement of, the Justice Department's September 15, 2010 regulations setting forth requirements to ensure that swimming pools are accessible to people with disabilities. These regulations, the product of an extensive and considered process of deliberation, were originally scheduled to go into effect on March 15, 2012 and are now slated to take effect in May 2012.

H.R. 4200, introduced on March 16, 2012, would deprive the Justice Department of the authority to enforce its own regulations implementing the ADA with respect to the accessibility of swimming pools. H.R. 4256, introduced on March 26, 2012, would prohibit any court enforcement of the Justice Department's new regulations concerning pool accessibility for a period of one year from enactment of the bill and require the Justice Department to issue new regulations with weaker substantive standards (permitting portable pool lifts even where installing a permanent lift would be readily achievable). These bills present a number of serious concerns.

First, the prospect of Congress preventing an executive branch agency from enforcing its own regulations is very troubling. The regulations at issue were promulgated by the Department of Justice -- the agency charged by Congress with enforcement of the ADA -- and based on standards issued by the United States Access Board, a federal agency devoted to developing and maintaining standards to ensure accessibility for individuals with disabilities. The ADA requires the Justice Department's accessibility regulations to be consistent with Access Board standards. Both the Access Board and the Justice Department have extensive expertise in setting appropriate accessibility standards that take into account the needs of people with disabilities as well as those of business owners. Congress need not and should not step in to deprive the agencies it designated to issue accessibility standards of the authority to enforce those standards.

Moreover, the opportunity to swim is important to individuals with disabilities just as it is to everyone else. People with disabilities should be able to enjoy swimming pools for recreation and exercise. If enacted, H.R. 4200 and H.R. 4256 would deprive many people with disabilities of access to swimming pools, and would create uncertainty among pool owners about the standards with which they must comply in order to meet the ADA's requirements with respect to pool access.

The regulations at issue do not present a significant burden to hotels or other pool owners. For pools already built when the new regulations take effect, the regulations do not require owners to satisfy the new accessibility requirements. If doing so is not "readily achievable" -- that is,

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"easily accomplishable and able to be carried out without much difficulty or expense" – they need not do so.

In addition, individuals with disabilities are not entitled to damages in ADA lawsuits challenging the inaccessibility of public accommodations.

The hotel industry has been aware of -- and involved with -- the development of the new pool accessibility standards for a decade. The Access Board initially issued standards for pool accessibility in 2002 guidelines for recreational facilities. In 2004, the Access Board incorporated those standards into its new Accessibility Guidelines. The new regulatory standards come directly from those 2004 guidelines. The Justice Department first published an Advance Notice of Proposed Rulemaking requesting feedback concerning the Access Board standards in 2004, followed by a second Advance Notice of Proposed Rulemaking in 2008. The final rule was adopted on September 15, 2010, and gave existing pools another eighteen months to comply with the new requirements.

In conclusion, we oppose any effort to roll back regulations providing accessible swimming pools for people with disabilities. These places of public accommodation have had years of notice and substantial opportunity to prepare for these requirements.

Sincerely,

ACCSES

American Association of People with Disabilities

American Foundation for the Blind

American Network of Community Options and Resources

Association of University Centers on Disabilities

The Arc of the United States

Bazelon Center for Mental Health Law

Brain Injury Association of America

Council of Parent Attorneys and Advocates, Inc.

Daniel Jordan Fiddle Foundation

Disability Rights Education and Defense Fund

Easter Seals

Epilepsy Foundation

Helen Keller National Center

Mental Health America

National Association of Councils on Developmental Disabilities

National Council on Independent Living

National Disability Rights Network

National Down Syndrome Society

National Multiple Sclerosis Society
Paralyzed Veterans of America
United Cerebral Palsy
United Spinal Association

Prepared Statement of the National Disability Rights Network

As the nonprofit membership organization for the federally mandated Protection and Advocacy (P&A) Systems and Client Assistance Programs for people with disabilities, the National Disability Rights Network (NDRN) would like to thank Chairman Franks, Ranking Member Nadler and the Subcommittee for the opportunity to submit written testimony for today's hearing on the Department of Justice's Guidance on Access to Pools and Spas under the Americans with Disabilities Act. Over twenty years after the passage of the Americans with Disabilities Act (ADA), the accessibility of swimming pools and other recreational facilities remains a problem for people with disabilities around the country. NDRN encourages the Judiciary Committee to work with the Department of Justice and with swimming pool owners to ensure that people with disabilities are able to enjoy swimming pools and other recreational facilities to the same extent as others in our society.

As a part of the training and technical assistance that NDRN provides to the Protection and Advocacy agencies, NDRN holds many face-to-face meetings in hotels throughout the country. As such, NDRN routinely books hotel rooms and wants our staff, the staff of the P&A agencies, and other participants to have the opportunity to enjoy all the amenities provided by the hotels. As a disability rights organization whose staff and membership include people with disabilities, we are committed to holding our conferences and meetings at locations that provide full accessibility.

The effective date for swimming pool owners to become compliant with ADA standards was originally March 15, 2012, but the Department on its own chose to extend that time until May 21, 2012. Based on the history of these standards discussed below, NDRN believes that this first extension was unnecessary and sees no reason (politically, practically, or in the furtherance of public policy) to extend this compliance date any longer. The 2010 ADA Accessibility Standards did not create the requirement for accessibility for pools and spas; it only provides more detailed specifications of *how* to provide that accessibility.

Protection and Advocacy programs across the country have represented people with disabilities seeking access to public swimming pools. For example, P&As in Pennsylvania, Ohio, and Colorado have successfully negotiated agreements with

owners of pools to provide pool lifts to allow individuals with disabilities to use those pools. Despite these modest successes, most people with disabilities throughout the country continue to be unable to access swimming pools on the same basis as their non-disabled peers.

The Department's process to develop accessibility guidelines for swimming pools began over 7 years ago on September 30, 2004, when the Department published an Advance Notice of Proposed Rulemaking (ANPRM), 69 FR 58768. This ANPRM requested feedback about the Department's proposal to adopt the Access Board's 2004 revisions to the ADA Accessibility Guidelines (ADAAG), which included provisions for swimming pool accessibility. The Department then published a Notice of Proposed Rulemaking almost 4 years ago on June 17, 2008 seeking public comment, 73 FR 34508. The Final Rule was formally published in the Federal Register on September 15, 2010, 75 FR 56254, and gave owners and operators of existing pools 18 months before the specific regulations became enforceable.

Enough time has passed to allow swimming pool owners to make their pools comply with the ADA. Over 18 months has passed from the date the final rule was announced, over 4 years has passed from first proposal of a final rule, and over 7 years has passed from first the first proposal to adopt the ADAAG standards for pools and spas. Moreover, the requirement to remove barriers to accessibility to swimming pools for people with disabilities has been part of the statutory requirement under the Americans with Disabilities Act since it was passed in 1990, almost 22 years ago. The need for pools and spas to be accessible for people with a disability is not some new idea, but one that has been in federal law for more than 2 decades.

Additionally, the Department's regulations provide more than sufficient flexibility since the requirement is removal of physical barriers that is "readily achievable," or easily accomplishable and able to be carried out without much difficulty or expense.

The swimming pool owners have raised concerns about the Department of Justice requirement that they install fixed rather than portable lifts. The Americans with

Disability Act Accessibility Guidelines, or ADAAG, include specific guidelines regarding the installation of pool lifts. See *http://www.access-board.gov/ada-aba/final.cfm#a1009*. Generally, portable pool lifts cannot meet the ADAAG standards, because they cannot be installed or independently operated by people with disabilities. As the Department of Justice has indicated, however, if an entity chooses to use a lift complying with the ADAAG standards that is removable or otherwise designated as "portable," it may do so, as long as while the lift is provided at the pool, it is affixed in some manner to the pool deck or apron.

NDRN is pleased that some members of the hotel industry have realized that over the course of 22 years the ADA applies to the accessibility of their pools and have taken a proactive approach and installed pool lifts. For example, in recent negotiations with a hotel chain to hold a conference, NDRN raised the issue of whether the swimming pools were accessible for people with disabilities, and were assured that all the hotels were in compliance with all current ADA laws and regulations concerning the pool and had a pool lift. In addition, they were prepared to comply with any and all revisions to Title 3 of the ADA that may occur, and took, "great pride in ensuring . . . our properties meet and exceed any government regulation."

As NDRN continues to contract for our business meetings as well as our staff making their own personal summer travel and vacation plans, we believe that people with disabilities should be able to enjoy the same recreational amenities and opportunities as every other American. Delaying the effective date of the regulations any further will mean another season where people with disabilities will be denied the opportunity to use pools when they travel on vacations with their families or on business. This is unacceptable.

STATEMENT FOR THE RECORD

to

Committee on the Judiciary's Subcommittee on the Constitution

Hearing on

The Department of Justice's Guidance on Access to Pools and Spas Under the Americans with Disabilities Act

Tuesday, April 24, 2012

2141 Rayburn House Office Building

Submitted by

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Introduction

On behalf of its more than 35,000 members, 62 chapters and support groups nationwide and the more than 1 million Americans with spinal cord injuries and disorders across the country, the United Spinal Association strongly supports the Department of Justice's (DOJ) final rule detailing requirements for accessible entry and exit for pools and spas under the Americans with Disabilities Act (ADA) of 1990, [accessibility – 28 CFR 35.150; readily achievable barrier removal –28 CFR 36.304]. United Spinal submits these comments for the record for the April 24, 2012 Committee on the Judiciary's Subcommittee on the Constitution hearing on both the accessibility and readily achievable barrier removal rules.

Founded in 1946 by paralyzed veterans, United Spinal has since provided services, programs and advocacy to improve the quality of life of individuals of all ages living with spinal cord injuries and disorders (SCI/D) such as multiple sclerosis, amyotrophic lateral sclerosis, post-polio syndrome and spina bifida. Throughout its history, United Spinal Association has devoted its energies, talents and programs to improving the quality of life for these Americans and advancing their independence. United Spinal Association is also a VA-authorized veterans' service organization assisting veterans with disabilities to receive their rightful benefits.

Background

The Department of Justices' (DOJ) regulations concerning swimming pool accessibility were based directly on standards adopted by the U.S. Access Board in 2002[1], appointed by then President George W. Bush to provide federal expertise in developing accessibility standards for people with disabilities. Hotel owners and other swimming pool owners, therefore, were hardly taken by surprise by the final regulations originally issued by DOJ in 2010 which were to become effective in March 2012, some 22 years after the ADA was enacted. The Access Board began looking at the issue of pool access in 1996, adopted pool access standards in 2002 and incorporated those standards into its ADA Accessibility Guidelines in 2004. The DOJ adopted these standards as part of the 2010 Advanced Notice of Proposed Rulemaking (ANPRM), informing the hotel industry and other pool owners, nearly two years before the rule was to be implemented. Moreover, as Representative Jerrold Nadler (D-8th NY) noted at the April 24

[1] Half of the Access Board's members are appointed by the President and half are representative of federal agencies.

Constitution Subcommittee hearing, the hotel industry's comments submitted in response to that ANPRM contemplated the possibility that fixed pool lifts would be required in 2010. Pool owners then had another 18 months after the promulgation of these regulations to prepare themselves to comply with the law.

The Access Board's extensive consideration of the pool access standards included a detailed research study by the National Center on Accessibility (NCA) in 1996. The study evaluated different methods and standards for their appropriateness, facilitation of independent use, degree of consistency with existing building standards, level of safety, and impact on pool design. With the assistance of a national advisory panel, the NCA undertook a comprehensive review of literature, a national survey of hundreds of people with disabilities, hundreds of swimming pool operators, managers, aquatic directors, and adaptive aquatic instructors, and actual on-site pool testing of identified designs and devices by people with disabilities. The on-site testing examined the appropriateness, independent use, and safety of the identified means of pool access by people with diverse disabilities.[2]

The Board's comprehensive examination and DOJ's subsequent deliberations took into account the input and interests of all stakeholders, considering among other things cost and safety issues. If anything was extraordinary about this rulemaking process, it was the thorough and detailed consideration that was involved. In view of this highly deliberate and thorough approach, any suggestion that further study of these compliance standards is now needed is without merit and would represent an unwarranted increased delay in the implementation of these overdue disability rights regulations.

The hotel industry has expressed concerns about a January 2012 DOJ technical assistance document that clarified that covered entities may have to install a "fixed" pool lift in existing pools if doing so is readily achievable. The industry claims that this was a "new and arbitrary" standard. However, throughout the history of the ADA, DOJ's accessibility standards have consistently applied to fixed or "built-in" elements. Any doubt about this is resolved by the DOJ's own regulations, which explicitly state: "The 1991 Standards and the 2010 Standards

[2]See National Center on Accessibility, *Swimming Pool Accessibility Project*, Executive Summary, at http://www.ncaonline.org/pools/poolstudy.shtml. Among other things, the study recommended that "[p]ool lifts shall facilitate unassisted operation." Portable pool lifts rarely offer opportunities for unassisted operation, and the hotel industry's position that portable lifts should be stored away unless and until a person specifically requests to use them would effectively prohibit unassisted operation.

apply to *fixed or built-in elements* of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site."[3] With precedent of more than 20 years in the law's implementation, Congress should not be engaging in efforts to undermine the continuing application of the ADA.

DOJ is acting within its authority to enforce accessibility and readily achievable barrier removal regulations.

The DOJ ADA regulations at issue require existing facilities to satisfy accessibility standards only if doing so is "readily achievable," i.e., "easily accomplishable and able to be carried out without much difficulty or expense." If compliance by installing a fixed pool lift can be demonstrated by pool owners to be unaffordable and overly burdensome, then a portable lift may prove adequate to achieve compliance. Congressional attempts to deprive the DOJ of its authority to enforce its own regulations to implement the ADA would be both arbitrary and capricious. The DOJ rulemaking process for accessibility and barrier removal has been transparent and accountable and is well within the DOJ's interpretive authority and offers considerable flexibility. Legislation that would now deprive the DOJ its authority to enforce its own regulations would establish a dangerous precedent and would unfairly initiate a process depriving 54 million Americans with disabilities of their legal right to participate in a broad range of activities enjoyed by the general population.

The Justice Department's regulations do not impose unreasonable cost burdens on pool owners and operators such as hotels.

Despite the hotel industry's allegations that compliance with the regulations would be so costly and burdensome that pools will shut down rather than comply, the regulations require the installation of a fixed pool lift in existing pools *only* where it is "readily achievable", that is, where it can be accomplished "without significant difficulty or expense." Readily achievable means that an existing pool or spa would only need to have a fixed pool lift if the owner could demonstrate that the installation could not be afforded or was otherwise unduly burdensome. If it is too expensive and not considered easy to install a fixed pool lift in an existing pool, then a portable lift may be all a facility would be required to provide.

The "readily achievable" standard was imposed by Congress in the ADA itself, and has been used for nearly 22 years. In fact, this standard was sought by business leaders in order to avoid a

[3] 28 C.F.R. § 35.151(d).

"one size fits all" standard for existing facilities and have instead a more flexible, individualized standard that would take into account factors such as the size, nature, and resources of a particular business. Business owners benefit from this flexible test, but must of course make the determination about whether it is readily achievable to meet accessibility standards. That is hardly unreasonable or unfair. Pool owners who cannot afford to install lifts in existing pools do not have to shut down their pools, nor will they face civil penalties. Pool owners that fail to comply with the regulations are not subject to large damage awards. They are required only to determine how best they can comply and act accordingly. On the other hand, individuals with disabilities cannot obtain monetary damages against hotels and other private pool owners for violations of the ADA's accessibility requirements.

Rules on readily achievable barrier removal provide the necessary flexibility.

We believe that the existing provisions for program accessibility (28 CFR 35.150) and readily achievable barrier removal (28 CFR 36.304) provide sufficient relief for entities that may not be able to immediately comply with the requirements to provide pool or spa access, especially when they have more than one such facility at a property. Furthermore, the concepts of program accessibility and readily achievable barrier removal are not new and have been an integral part of the Americans with Disabilities Act (ADA) since its passage in 1990.

All of the entities currently requesting an extension to the implementation of the rules should be familiar with these concepts and have (or at least should have) already applied them to other aspects of their programs and facilities such as entrances and exits, curbs and elevators. Moreover, ADA requirements are ongoing and even when financial hardship may delay compliance for a year or two, it still remains incumbent on the pool or spa owner to adequately plan in advance for such compliance in anticipation of fulfilling the legal requirements whatever the approved timeframe.

As a service organization that provides accessibility consultation, United Spinal Association has, since 2010, received numerous calls for assistance from various types of entities that have pools and spas within their facilities. These entities were interested in meeting their obligations as set forth in the 2010 ADA Standards and were actively engaged in planning how they would comply. They did not make excuses, request delays or focus their energies on trying to diminish the required standard. They understood the concept of barrier removal, its achievability and the importance of planning to fulfill their legal responsibility. We, therefore, find rather

disingenuous recent complaints from pool owners that led to DOJ's postponement of the rule's effective date until May 21, 2012.

If the vast majority of owners and operators of public use swimming facilities were genuinely confused about the requirements, then where was the outcry 18 months ago when the 2010 Standards were initially released? We fail to see rational justification for any further delay, nor, frankly, for the current delay.

The DOJ regulations do not create unusual safety risks.
The U.S. Access Board concluded after extensive investigation that pool lifts pose no greater safety risks than any other pool equipment. In studying this issue, the Board consulted with hundreds of swimming pool operators, managers, aquatic directors, adaptive aquatic instructors, and people with disabilities, and conducted on-site testing of all types of pool access methods by people with different disabilities. Based on this extensive evidence, the Board rejected the hotel industry's speculation about safety concerns. If Congress intervened every time a trade association hired its own expert to disagree with the experts whose conclusions formed the basis for a regulation, the entire federal regulatory process would come to a halt.

Moreover, the hotel industry's suggestion that the DOJ cannot require fixed lifts until it has studied the safety issues further, and that those safety issues cannot be fully understood as long as fixed lifts are not required, appears intended to prevent the DOJ from *ever* acting on this issue. In her testimony on behalf of the American Hotel and Lodging Association, Ms. Minh Vu stated that the DOJ's finding that there is no evidence of child safety risks reflects the fact that there has never before been a requirement to have permanent pool lifts, and the issue must be studied further before the DOJ can act. Yet Ms. Vu and her client vigorously oppose the imposition of any requirement to install permanent pool lifts. If Congress were to grant their request, according to Ms. Vu's logic, there would never be a sufficient basis for the DOJs to act on this issue; absent any requirement to install permanent lifts, further study would always be needed. Congress must see through this specious reasoning.

Fixed pool lifts do not pose increased safety risks. The Accesss Board thoroughly addressed safety concerns in its 2004 pool guidelines and found "no evidence" of increased risk from pool lifts. Pool owners can take the same steps for pool lifts that they already take to ensure pools or pool fixtures (such as diving boards) are not used improperly or without supervision.

Access to swimming pools and spas is vital for people with disabilities.
Access to swimming pools is extremely important for people with disabilities. Swimming is an important part of participating fully in one's community and engaging in social interaction with friends and family. Can it ever be justifiable to prevent our nation's wounded service-members and disabled veterans from their rightful access to public pools with their families after their sacrifice in defense of our nation's security and freedom? We think that is exactly what the proposed legislation to undermine the accessibility regulations would do! In addition, for many people with disabilities, swimming is a critical means of rehabilitation and exercise that helps maintain strength and independence. Portable pool lifts are frequently inadequate for people with disabilities. Too often hotel and pool staff do not know where to find the portable lifts or how to set them up.

The opportunity to swim is important for people with disabilities, as it is for the general population. Ensuring that people with disabilities have access to everyday activities and can participate in all aspects of society has always been a core civil right promoted by the ADA. The April 24th testimony of Ms. Christa Bucks Camacho, a Senior Executive Service Candidate with the Social Security Administration living with a significant disability and Ms. Ann Cody, a paralympian representing BlazeSports America, confirmed the experiences of so many people with disabilities; swimming is not only a means of recreation and relaxation, but also an important avenue for children and adults with disabilities to interact with their peers and their families, and participate in their communities. In addition, swimming is a critical way for many people with disabilities to exercise and build strength and stamina in order to facilitate greater independence. Ms. Camacho's testimony validates these results as she attributes the strength she gained through swimming to her capacity to get in and out of a car independently, to transfer in and out of bed on her own, and to go to the bathroom by herself.

Current legislative proposals threaten DOJ authority to carry out the law as iuteuded.
Certain members of Congress have introduced legislation that would delay or revise the ADA pool accessibility rules. H.R. 4200, recently introduced by Rep. David Schweikert (R-5th AZ), would 'amend the Americans with Disabilities Act of 1990' to stop the U.S. Attorney General from enforcing ADA accessibility regulations for accommodations at public pools. H.R. 4256, the Pool Safety and Accessibility for Everyone (Pool SAFE) Act', introduced by Rep. Rick Mulvaney (R-5th SC), would order the Attorney General to revise rules under Titles II and III of the ADA related to accessible means of entry to public pools. Senate counterpart bills to these

proposals, S. 2191 and S.2186, have been introduced by Sen. Jim DeMint (R-SC). Any of these bills, if enacted, would make a mockery of the DOJ's appropriate authority to enforce the ADA pool accessibility regulations and threatens the capacity of government to fulfill the law's disability rights obligations going forward. This threat was highlighted in the opposition to HR 4200 expressed so eloquently by Rep. John Conyers (D-14th MI) at the hearing on April 24. We urge that Congress recognize the havoc that would be wrought by the proposed legislation and defeat them as well as the proposed amendment that would prohibit the Department of Justice from enforcing rules under the ADA requiring public and commercial facilities to provide a permanent means of access to public pools and spas for people with disabilities. Our lawmakers should not turn back the clock on ADA implementation and reinforce the discrimination that the law was intended to overcome.

Conclusion

United Spinal Association strongly supports the principles of the ADA, enabling equal opportunities for individuals with disabilities in the areas of employment, public services, public transportation, public accommodations and communications. The law reflects hard-fought victories for civil rights and equality. Along those lines, Congress must not weaken the principles of the ADA by delaying or otherwise inhibiting DOJ's enforcement of the pool and spa accessibility regulatory requirements.

We believe that our nation's 54 million individuals with disabilities, including the more than one million individuals with spinal cord injuries and disorders, have waited long enough for access to pools and spas. The January 2012 guidance issued by DOJ clarifying the intent of the final rule for existing pools and spas did not alter the requirements DOJ published in September 2010. The gold standard for new construction is a fixed pool lift. It is logical that fixed pool lifts would be required for existing pools and spas if "readily achievable." Readily achievable means that an existing pool or spa would only need to have a fixed pool lift if the owner could demonstrate that the installation could not be afforded or was otherwise unduly burdensome. Readily achievable is the flexibility that was built into the ADA to ensure that a one size fits all approach is not required. If it is not readily achievable for a small, family-owned business to install a fixed lift for a pool or spa, then that business may be permitted to install a portable lift. The ADA's inclusion of the readily achievable standard represents the compromise between the needs of people with disabilities and the costs of accommodations.

If Congress intervenes by delaying implementation or hindering enforcement of DOJ's final rule, we fear that a dangerous precedent will have been set for the future of the ADA. The final rule was the result of an extensive regulatory process that provided ample opportunity for participation. It is now time for Congress to step back and let the regulatory process function as was envisioned when the ADA was passed with broad bipartisan support 22 years ago.

For all of the reasons stated above, we urge that the DOJ be permitted to move forward without further delay to make effective the requirements to provide access to pools, wading pools and spas on May 21, 2012. Congress must resist efforts by certain pool owners and members of Congress to deprive individuals living with disabilities from their equal rights to access and enjoy swimming and spa facilities available in their communities.

FOR IMMEDIATE RELEASE

Contact: Kathryn Potter (202) 289-3130

AH&LA Testifies in Support of Reasonable Pool Entry

Washington, D.C., April 24, 2012 – The American Hotel & Lodging Association (AH&LA) today testified before the House Judiciary Subcommittee on Constitution in support of reasonable pool and spa entry requirements for travelers with disabilities and called on the Department of Justice (DOJ) to work for sensible measures that provide access while protecting children from harm.

AH&LA ADA Counsel Minh Vu, a partner with Seyfarth Shaw, testified that, "much to their (the lodging industry) surprise and dismay, the Department of Justice changed the rules on January 31, 2012 – only six weeks before the compliance deadline," adding that "the DOJ violated the Administrative Procedures Act when it issued these substantive new requirements without public notice or comment. These requirements were never mentioned by the DOJ *at any time in the rulemaking process* and do not appear anywhere in the 2010 Final Rule."

Many lodging operators had purchased, or were in the process of purchasing, portable pools lifts that would provide access for travelers with disabilities under the 2010 Standards. These lifts can be stored when not in use, and thus prevent children from playing on them and getting hurt or damaging expensive equipment. On January 31, 2012, the Justice Department reinterpreted the 2010 Standards to require all lifts to be permanently affixed to the pool deck and available any hour a pool or spa is open to the public. Affixing a pool lift requires demolition of a pool deck to electrically ground, or bond, the lift to the deck. Portable lifts complying with all requirements of the 2010 Standards require no changes to a pool deck and can be quickly secured into place for use at adjoining pools and spas.

Ms. Vu raised several lodging industry concerns, including:

- "The 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…The Association recently submitted a report to DOJ 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."
- "The DOJ did not consider the risk of individuals with disabilities being injured while using an unattended lift that they have not used before."
- "The DOJ did not consider the liability that businesses will face when children and other people injure themselves using unattended lifts."
- "The 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."

AH&LA called on the Justice Department to withdraw the January 31, 3012, reinterpretation of the 2010 Standards 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 lifts.

These new regulations will affect hundreds of thousands of pools and spas owned or operated by businesses and state and local governments.

The lodging industry fully supports the goals of the landmark Americans with Disabilities Act and prides itself in meeting the needs of all travelers. Hoteliers are seeking a solution that achieves the dual purpose of accessibility and safety for all guests.

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Serving the hospitality industry for over a century, 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, hotel companies, student and faculty members, and industry suppliers. Headquartered in Washington, D.C., AH&LA provides members with national advocacy on Capitol Hill, public relations and image management, education, research and information, and other value-added services to provide bottom-line savings and ensure a positive business climate for the lodging industry. Partner state associations provide local representation and additional cost-saving benefits to members.

May 1, 2012

The Honorable Trent Franks
Chairman, Judiciary Committee Subcommittee on the Constitution
2435 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member, Judiciary Committee Subcommittee on the Constitution
2334 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler,

I write to you today as a(n) *parent of a youth with a disability* to respectfully request that my *son Taevan* Grant and all individuals with disabilities have equal access to aquatic recreational opportunities as individuals without disabilities. I have recently been informed that Congress is considering legislation that would prevent the Department of Justice from enforcing its own regulations and keep public pools from being accessible as required by the ADA. I am very concerned about this legislation. I strongly encourage you and your colleagues to act to ensure that individuals with disabilities have the ability to access swimming pools and other facilities.

My son Taevan lost his lower right leg at the tender age of two now he is seven and swimming ever sense. My son loves the water, it helps build his self esteem, and the water gives him a sense of freedom. My family does not own a pool and cannot afford one at this point. It would be devastating to Taevan to know he couldn't go to the pool anymore because adults did not think through this matter clearly. We are depending on you to make the righ decision. Please allow disable people the same rights as others .We all are human; the same color blood pour from our vain which shows we all are one.

It is critical that all individuals, including individuals *my son* with a disability, have the opportunity to participate in physical activity and sport. Research has shown that physical activity significantly enhances the physical, mental, social, and emotional wellbeing of an individual with a disability. [*This is a fact we have seen for ourselves! or This has certainly proven true in our family!]* Yet many individuals with disabilities face barriers to accessing physical activity opportunities and the result is that obesity rates for adults and children with disabilities are 57% and 38% higher, respectively, than rates for adults and children without disabilities (Centers for Disease Control and Prevention). Swimming is a highly desirable activity for many people with mobility impairments (more than 13 million Americans who use a wheelchair, walker, cane or other aid to assist in mobility), as it enables individuals with disabilities to move freely with fewer limitations (U.S. Census).

Our family has been fortunate to have the ability to access adaptive swimming programs through a *[BlazeSports club, our local parks department, our school, etc].* Regrettably too many families, unfortunately, do not have same opportunities. Please, do not limit the Department of Justice's ability to ensure full access to swimming pools and spas for individuals with disabilities.

Thank you for considering this request.

Sincerely,

Alene Brown-Grant

May 7, 2012

The Honorable Trent Franks
Chairman, Judiciary Committee Subcommittee on the Constitution
2435 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member, Judiciary Committee Subcommittee on the Constitution
2334 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler,

I write to you today as a swimming coach with twelve years of experience working with disabled swimmers of whom my son, Lantz, is one. I respectfully request that my son and my athletes and all individuals with disabilities have access to aquatic recreational opportunities just as individuals without disabilities. I have recently been informed that Congress is considering legislation that would prevent the Department of Justice from enforcing its own regulations and keep public pools from being accessible as required by the ADA. I am very concerned about this legislation. I strongly encourage you and your colleagues to act to ensure that individuals with disabilities have the ability to access swimming pools and other facilities.

My son has swum since he was nine years old. Swimming has provided him a way to make friends, earn respect, achieve goals and make the best of his disability (cerebral palsy). He has progressed to the highest level of disability swimming having swum and medaled in the Athens, Greece and Beijing, China Paralympics. Swimming has enabled him to develop a more positive image of himself as well as provide a role model for other children with disabilities.

I have coached swimmers with all kinds of disabilities, from amputees to swimmers with cerebral palsy, as well as my son, to traumatic brain injuries, to swimmers paralyzed from the waist down, to blind swimmers, to gunshot and shrapnel injuries and all sorts of hip and shoulder injuries. The swimmers who need the lifts the most are the ones who have no use of their legs since it is dangerous for the swimmers and their assistants who help them in and out of the pool. Without the lifts most of these swimmers will not try to transfer themselves out of their wheel chair and into the pool because of the risk of further injury.

It is critical that all individuals, including individuals like my son with a disability, have the opportunity to participate in physical activity and sport. Research has shown that physical activity significantly enhances the physical, mental, social, and emotional wellbeing of an individual with a disability. I have seen this numerous times as an individual with a disability realizes that they can participate in physical activity and achieve goals and benefits by their efforts. The pride of self returns when the swimmer sees that he or she can get better, swim faster and most of all achieve! Yet many

individuals with disabilities face barriers to accessing physical activity opportunities and the result is that obesity rates for adults and children with disabilities are 57% and 38% higher, respectively, than rates for adults and children without disabilities (Centers for Disease Control and Prevention). Swimming is a beneficial activity for many people with mobility impairments (more than 13 million Americans who use a wheelchair, walker, cane or other aid to assist in mobility), as it enables individuals with disabilities to be active with fewer limitations (U.S. Census).

Our program provides access to adapted swimming for many individuals. Regrettably too many families, do not have the same opportunities. Please, do not limit the ability of the Department of Justice to ensure full access to swimming pools and spas for individuals with disabilities.

Thank you for considering this request.

Sincerely,

Fred Lamback
5096 Mike Padgett Highway
Augusta, Georgia 30906

ASSOCIATION OF UNIVERSITY CENTERS ON DISABILITIES
RESEARCH · EDUCATION · SERVICE

May 7, 2012

Dear Representative:

On behalf of the Association of University Centers on Disabilities (AUCD), I am writing to urge you to oppose Representative Carter's amendment to the Commerce, Justice, and Science Appropriations Bill that would prevent the Justice Department from using its funds to enforce the ADA regulations to increase access for people with disabilities to swimming pools.

On March 15, the 2010 Standards for Accessible Design went into effect, setting accessibility requirements for built-in facilities including swimming pools. These standards were adopted as part of the revised regulations for Title II and Title III of the Americans with Disabilities Act of 1990 (ADA). Unfortunately, the regulations were met with strong opposition by the hotel industry due to a misunderstanding as to what they require and the "readily achievable" standard the ADA applies to ensure reasonable enforcement.

The readily achievable standard has been supported and recognized by the business community since the passage of the ADA in 1990. The standard, since its inception twenty-two years ago, provides the Justice Department with flexibility to determine what is achievable based on a covered entity's particular circumstances, and to prevent the Department from applying a rigid one-size-fits-all standard. In the case of the accessibility regulations for pool lifts, therefore, if it is too costly or burdensome for a small, family-owned business to install a fixed pool lift at their facility, the new regulations do not require that they do so. Furthermore, pool owners that fail to comply with the regulations are not subject to large damage awards largely in part to the fact that individuals cannot obtain money damages against hotels for violations of ADA's accessibility requirements.

The hotel industry has known about this issue for a decade, and has participated in every step of the way. They were given 18 additional months (past the publication of the finalized rules in September 2010) to prepare before the standards went into effect. As a result of the forgoing built in protections in the ADA, this amendment is not needed to protect small hotel owners.

Additionally, it is crucial to understand, that access to swimming pools is important for people with disabilities – it helps them participate in their communities, spend time with their families and, for many, is a critical means of exercise and maintaining good health.

If Congress intercedes by passing this amendment, we fear a dangerous precedent will have been set that could chip away at other provisions of the ADA. The final rule was the result of an extensive regulatory process that provided ample opportunity for participation. Accordingly, AUCD urges you to protect the ADA by opposing amendments that will take away the right of the Department to enforce such critical regulations.

Sincerely,

A. Anthony Antosh
President, Association of University Centers on Disabilities

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Barbara Wheeler, PhD
Multicultural Council

Amy Sharp, PhD
National Community Education Directors Council

Toby Long, PhD
National Training Directors Council

George S. Jensen, PhD
Executive Director

National Association of
Councils on Developmental Disabilities

May 8, 2012

Hon. Trent Franks, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
2435 Rayburn House Office Building
Washington, DC 20515

Hon. Jerrold Nadler, Ranking Member
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
2334 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler:

The National Association of Councils on Developmental Disabilities (NACDD) strongly opposes any additional delay in the effective date of standards under Title III of the Americans with Disabilities Act. NACDD is the association of Developmental Disabilities Councils in all 56 states and territories. We submit this letter for the record of the Subcommittee's hearing on this issue.

The ability to swim is important to individuals with disabilities just as it is to everyone else. People with disabilities should be able to enjoy swimming pools for recreation and exercise. It is troubling that ADA regulations that have been through extensive vetting and notice procedures could be so easily delayed. It would set a terrible precedent for other ADA regulations that have been or will be duly authorized with ample notice and opportunity to comment.

These regulations are no surprise to the hotel and recreation industry which has been aware of -- and involved with -- the development of the new pool accessibility standards for a decade. The Access Board initially issued standards for pool accessibility in 2002 guidelines for recreational facilities. In 2004, the Access Board incorporated those standards into its new Accessibility Guidelines. The new regulatory standards come directly from those 2004 guidelines. The Department of Justice first published an Advance Notice of Proposed Rulemaking requesting feedback concerning the Access Board standards in 2004, followed by a second Advance Notice of Proposed Rulemaking in 2008. The final rule was adopted on September 15, 2010, and gave existing pools another eighteen months to comply with the new requirements.

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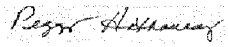
The ADA requires the Justice Department's accessibility regulations to be consistent with Access Board standards. Both the Access Board and the Justice Department have extensive expertise in setting appropriate accessibility standards that take into account the needs of people with disabilities as well as those of business owners.

The regulations at issue do not present a significant burden to hotels or other pool owners. For pools already built when the new regulations take effect, the regulations do not require owners to satisfy the new accessibility requirements. If doing so is not "readily achievable" -- that is, "easily accomplishable able to be carried out without much difficulty or expense" – they need not do so. Moreover, even if it would be readily achievable, they need not comply with the new standards if they meet previous accessibility standards issued in 1991. Thus, owners of pools built before the new regulations go into effect are not required to install a pool lift.

In conclusion, we oppose any effort to roll back regulations providing accessible swimming pools for people with disabilities. These places of public accommodation have had years of notice and substantial opportunity to prepare for these requirements.

Thank you for your consideration.

Sincerely yours,



Public Policy Manager
National Association of Councils on Developmental Disabilities

NCIL
National Council on Independent Living

www.ncil.org

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Region X
Roger Howard
Boise, Idaho

May 8, 2012

Trent Franks, Chairman
Subcommitee on the Constitution
Commitee on the Judiciary
U.S. House of Representatives
2435 Rayburn House Office Building
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Jerrold Nadler, Ranking Member
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
2334 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler:

These comments are submitted by the National Council on Independent Living (NCIL) for the record of the April 24, 2012 hearing on "The Department of Justice's Guidance on Access to Pools and Spas Under the ADA."

NCIL is the longest-running national, cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals including: Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), individuals with disabilities, and other organizations that advocate for the human and civil rights of people with disabilities throughout the United States. There are currently over 700 physical locations across America actively providing Independent Living services to people with disabilities.

This hearing was held to address the proposed legislation in the House that is set to address the concerns of the DOJ's decision to extend the rule ***RIN 1190-NYD Delaying the Compliance Date for Certain Requirements of the Regulations Implementing Titles II and III of the Americans with Disabilities Act.***
We have serious concerns with Congress preventing an executive branch agency from enforcing its own regulations such as what is written in H.R. 4256 and H.R. 4200. We must let you know that we find both these bills to be intrusive.

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NCIL Comments to House Judiciary Subcommittee - 2

We disagree with boyh bills.They try to accomplish giving the hospitality and hotel industry an opportunity to provide accessibility to the public in the least efficient manner or even at all. H.R. 4256 attempts to address technical requirements that have been negotiated over years in the rulemaking process that has worked well for all other aspects of accessibility. This bill is broader than H.R. 4200 because it prohibits any court enforcement of the new regulations for a year (while DOJ is changing the standards, as required by this bill), including enforcement by private plaintiffs.

To include Title II in the language of the resolution, even though it would appear by the rest of the language that the resolution concerns Public Accommodations only, under 28 CFR Part 36; creates confusion and uncertainty about exactly how far this resolutions impact and jurisdiction could be interpreted to go. The resolution calls for a one year extension to the effective date, which we in the community disagree with its necessity.

The ADA has been in effect for 21 years, and all the ADA pool rules have undergone extensive review for more than 10 years, with multiple comment periods and many opportunities for hotels to learn about their responsibilities. The new requirements already had a generous phase-in period of 18 months. Congress should not restrict enforcement of these, or any, ADA requirements.
In response to comments that referred to the hospitality industry not having adequate time to implement this rule, the burden of providing access to swimming pools and the cost for implementing this rule, we strongly disagree with all of these claims. Providing access to swimming pools is achievable and not burdensome. The ADA's accessibility requirements for barrier removal in existing facilities are very reasonable—they only require what is "easily accomplishable" and able to be carried out without much difficulty or expense. The rules are carefully crafted to take the needs of covered entities, such as small businesses including hotels, into account. In other words, hotel owners need not comply with the standards in the new regulations unless doing so would be inexpensive and simple. No extension or enforcement ban is needed.

We also believe that it is not acceptable for the Department of Justice to backtrack on ADA requirements because an industry exerts pressure. To do so is an invitation to other industries to say, "Roll back our requirements, too." Today it's the hotel industry. What weakening changes will come tomorrow? What other human and civil rights laws will be adjusted?
In reference to the expense this would cause for the hospitality industry, there are Tax Incentives which have always been available and under- utilized by businesses. IRS Tax code 44 and 190 provide generous credits (dollar for dollar) and deductions (reduction in gross reported to IRS) that let the hotel owner get the money back (1/2 in credit the rest in deductions) so cost should not be an issue.

The Disability and Business Technical Assistance Centers (DBTACs) has done a targeted education project for the "hospitality" industry for several years now and have repeatedly reached out to the organizations representing hotels. They can be reached at 800-949-4232 anywhere in the country.

The House bill H.R. 4256 represents an extraordinarily prejudicial precedent. This bill would deny any federal official, which can include judges, US attorneys, and other enforcing authorities, any power to administer or enforce the new DOJ ADA regulations regarding pools. It removes the waiting period and adds a clause that dismisses any suits filed after March 15, 2012. It also tries to clarify their portable vs. fixed lifts concern, something that should be done by DOJ.

The amendment would affect Title II State and Local Governments, which have been covered for access into the water since 1990. This is seen as a targeted process to undermine the strong federal enforcement role urgently needed and sometimes reached under the ADA. Passage of this bill could initiate a trend to render civil rights laws completely powerless and ineffective, even though they remain public law. This amendment would firmly take this part of the ADA backward. It is our belief that congress should craft strong civil rights protections to end discrimination, not remove the government's enforcing authority.

In the notice of proposed rulemaking, the Department of Justice requested comments on extending the compliance date "in the interest of promoting clear and consistent application of the ADA's requirements to existing facilities." The NCIL community has serious concerns with the number of years it has taken to explain "readily achievable barrier removal". Extensive technical assistance has been provided to explain to many public accommodation pool owners that the requirements are based on what they can afford to do today on their existing structures, with an obligation to provide better access when it can be afforded. Nothing has changed with that concept since the ADA was passed in 1990. It should not take another 6 months to "understand".

To include Title II entities in this extension is a huge step backward! Program access has been a requirement all along, and most state and local government-run pools and swimming facilities should already have addressed access into to the water for their programs. An extension is inappropriate as they have already been responsible for equal access to the water for years.

The part that is confusing is not for new construction and altered facilities having pools and spas, but at existing pools there is some *confusion that has been partly created by the DOJ*, as the Department responded in a letter February 21st to the American Hotel and Lodging Association (AHLA) when they asked for clarification on the provision of pool lifts. In that letter, the Department addresses several concerns raised in the "eleventh hour" of the rulemaking process by AHLA representatives - including some regarding "fixed" pool lifts versus "portable" pool lifts. The Department has created part of the problem in its convoluted definition of why a pool lift must be "fixed" which is not addressed in the rule, the scoping, or in the technical requirements of the 2010 ADA Standards for Accessible Design.

In addressing concerns by AHLA regarding existing hotels, the DOJ stated that where it is not readily achievable for a hotel owner to install a fixed pool lift, that a portable pool lift may be used if it can be attached to the pool deck while in use. That seems like a good idea to reduce liability for the hotel owner, and makes the unit more stable for the user, who also must be able

to use the unit independently. However, it is a matter of technical assistance advice that, with additional helpful information could be given without an extension in the effective date for compliance. Many of these discussions should have already taken place multiple times, given the length of time this rulemaking has taken, and to reiterate the principles of readily achievable barrier removal once again to the organizations pleading ignorance should **NOT** take an additional 6 months.

The NCIL membership is very disappointed that an exception was made in the rulemaking process by the current Administration, and strongly objects to the proposed rule extending the compliance date for public accommodations and effectively abolishing the program access requirements including pool lifts at swimming pools, parks, and resorts run with State funds through yet another swimming season - to September 2012. We insist the rulemaking proceed and become effective immediately following the 60 day extension.

Submitted by: L. Dara Baldwin, MPA – Policy Analyst, The National Council on Independent Living

Submitted For:

Mark Derry – Chair of the ADA/Civil Rights Committee for
The National Council on Independent Living

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Disability Rights Education

& Defense Fund **DREDF**

May 8, 2012

Dear Representative:

The Disability Rights Education and Defense Fund (DREDF) is a leading national law and policy center that advances the civil and human rights of people with disabilities through legal advocacy, training, education and public policy and legislative development.

On behalf of the DREDF, I am writing to urge you to oppose Representative Carter's amendment to the Commerce, Justice, and Science Appropriations Bill, H.R. 5326. This bill would prevent the Department of Justice from using its funds to enforce the American's with Disabilities Act (ADA) regulations related to grater access for people with disabilities to swimming pools. The Department of Justice must have the authority to enforce the ADA, which is crucial to protecting core civil rights principles and ensuring people with disabilities have access to all activities allowing them to participate in all aspects of society. Weakening civil rights enforcement of the DOJ sets a dangerous precedent.

The ADA was enacted over 21 years ago, and all the new ADA rules have undergone extensive review for more than 10 years, with multiple comment periods and many opportunities for hotels and other facilities with swimming pools to learn about their responsibilities. The new requirements set by the 2010 Standards for Accessible Design went into effect on March 15 and already included a generous phase-in period of 18 months, which has been extended already by two months. These standards were adopted as part of the revised regulations for Title II and Title III of the ADA. Unfortunately, the regulations were met with strong opposition by the hotel industry due to a misunderstanding as to what they require and the "readily achievable" standard, which is carefully crafted to take the needs of covered entities large and small, such as hotels, into account.

The readily achievable standard has been supported and recognized by the business community since the passage of the ADA in 1990. The standard, since its inception twenty-two

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Doing disability justice

years ago, provides the Justice Department with flexibility to determine what is achievable based on a covered entity's particular circumstances, and to prevent the Department from applying a rigid one-size-fits-all standard. In the case of the accessibility regulations for pool lifts, therefore, if it is too costly or burdensome for a small, family-owned business to install a fixed pool lift at their facility, the new regulations do not require that they do so. Furthermore, pool owners that fail to comply with the regulations are not subject to large damage awards largely in part to the fact that individuals cannot obtain money damages against hotels for violations of ADA's accessibility requirements.

The hotel industry has known about this issue for a decade, and has participated in every step of the way. They were given 18 additional months (past the publication of the finalized rules in September 2010) to prepare before the standards went into effect. As a result of the foregoing built-in protections in the ADA, this amendment is not needed to protect small hotel owners.

Additionally, it is crucial to understand that access to swimming pools is important for people with disabilities – it helps them participate in their communities, spend time with their families and, for many, is a critical means of exercise and maintaining good health and physical rehabilitation.

ADA accessibility requirements providing access to swimming pools and spas is doable, not burdensome and are, in fact, reasonable. If Congress intercedes by passing this amendment, we fear a dangerous precedent will have been set that could chip away at other provisions of the ADA and other civil rights legislation. The final rule was the result of an extensive regulatory process that provided ample opportunity for participation. DREDF urges you to protect the ADA by opposing amendments that will take away the right of the Department to enforce such critical regulations.

Sincerely,

Susan Henderson

Executive Director

CONSORTIUM FOR CITIZENS
WITH DISABILITIES

May 8, 2012

Hon. Trent Franks, Chairman
Subcommitee on the Constitution
Commitee on the Judiciary
U.S. House of Representatives
2435 Rayburn House Office Building
Washington, DC 20515

Hon. Jerrold Nadler, Ranking Member
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
2334 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler:

The undersigned members of the Consortium of Citizens with Disabilities (CCD) submit these comments for the record of the April 24, 2012 hearing on "The Department of Justice's Guidance on Access to Pools and Spas Under the ADA." CCD is a coalition of national disability-related organizations working together to advocate for public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

1. The Justice Department acted entirely within its authority in conducting its rulemaking process and interpreting its own regulations concerning swimming pool access.

We submit this statement to respond to arguments made at the hearing by the hotel industry that the Justice Department's rulemaking concerning swimming pool access and its interpretation of its own regulations constituted a lawless process that violated the Administrative Procedures Act, that the Department issued "new and arbitrary rules" in 2012 that circumvented the regulatory process, and that congressional action is necessary to "restore order to the regulation-making process."

These claims are unfounded. That the Justice Department reached different conclusions than those that the industry might have preferred does not render the process illegal or improper. On the contrary, the Justice Department's swimming pool regulations were the product of a years-long, fair, considered, and objective process that included the consideration and conclusions of the U.S. Access Board under President George Bush.[1]

The Justice Department's Rulemaking Process Was Thorough, Extensive and Fair

The Justice Department's rulemaking concerning pool lifts involved a lengthy and considered process that involved all stakeholders, including the hotel industry, throughout. The regulations at issue implement a law that was passed nearly 22 years ago. The U.S. Access Board began looking at the issue of pool access in 1996, adopted standards concerning pool access under President Bush in 2002, and incorporated those standards into its ADA Accessibility Guidelines in 2004. In 2004, the Justice Department issued an Advance Notice of Proposed Rulemaking concerning the extent to which the Access Board's accessibility guidelines should be adopted as part of the Department's own regulations. As Representative Nadler noted at the hearing, the hotel industry's comments submitted in response to that ANPRM contemplated, even then, the possibility that fixed pool lifts would be required. The Access Board's pool access requirements formed the basis for the Justice Department proposed regulations in 2008, and its final regulations in 2010.

The Access Board's extensive consideration of pool access included a detailed research study undertaken on its behalf by the National Center on Accessibility (NCA) in 1996. The study evaluated different methods and standards for their appropriateness, facilitation of independent use, degree of consistency with existing building standards, level of safety, and impact on pool design. With the assistance of a national advisory panel, the NCA undertook a comprehensive review of literature, a national survey of hundreds of people with disabilities, a national survey of hundreds of swimming pool operators, managers, aquatic directors, and adaptive aquatic instructors, and actual on-site pool testing of identified designs and devices by people with disabilities. This on-site testing examined the appropriateness, independent use, and safety of the identified means of pool access by people with diverse disabilities.[2]

The extensive process of deliberation by the Access Board, and subsequent deliberations by the Justice Department, took into account the interests of all stakeholders, including cost and

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[1] Half of the Access Board's members are appointed by the President and half are representatives of federal agencies.

[2] See National Center on Accessibility, *Swimming Pool Accessibility Project*, Executive Summary, at http://www.ncaonline.org/pools/poolstudy.shtml. Among other things, the study recommended that "[p]ool lifts shall facilitate unassisted operation." Portable pool lifts rarely offer opportunities for unassisted operation, and the hotel industry's position that portable lifts should be stored away unless and until a person specifically requests to use them would effectively prohibit unassisted operation.

safety concerns. If there was anything extraordinary about this rulemaking process, it was the thorough and detailed consideration involved. In light of this extensive process, the idea that it was somehow improper for the Justice Department to issue standards without further study is absurd.

The Department's Interpretation of its Own Regulations was Eminently Reasonable and Entitled to Deference

The hotel industry's biggest complaint is that in January 2012, the Justice Department clarified in a technical assistance document that covered entities may have to install a "fixed" pool lift in existing pools if doing so is readily achievable. The industry claims that this was a "new and arbitrary" standard, since the regulations themselves do not explicitly state that pool lifts must be fixed rather than portable.

The Department's accessibility standards, however, have always applied to fixed or "built-in" elements. Any doubt about this is resolved by the Department's own regulations, which explicitly state: "The 1991 Standards and the 2010 Standards apply to *fixed or built-in elements* of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site."[3]

Far from being unlawful, the Department's interpretation of its own regulations is perfectly permissible and eminently reasonable. Agencies have the authority to interpret their own regulations and routinely do so. In fact, agencies receive *deference* in resolving ambiguities in their own regulations. *See Auer v. Robbins*, 519 U.S. 452, 461-63 (1999). An agency's interpretation of its own regulations is controlling unless "plainly erroneous or inconsistent with the regulation." *Id.* at 461. Nothing about the Department's interpretation of its regulations to require fixed pool lifts where readily achievable is "plainly erroneous" or in any way inconsistent with the regulation itself.

2. The Justice Department's regulations do not impose high cost burdens on hotels.

Despite the hotel industry's allegations that compliance with the regulations would be so costly and burdensome that pools will shut down rather than comply, the regulations require the installation of a fixed pool lift in existing pools *only* where it is "readily achievable" -- that is, where it can be accomplished "without significant difficulty or expense." If installing a fixed lift is not affordable and easy, it is not required. The idea that this requirement is so burdensome that it will shut down pools is entirely unfounded.

[3] 28 C.F.R. § 35.151(d).

The "readily achievable" standard was imposed by Congress in the ADA itself, and has been used for nearly 22 years. In fact, this standard was *sought* by business leaders in order to avoid a "one size fits all" standard for existing facilities and have instead a more flexible, individualized standard that would take into account factors such as the size, nature, and resources of a particular business. Business owners benefit from this flexible test, but must of course make the determination about whether it is readily achievable to meet accessibility standards. That is hardly unreasonable, much less unlawful.

3. The Justice Department's regulations do not create particular safety risks.

The U.S. Access Board concluded after extensive investigation that pool lifts pose no greater safety risks than any other pool equipment. In studying this issue, the Access Board consulted with hundreds of swimming pool operators, managers, aquatic directors, adaptive aquatic instructors, and people with disabilities, and conducted on-site testing of all types of pool access methods by people with different disabilities. Based on this extensive evidence, the Board rejected the hotel industry's speculation about safety concerns. If Congress intervened every time a trade association hired its own expert to disagree with the experts whose conclusions formed the basis for a regulation, the entire federal regulatory process -- which already provides for ample stakeholder involvement -- would be threatened.

Moreover, the hotel industry's suggestion that the Justice Department cannot require fixed lifts until it has studied the safety issues further, and that those safety issues cannot be fully understood as long as fixed lifts are not required, appears intended to prevent the Justice Department from *ever* acting on this issue. In her testimony on behalf of the American Hotel and Lodging Association, Ms. Vu stated that the Justice Department's finding that there is no evidence of child safety risks reflects the fact that there has never before been a requirement to have permanent pool lifts, and the issue must be studied further before the Justice Department can act. Yet Ms. Vu and her client vigorously oppose the imposition of any requirement to install permanent pool lifts. If Congress were to grant their request, according to Ms. Vu's logic, there would never be a sufficient basis for the Justice Department to act on this issue; absent any requirement to install permanent lifts, further study would always be needed. We urge you to see past this specious reasoning.

4. Access to swimming pools is important for people with disabilities.

The opportunity to swim is important for people with disabilities, as it is for everyone. Ensuring that people with disabilities have access to everyday activities and can participate in all aspects of society has always been a core civil right promoted by the ADA. The April 24th testimony of Ms. Camacho and Ms. Cody confirmed the experiences of so many people with disabilities: swimming is not only a means of recreation and relaxation, but also an important avenue for children and adults with disabilities to interact with their peers and their families, and participate in their communities. In addition, swimming is a critical way for many people with

disabilities to exercise and gain strength in order to facilitate greater independence. This point is illustrated well by Ms. Camacho's testimony that swimming helped her to gain the strength she needed to get in and out of a car independently, to transfer in and out of bed on her own, and to go to the bathroom by herself.

5. People with disabilities attended the hearing due to their own interest and well-founded concern, rather than as a consequence of exploitation.

We were troubled by Chairman Franks' remarks that the numerous individuals with disabilities who came to the hearing had been "exploited" into taking actions that were against their own interests. People with disabilities deserve more credit than is suggested by the presumption that the individuals who attended the hearing lacked the ability to think for themselves and were simply pawns in the schemes of others. We are quite confident that the individuals with disabilities who chose to attend the hearing did so of their own accord, out of deep and abiding concerns about the legislation's potential consequences for their lives.

Those concerns go far beyond the desire for access to swimming pools. As many of the individuals who attended the hearing made clear, the Justice Department's ADA regulations and its interpretations of those regulations have played an extremely significant role in promoting their rights to live in their homes and communities rather than institutions, and to participate fully in society. Individuals with disabilities are deeply and rightfully concerned about efforts to undermine the Justice Department's authority to interpret and enforce its ADA regulations.

Thank you for your consideration of these comments.

Sincerely yours,

ACCSES

American Association of People with Disabilities

American Council of the Blind

American Foundation for the Blind

The Arc of the United States

Association of University Centers on Disabilities

Autistic Self-Advocacy Network

Bazelon Center for Mental Health Law

Disability Rights Education and Defense Fund

Easter Seals

Epilepsy Foundation

Little People of America

Mental Health America

National Association of Councils on Developmental Disabilities

National Council on Independent Living

National Disability Rights Network

Paralyzed Veterans of America

United Cerebral Palsy

United Spinal Association

May 8, 2012

The Honorable Trent Franks
Chairman
House Committee on the Judiciary
Subcommittee on the Constitution
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
House Committee on the Judiciary
Subcommittee on the Constitution
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler:

We the undersigned veterans and military organizations are writing in support of the Department of Justice's (DOJ) final rule detailing requirements for accessible entry and exit for pools and spas under the Americans with Disabilities Act (ADA). We ask that our below comments be submitted for the record of the April 24, 2012, subcommittee hearing, "The Department of Justice's Guidance on Access to Pools and Spas Under the ADA."

Our organizations strongly support the principles of the ADA, because they ensure independence and reintegration for wounded servicemembers and disabled veterans. After a decade of war, we must ensure that the ADA continues to stand for equal treatment and non-discrimination in access to rehabilitation, employment, educational, and recreational opportunities.

Specifically, Congress must not weaken the principles of the ADA by delaying or otherwise inhibiting DOJ's enforcement of the pool and spa accessibility regulatory requirements. DOJ published the final rule on accessibility in September 2010 after engaging in six years of public outreach, which included multiple opportunities for all stakeholders to provide comments. Although the final rule was to go into effect on March 15, 2012, DOJ delayed compliance until May 21.

We believe that our nation's disabled veterans and wounded warriors have waited long enough for access to pools and spas. The January 2012 guidance issued by DOJ clarifying the intent of the final rule for existing pools and spas did not change the requirements DOJ published in September 2010. The gold standard for new construction is a fixed pool lift. It is logical that fixed pool lifts would be required for existing pools and spas if "readily achievable." Readily achievable means that an existing pool or spa would only need to have a fixed pool lift if it was not costly or burdensome.

Readily achievable is the flexibility that was built into the ADA to ensure that a one-size-fits-all approach would not be required. Thus, if it is not readily achievable for a small, family-owned business to install a fixed lift for a pool or spa, then they are not required to under the ADA. The

ADA's inclusion of the readily achievable standard represents the compromise between the needs of people with disabilities and the costs of accommodations.

If Congress intercedes by delaying implementation or hindering enforcement of DOJ's final rule, we fear that a dangerous precedent will have been set for the future of the ADA. The final rule was the result of an extensive regulatory process that provided ample opportunity for participation. It is now time for Congress to step back and let the regulatory process function as was envisioned when the ADA was passed by a bipartisan Congress 22 years ago.

If you have any questions, please contact Heather Ansley, Vice President of Veterans Policy for VetsFirst, a program of United Spinal Association, at (202) 556-2076, ext. 7702 or by e-mail at hansley@vetsfirst.org.

Sincerely,

Blinded Veterans Association
Disabled American Veterans
Iraq and Afghanistan Veterans of America
Jewish War Veterans
Military Officers Association of America
National Association for Black Veterans
Paralyzed Veterans of America
Veterans for Common Sense
Veterans of Foreign Wars
Veterans of Modern Warfare
VetsFirst, a program of United Spinal Association
Vietnam Veterans of America

Department of Justice

STATEMENT

OF

EVE HILL
SENIOR COUNSELOR TO THE ASSISTANT ATTORNEY GENERAL
FOR CIVIL RIGHTS
DEPARTMENT OF JUSTICE

BEFORE THE
COMMITTEE ON JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
UNITED STATE HOUSE OF REPRESENTATIVES

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

APRIL 24, 2011

Statement of the U.S. Department of Justice
Before the House Committee on the Judiciary's
Subcommittee on the Constitution
Hearing on Pool Accessibility
April 24, 2012

The Department of Justice appreciates the opportunity to submit this statement for the record of the Subcommittee's April 24, 2012 hearing on the Department's Guidance on Access to Pools and Spas Under the Americans with Disabilities Act (ADA) and related legislation. In this statement, the Department will address misunderstandings about the pool access requirements of the Department's revised ADA regulations and explain how the bills currently being considered by this Committee would undermine a thorough and transparent regulatory process which solicited and considered input from all interested stakeholders on multiple occasions, revise the long-established legal framework of the ADA, and unnecessarily impair the civil rights of people with disabilities. The Department would have been pleased to testify at the hearing itself had it received sufficient notice to enable it to do so.

I. Introduction

The ADA prohibits state and local governments (title II) and public accommodations (title III) (including hotels, resorts, swim clubs, and sites of events open to the public) from discriminating against people on the basis of disability. As these requirements apply to existing pools, they are intended to ensure that, over time, people with disabilities can enjoy the same activities—such as swimming in a hotel pool, participating in a community swim meet, or taking private swim lessons—with the same independence, ease, and convenience as everyone else. Many people with mobility disabilities have long been excluded from these activities, not because they were physically unable to swim, but because there was no way for them to get into or out of a swimming pool. This reduced them to mere bystanders, sitting at the side of the pool to watch people without disabilities, including their families and friends, enjoy the therapeutic and recreational benefits of swimming. The Department's revised ADA regulations, which were published in 2010 after extensive notice and comment, adopted revised ADA Accessibility Standards that for the first time included requirements for accessible entry to swimming pools. These requirements apply to new construction and alterations of swimming pools, as well as to existing pools through the application of the title II program access[1] requirements and title III barrier removal requirements.

[1] Section 35.150(b)(1) of the title II regulation, which addresses program accessibility in existing facilities, provides state and local governments with flexibility to use other means such as acquisition or redesign of equipment, or reassignment of programs or services to accessible buildings, in lieu of making structural alterations to facilities when they are providing program accessibility in their existing programs, services, or activities.

Consider the following scenarios:

- A parent with a mobility disability finds herself with an hour for a family swim. She, like any other parent, wants to be in the water with her children, but before she can go swimming, she must do the following: find hotel staff that a) knows where the lift is and can easily access it; b) knows how to set up or install the lift; c) is available and not otherwise engaged in other work; and d) can install the lift in a timely manner. Even if all this could be done in a short period of time, the experience and use of the amenities would be significantly different for her and her family than for other guests without disabilities.

- A businessman with a mobility disability checks into his hotel after a long day on the road and wants to get some exercise before preparing for the next day's meetings. If only one staff person is on duty, or available staff do not have the physical capacity to transport and set up the lift, then the likely result will be that this guest will be denied access to this amenity, which is otherwise readily available to guests without disabilities.

The Department believes there are compelling reasons why these bills should not be passed. Specifically, modifying or repealing the regulatory requirements as they apply to pools would do the following:

1. Undercut the thorough regulatory process to which the rules were subject;

2. Unnecessarily undermine the longstanding legal framework for readily achievable barrier removal provided in the statute; and

3. Compromise the civil rights provided by the ADA to people with disabilities;

H.R. 4256 proposes to extend for one year the deadline for compliance with the revised ADA title III regulation as it applies to the accessible means of entry to pools, including swimming pools, wading pools, saunas, steam rooms, spas (or so-called "hot tubs"), wave pools, lazy rivers, sand bottom pools, other water amusements, or any other man-made body of water subject to the ADA (hereinafter "pools"). H.R. 4256 also requires the Attorney General to amend the ADA regulations within 60 days of the effective date of the legislation to (1) allow places of public accommodation to use a portable pool lift (i.e., a non-fixed, movable lift) on request by a person with a disability even where it is readily achievable for the entity to provide a fixed, permanent lift, and (2) allow places of public accommodation to use one portable lift to share between pools if that entity has more than one pool or water feature. H.R. 4200 proposes to amend the text of the ADA to prohibit the Attorney General or any official of the Federal Government, from enforcing the regulations as they apply to accessible means of entry to pools. The effect of this bill would be to essentially repeal the provisions of the 2010 Standards for Accessible Design ("2010 Standards") as they apply to pools, leaving individuals with disabilities without the ability to safely and independently access pools owned or operated by public entities and

public accommodations.

This statement seeks to clarify the requirements of the ADA on pool accessibility and address the serious misunderstandings that have arisen in connection with them. Because the hearing focused on the application of the Department's revised requirements to public accommodations under title III, these comments will, for the most part, focus on issues related to public accommodations.

II. Background on Department's Revised ADA Regulations

Title III of the ADA prohibits discrimination by places of public accommodation, which include, for example, restaurants, hotels, retail stores, doctors' offices, and theaters. Title III requires newly constructed and altered business facilities to be fully accessible to people with disabilities, applying the 2010 Standards. In addition, title III requires businesses to remove accessibility barriers in existing facilities when it is readily achievable to do so.

The Department of Justice published its revised final regulations implementing the ADA for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010. The revised regulations update the general nondiscrimination provisions implementing the ADA; with some exceptions, revisions to these general nondiscrimination provisions have been in effect since March 2011. The revised regulations also adopt revised design requirements for new construction and alterations, known as the 2010 ADA Standards for Accessible Design ("2010 Standards"). The 2010 Standards update requirements for accessible fixed or built-in elements that were originally covered in the 1991 ADA Accessibility Guidelines ("1991 Standards") and also establish new ("supplemental") requirements for a variety of recreational facilities, including requirements for accessible means of entry for swimming pools.

The 2010 Standards are based in large part on the 2004 ADA and Architectural Barriers Act (ABA) Accessibility Guidelines, which were adopted by the United States Access Board ("Access Board") in 2004 as the culmination of a decade-long effort to revise its 1991 ADA Accessibility Guidelines. *See* 69 FR 44083 (July 23, 2004). The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the guidelines issued by the Access Board, 42 U.S.C. 12134(c), 12186(c).

The 2010 Standards require that newly constructed or altered pools have an accessible means for people with disabilities to enter and exit. The 2010 Standards also provide technical specifications for when a means of entry and exit is accessible, such as, for pool lifts, the location, size of the seat, lifting capacity, and clear floor space. In addition, the title III regulation provided that as of March 15, 2012, public accommodations must use the 2010 Standards as the benchmark for their ongoing obligation to remove architectural barriers in existing facilities to the extent such compliance is readily achievable. 28 CFR 36.304(d)(2).[2] However, with respect to the readily achievable barrier removal obligations for

[2] The title III rule requires covered entities to apply the alterations provisions of the regulations when removing barriers, but only to the extent that it is readily achievable to do so. 28 C.F.R. 36.304(d).

existing pools, the Department delayed the compliance date for the specific requirements in the 2010 Standards relating to accessible means of entry into existing pools until May 21, 2012. The delay was provided in order to give pool owners and operators, many of whom misunderstood the application of the barrier removal obligation to their existing pools, additional time to comply with the requirements.

Because the 2010 Standards include requirements for accessible means of entering and exiting pools, businesses are required by the regulation to make their existing pools accessible, but only to the extent it is readily achievable. To determine whether providing an accessible means of entry and exit is readily achievable, businesses must use the same general barrier removal analysis that has applied to other elements in existing facilities covered by the ADA Standards, since they were first issued in 1991. Both the ADA statute, which Congress passed in 1990, and the Department's ADA title III regulation, which was originally published in 1991, set out a case-by-case analysis to be used in determining whether removing barriers is readily achievable. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. 28 C.F.R. § 36.104. Specifically, the regulations provide at § 36.104 that in determining whether an action is readily achievable, public accommodations must consider the following factors:

(1) The nature and cost of the action;
(2) The overall financial resources of the site or sites involved; the number of persons employe at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;
(3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

The readily achievable factors are purposefully individualized to assess a particular entity's ability to remove barriers in its existing facilities, and this approach was designed to balance the ADA's mandate to provide equal access for persons with disabilities alongside businesses' legitimate financial and operational concerns.

III. The Regulatory Process was Thorough and Transparent

The regulatory requirements at issue in both these bills are the result of a comprehensive six-year regulatory process by the Department, which included the issuance of an Advance Notice of Proposed Rulemaking ("ANPRM") (2004), a Notice of Proposed Rulemaking ("NPRM") (2008), and a day-long public hearing on the proposed rule (2008). The Department received over 900 comments during the 2004 ANPRM. During the course of the 2008 NPRM alone, the Department received over 4,435 written comments from individuals with disabilities, disability advocacy groups, state and local governments, and the business community, including the American Hotel & Lodging Association ("AH&LA"), the Asian American Hotel Owners Association ("AAHOA"), and swimming pool owners and operators. In addition to this lengthy rulemaking process, the pool requirements were also subject to an additional public notice and comment period in 1999 during the Access Board's rulemaking on its recreation guidelines.

The record clearly establishes that the Department made clear throughout the regulatory process that the ADA Standards apply to fixed or built-in elements, not portable, non-fixed elements. For example, in 2004 when the Department began the process of revising its regulations as a result of the Access Board's revised ADA/ABA Guidelines, it dedicated an entire section of its ANPRM to discussing the fact that the ADA Standards only applied to fixed and built-in elements. In a section of the ANPRM entitled "Application of ADA Standards and ADA to Free-Standing Equipment," the Department stated that "the revised *ADA Standards will apply directly only to fixed equipment*—as described above, equipment that becomes built into the structure of a facility—and not to free-standing equipment." 69 Fed. Reg. 58768, 58775 (Sept. 30, 2004) (emphasis added). When the Department issued its NPRM in 2008, it once again reiterated that the ADA Standards applied to fixed elements. In a section of the NPRM entitled "Section 36.406(b) Application of Standards to Fixed Elements," the Department proposed regulatory text to clarify that "the requirements in the proposed standards (and the 2004 ADAAG) prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to people with disabilities." 73 Fed. Reg. 34508, 34543 (June 17, 2008). In 2010, the Department adopted the regulatory text proposed in the NPRM providing that "[t]he 1991 Standards and the 2010 Standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site." 28 C.F.R. §§ 35.151(d), 36.406(b). In addition to the notice the Department provided in its rulemaking process regarding the application of the ADA Standards to fixed elements, the Access Board also made it clear throughout its rulemaking process for the ADA Accessibility Guidelines – including the pool access guidelines included in the 2004 ADA/ABA Guidelines – that the Guidelines only applied to fixed elements.[3]

[3] In the preamble to the Access Board's ADA/ABA Accessibility Guidelines, on which the Department's 2010 Standards are based, the Access Board makes clear that the guidelines apply to fixed elements.

> *Comment*. In the proposed rule, the term "fixed" had been removed as a modifier of certain elements covered by the guidelines, such as tables and storage. This was removed, along with references to elements that are "built-in." Some

Accordingly, the technical assistance document issued by the Department in January 2012 regarding pool access requirements was not the first time that the Department had disclosed that the pool access requirement of the 2010 Standards applied to fixed elements so stakeholders had ample opportunity during the regulatory process to raise concerns regarding the requirement for fixed elements for pool access.

As part of its final rule, and in compliance with the Small Business Regulatory Enforcement Fairness Act (SBREFA) and Executive Order 12866, the Department issued its Final Regulatory Impact Analysis (RIA), which provided an analysis of the costs and benefits of adopting the changes contained in its rules. The Department's RIA looked at costs with respect to fixed and built-in elements when analyzing the provisions of the 2010 Standards. With respect to existing pools, the RIA provided cost estimates for the barrier removal requirements for both "the pool lift equipment *and* installation costs." *See* Final Regulatory Impact Analysis of the Final Revised Regulations Implementing Titles II and III of the ADA, Including Revised ADA Standards for Accessible Design at p. 283 (July 23, 2010) (emphasis added), available at http://www.ada.gov//regs2010/RIA_2010regs/ria.htm.See also RIA at 59-60.

H.R. 4256 and H.R. 4200 attempt to substantively change the Department's regulation, and in so doing, undermine the thorough and transparent rulemaking process underlying the revised ADA regulations. However, the regulations at issue here were subject to a comprehensive regulatory process, which included multiple opportunities for all stakeholders to present facts and comments for the Department to consider in determining whether it should adopt the proposed ADA Standards, including the pool access provisions. During the comment process, the Department did not receive any comments that raised questions about the basis for the Access Board's decision to include fixed pool lifts as an accessible means of entry for pools in its revised ADA/ABA Guidelines. In this regard, the Department received no requests to revisit the Access Board's conclusion that fixed lifts were an important—and safe—means for providing access to pools for persons with disabilities, and no persuasive information that would support a different conclusion. Accordingly, after extensive and multiple comment periods, the pool access requirements were adopted as part of the 2010 Standards. Any attempt to rewrite these

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comments argued that this change could be interpreted as broadening the scope of the guidelines to cover elements that are not fixed or built-in.

Response. References to "fixed" and "built-in" were removed for editorial purposes of clarity and consistency. While the scope of the guidelines does not extend to elements that are not fixed or built-in, the Board believes that such clarification can be appropriately addressed in the regulations that implement the enforceable standards based on the Board's guidelines. 69 Fed. Reg. 44084, 44089 (July 23, 2004). This approach was consistent with the application of the previous version of the guidelines, the 1991 ADA Accessibility Guidelines, which also provided that "[t]hese guidelines [were] intended to address only that equipment that is fixed or built into the structure of the building." 56 Fed. Reg. 35415, 35408 (July 26, 1991). With regard to the specific recreation provisions of the revised guidelines, which include the pool access requirements at issue, the Board has stated that "[th]e guidelines apply to 'fixed' facilities and elements. *They do not cover equipment that is frequently moved.*" *See* Accessible Sports Facilities: A Summary of Accessibility Guidelines for Recreation Facilities at p. 7 (June 2003), available at http://www.access-board.gov/recreation/guides/pdfs/sports.pdf (emphasis added).

regulations and circumvent the regulatory process is especially concerning given that this rule implements statutory civil rights guarantees.

IV. The Proposed Legislation Would Unnecessarily Change the Long-Established Legal Framework of the ADA

Both the ADA and the title III regulation require public accommodations to remove accessibility barriers when it is readily achievable to do so. The ADA Standards provide the benchmark for readily achievable barrier removal in existing facilities. *See*, e.g., 28 C.F.R. § 36.304(d) - "Except as provided in paragraph (d)(3) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in §36.402 and §§36.404 through 36.406 of this part for the element being altered." Thus, an existing pool must provide a fixed lift or other element that complies with the ADA Standards if it is readily achievable to do so. The same approach to fixed versus portable accessibility elements has been in place for 20 years. ("Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable." 28 C.F.R. §36.304(e); *see also* Title III Final Rule, 56 Fed. Reg. 35544, 35598 (July 26, 1991)). The Department, in technical assistance, has made clear that the same approach applies to pool lifts (March 2011 ADA Update: A Primer for Small Businesses," March 16, 2011, at 10, available at http://www.ada.gov//regs2010/smallbusiness/smallbusprimer2010.htm. ("Therefore, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so. For example, a hotel must determine whether it is readily achievable to make its swimming pool accessible to people with mobility disabilities by *installing* a lift or a ramp as specified in the 2010 Standards.") (emphasis added)).

The statute and regulations provide specific factors to be considered in making the readily achievable determination. The factors are necessarily individualized to assess a particular entity's ability to remove barriers to their existing facilities—e.g., the nature and cost of the action; the overall financial resources of the covered entity; and legitimate safety concerns. Changing the regulation is unnecessary, as the readily achievable barrier removal framework already provides covered entities the option of using a portable, non-fixed lift if it is not readily achievable to install a fixed lift. Moreover, installing a lift of any type may not be required for some entities under the barrier removal analysis. Thus, the current regulations reasonably balance the access needs of individuals with disabilities against legitimate and sometimes competing safety and feasibility concerns.

To override the readily achievable barrier removal analysis, as H.R. 4256 would do, undercuts a 21-year statutory requirement. As stated above, the barrier removal requirements have been in place since the ADA was enacted in 1990. At that time, Congress made a conscious effort to address the concerns of businesses. To that end, it decided there should be no one-size-fits-all answer to what constitutes "readily achievable" under the ADA. Again, among the key factors to be considered are the nature and cost of the needed action, all the resources available to the covered entity, and the impact on the operation of the site, including legitimate safety requirements that are necessary for safe operation.

Thus, determining whether removal of a particular barrier is readily achievable will vary from business to business and sometimes from one year to the next for the same business. Changing economic conditions can be considered in determining what is readily achievable. We note that this standard is not new. Regulated entities of all sizes have successfully applied this standard for years because the standard provides the flexibility for each public accommodation to tailor its response to the ADA Standards to take into account its specific circumstances.[4]

Businesses will not be harmed by the Department's regulations for several reasons. First, to assist businesses with complying with the ADA, Section 44 of the Internal Revenue Code allows a tax credit for small businesses and Section 190 of the Internal Revenue Code allows a tax deduction for all businesses. 26 U.S.C. §§ 44, 190. The tax credit is available to businesses that have total revenues of $1,000,000 or less in the previous tax year or 30 or fewer full-time employees. This credit can cover 50% of the eligible access expenditures in a year up to $10,250 (maximum credit of $5,000). The tax credit can be used to offset the cost of undertaking barrier removal and alterations to improve accessibility; providing accessible formats such as Braille, large print and audio tape; making available a sign language interpreter or a reader for customers or employees, and for purchasing certain adaptive equipment. The tax deduction is available to all businesses with a maximum deduction of $15,000 per year. The tax deduction can be claimed for expenses incurred in barrier removal and alterations. Second, hotels and other public accommodations will not be required to close their existing pools. Title III of the ADA does not require that a public accommodation close its facility if measures needed to comply with the applicable ADA Accessibility Standards are not easily accomplishable or able to be carried out without much difficulty or expense—whether it is an entrance to a basement restaurant, an inaccessible playground, or an inaccessible swimming pool. Similarly, covered entities will not be in violation of the ADA if they are unable to acquire a lift because of a manufacturing backlog. The lack of availability of a compliant lift because of limitations in manufacturing capacity would demonstrate that it is not readily achievable to comply with the requirements, until such time as a lift becomes available. Third, safety and an increased risk of injury is a concern that was considered during the rulemaking process. However, the rulemaking record reveals no evidence that portable or fixed lifts are unsafe. Moreover, the Access Board, in issuing the Guidelines for recreation facilities on which the pool access requirements in the 2010 Standards are based, found "[p]ool lifts have been commercially available for over 20 years. While the Board recognizes that inappropriate use of pool lifts may result in accident or injury, the Board is not aware of any incidents of injury or accidents involving pool lifts. The Board is also not aware of any evidence that shows that pool lifts are any less safe than other components of a pool facility, such as other means of pool entry, when they are used inappropriately. Manufacturers are also incorporating features which are intended to discourage inappropriate use, such as fold-up seats and covers." *See* 67 Fed. Reg. 56352, 56379 (September 3, 2002). Notwithstanding the above, the ADA permits consideration of legitimate safety requirements in its assessment of whether barrier removal is readily achievable, "so long as the requirements are based on actual risks and are necessary for safe operation of the public accommodation." 28 CFR pt. 36, App. C at 884 (2011). However, speculation or

[4] The Department notes that the barrier removal standard is not new to the lodging industry. Under a grant from the Department, the AH&LA (then the American Hotel & Motel Association) developed an ADA compliance manual for use by the lodging industry, which details the application of the barrier removal standard. *See* Accommodating All Guests: The Americans with Disabilities Act and the Lodging Industry at pp. 22-29 (December 1992).

unsubstantiated generalizations about safety concerns or risks cannot form the basis of a legitimate safety requirement.

V. The Proposed Legislation Would Impair the Civil Rights of People with Disabilities

The ADA's readily achievable barrier removal framework balances the provision of equal access for persons with disabilities with legitimate financial and operational concerns of businesses. To this end, a pool owner is required to install a fixed lift in an existing pool only to the extent that it is readily achievable to do so (i.e., easily accomplished without much difficulty or expense). H.R. 4256 and H.R. 4200 would change the substance of the pool requirement and irreparably skew this carefully crafted balance for people with disabilities by legislating that people with disabilities have no right to equal and independent access to a hotel's pool even where the hotel could readily afford to install a fixed lift.

Many entities wish to use portable lifts so they can keep the lifts stored away and take them out only at the request of a person with a disability. While, at first glance, this approach may seem to pose only minor inconvenience, it puts people with disabilities at a disadvantage by unnecessarily imposing very different terms and conditions for access to amenities that are immediately available to other customers.

Lifts should be consistently mounted for safe and independent use in an accessible location that complies with the requirements in the 2010 Standards and that persons with disabilities will not experience discrimination on the basis of their disability. Prior to the pool requirements in the 2010 Standards, many older portable lifts were not independently operable and were difficult for the swimmer to use. For example, lifts with hand cranks were included among the early pool lifts and they were not independently operable and were particularly difficult to use in getting out of the pool, even with assistance.

The 2010 Standards provide specific requirements for the design, location, and operation of pool lifts. The use of non-fixed portable lifts that are made available only on the request of a person with a disability raises safety concerns because of the possibility that the lift will not be assembled and located properly in relationship to the pool for the safe and independent use by a person with a disability. For instance, providing a consistent mounting point for a pool lift helps to assure that the lift will be consistently mounted in a location that complies with the 2010 Standards. In contrast, portable lifts that are not fixed to the pool deck can be erratically placed in any location with respect to the pool and used in a way that does not comply with 2010 Standards. Allowing lifts to be provided only on request could also increase the probability that the lift will be placed in a location that fails to provide the necessary clear floor space as required by the 2010 Standards. This clear floor space is necessary to allow placement of a wheelchair or other mobility device next to the lift to facilitate an individual's safe transfer from the mobility device to and from the lift.

H.R. 4256 also would require revising the regulation to allow an entity to share a portable lift

among pools when that entity has more than one pool. Sharing portable pool lifts between or among multiple pools also can pose safety risks to swimmers with disabilities because if a lift has been moved to another pool, a person with a disability might be unable to get out of the pool when they would otherwise choose to do so. This is increasingly problematic if there are multiple pools spread out over a large area.

The use of non-fixed portable lifts only on request of a person with a disability significantly increases the likelihood that persons with disabilities will be denied the "equality of opportunity and full participation" that the ADA requires. Allowing portable lifts to be provided only upon request runs counter to the ADA's core principles of inclusion, equal opportunity, and independence by forcing individuals with disabilities to rely upon others to provide access for them. It would require an individual with a disability to call special attention to herself and her disability, interrupt staff who may be engaged in meeting the needs of other guests, and delay her enjoyment of the pool.

A complicating factor in the use of portable lifts is the fact that many portable lifts use batteries, which require attention to ensure they are fully charged so the lift is operational when needed. When lifts are stored away and not regularly recharged, the battery will die. Thus, even if a hotel employee is readily available and able to quickly and properly set up a portable lift upon request, a dead battery renders the lift unusable.

Consistent with the Department's experiences regarding portable accessible elements, persons with disabilities have relayed their experiences of unsuccessful attempts to use portable non-fixed lifts. For example, an individual who commented on the Department's recent NPRM regarding the four-month extension of the compliance date for existing pools offered the following observations:

> *"Portable lifts will mean that individuals [with disabilities] need to approach personnel, and have trained personnel available to use these lifts. In my experience, being forced to rely on additional personnel will limit safe access in practice. Hotels in particular frequently rely on low paid and apparently temporary workers who will not know how to access portable lifts or how to safely set them up. In practice when I have to receive assistance from personnel as opposed to being able to use accessible features independently, I find innumerable obstacles and waits that deny safe and equivalent enjoyment of facilities and services."*

Witnesses with disabilities at the April 24, 2012 hearing also emphasized the difficulties with portable accessible pool lifts. Ann Cody, Director, Policy and Global Outreach, BlazeSports America, testified:

> *"In my experience, the best way to ensure access to swimming pools is a fixed or permanent lift. A fixed lift is there and ready whenever a person with a disability wants to swim. The person doesn't have to find a staff person who knows where the lift is, where the keys are, how to set it up, and operate it. Often the keys to these lifts reside with a staff person who has to be paged over the radio. If the person with the key is in the middle of a job or on a break they are not able*

to respond quickly leaving the person with a disability wondering if they'll be able to use the pool at all."

In its comments to the Department's 2004 Advanced Notice of Proposed Rulemaking, the National Center on Accessibility (NCA) advised the Department that it had collected anecdotal information over several years indicating that pool lifts installed on a temporary basis are not readily available for use by people with disabilities. The NCA noted a lack of staff on any given day with the training and expertise to install the pool lift, which would render the pool unavailable for use by people with disabilities. In addition to staffing concerns, individuals with disabilities have reported that there are often missing parts when portable lift assembly is attempted so that the lift is inoperable (or not safely operable). The NCA also questioned the feasibility of using one pool lift for multiple settings. Shared portable lifts compromise equal access and independence, by again relying on staff for pool access. Sharing lifts also poses a potential safety risk for a swimmer with a disability who may be in the pool and unable to exit because the lift has been moved to another location. This comment by the NCA is particularly notable because NCA conducted the Access Board's pool lift study.

The Department recognizes that under the current ADA regulatory framework, portable lifts may sometimes be used in situations where it is not readily achievable to provide fixed lifts. However, revising the regulation to allow portable lifts in all circumstances—as H.R. 4256 does—undermines the statute and regulation by removing the individualized barrier removal assessment and determining de facto what is readily achievable for all entities, irrespective of an entity's ability to provide a fixed lift.

VI. Conclusion

The Department stands by the existing regulatory framework governing the accessibility of pools for people with disabilities, and opposes the adoption of legislation that would undermine the six-year, thorough and transparent rulemaking process that offered multiple opportunities for stakeholders to comment and address any concerns with the Department's proposals. When the ADA was signed into law in 1990, Congress charged the Department with enforcing this critical civil rights statute and promulgating regulations to implement it. The Department has always taken these responsibilities very seriously and is committed to vigorous stewardship of the ADA to meet the legitimate needs and interests of both people with disabilities and covered entities.