

PROPOSED DOJ RULEMAKING FOR ENFORCING ADAAG/ABAAG

On September 30, 2004, the Department of Justice published a “notice of proposed rulemaking” regarding its process to issue rules on the enforcement of the new ADAAG/ABAAG. (A comprehensive update of ADAAG was published by the Access Board on July 23, 2004.) The DOJ notice is available at <http://www.usdoj.gov/crt/ada/proposal.htm>; the new ADAAG is available at: <http://www.access-board.gov/ada-aba.htm>. Both are free of charge.

The DOJ has just begun the rule-making process, and the notice is fundamentally a series of options they are considering and request for input. It seeks comment on a number of issues as discussed below. **COMMENTS ARE DUE TO THE DEPARTMENT OF JUSTICE ON JANUARY 28, 2004.** Note that it is likely to take at least several months after the close of comments to develop a complete proposed rule and publish that. There will then likely be another six months of comment, then a period of revision before publishing. So the earliest the new DOJ rule could be final is likely to be sometime in 2006. The effective date for start of enforcement of the new ADAAG/ABAAG will then more than likely be later in 2006 or 2007.

Of particular concern to property owners and designers are the following:

New Construction and Alterations

The new ADAAG/ABAAG will absolutely apply in entirety to these projects after some effective date, specified by both a “trigger” and “time period.” It will apply to facilities owned by both local governments/public entities and private entities. For the original ADAAG the trigger dates were as follows:

- New Construction by private entities: building permit issued after January 26, 1992 and first occupancy or certificate of occupancy after January 26, 1993
- New Construction by local governments: start of construction after January 26, 1992
- Alterations by either public or private entities: start of construction after January 26, 1992

The DOJ says it intends, to the extent practicable, to use the same triggering events as above.

They are concerned, however, about situations where entities don't have to obtain building permits or
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certificates of occupancy: for example, outdoor recreational facilities. They request specific examples where the above triggering-events are simply not practicable.

Re: effective date, this will be tied not to the publication of the revised ADAAG/ABAAG (July 2004), but rather the publication of the final DOJ rule making ADAAG effective, and thus probably some time in 2006 as noted above. The DOJ comments that the date of January 26, 1992, above, which was 18 months after ADA was passed by Congress, was in the context of a new law and significant changes in the design guidelines. Eighteen months after they publish their final rule “may be inappropriately long” for the revised ADAAG/ABAAG. The other two options being considered are six months and twelve months. Given that 1) a lot of the standards aren’t changed; 2) people can voluntarily do most of it immediately (except where the new requirement is lower than the current one); 3) how long it takes for DOJ to get through the process to actually finalize the rule; and finally, 4) they may require everybody to upgrade some or all things legally designed under the old ADAAG to the new one (see below), they appear to be inclined to use six months from the date the DOJ rule is final and thus no earlier than sometime in 2006. However, they will consider 12 months if enough commenters make a good case for it. They may also do six months with some specific exceptions. If you think you can make an effective case for not meeting this new standard until more than six months after the final rule is published, by all means comment!

Existing Facilities Owned by Private Entities

This is the tricky one. The DOJ notes that the issue is not discussed at all in the new ADAAG because it is not the responsibility of the Access Board to address the issue of if/when facilities designed under ADAAG have to be upgraded to ADAAG/ABAAG. But don’t be misled by the fact that there is no discussion of upgrading existing facilities in ADAAG/ABAAG.

First, the DOJ stated that it fully intends to require anybody who has a facility that does not comply with the current ADAAG as of the effective date they set for ADAAG/ABAAG to make modifications in accordance with the new one. Remember that private entities are required to make modifications where it is “readily achievable” to do so, and that this is a continuing, infinite time requirement if a facility has not already been brought into full compliance with ADAAG. Given that an

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awful lot of the modifications that were done did not fully comply (not to mention the modifications that actually violate ADAAG such as curb ramps built in access aisles), there is an exposure that somebody will file a complaint, the DOJ will investigate, and the owner of a property will be ordered to make modifications.... complying with the new one!

Option I proposed by DOJ is the so-called safe harbor. There is a pretty good example of how it would work so I will simply paraphrase it. The new ADAAG/ABAAG requires that the side reach range be 48" maximum above the floor, less than the 54" max in the old standard. If a hotel owner already lowered light switches that were previously 60" to 54" to meet the requirements for barrier removal for existing facilities, a safe harbor would mean they would not have to go back and lower them all to 48". If they have not yet been lowered from 60", they would be required to lower them to 48" as soon as it is readily achievable. (We won't go into all the details of "readily achievable"!)

If, however, they were improperly installed at 60" as part of new construction or alterations after the trigger/date of the original ADA, they would be required to correct them immediately upon it being noted, regardless of it being "readily achievable." In other words, they are not going to "grandfather" stuff that still doesn't comply with ADAAG-91. Just because it wasn't readily achievable 10 years ago doesn't mean it is not readily achievable now! And the safe harbor will not apply to things that were not covered in the original ADAAG (such as the ATM, recreational facility and other "new" requirements).

The DOJ is interested in whether the safe harbor approach should apply to the entire standard, or whether it should be limited to specific types of issues. Given that individuals and groups will almost certainly submit comments asking that there be no safe harbor at all, and others will submit comments arguing that a safe harbor not be applicable to specific items they believe passionately should be implemented everywhere, it behooves those who think that the safe harbor should be applied to something to comment!

Option II in this area is to have reduced scoping for specific elements. The concept is the same as the special exceptions for historic preservation included in the rules published back in 1991. They are particularly interested in using this for areas where there weren't any requirements in the original ADAAG. The example they give is that the new ADAAG/ABAAG requires that a swimming pool over 300 ft in perimeter must have two accessible means of entry to the pool. Specific requirements for swimming pools were not in ADAAG (although there were applicable requirements for design of parking and bathrooms, etc.) Option II might result in a specific requirement that a swimming pool existing

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before the effective date of ADAAG/ABAAG can have only one accessible means of entry into the pool. Thus, if there is no accessible entry now, the owner would have to retrofit the pool to provide only one when it is readily achievable under the rules for existing pools but would never have to add the second one.

Option III is to add a number of exemptions that specific elements are exempt from barrier removal requirements altogether. If there is a general exception for pool entries noted above for existing pools, the pool owner would never have to add any accessible entry to that pool, until or unless the pool is altered (again we won't go into the definition of alterations) at which time two accessible entries would have to be provided (because alterations have to fully meet ADAAG/ABAAG.)

Clearly, they are looking for commenters to make cases regarding which elements merit either reduced scoping or specific exemption.

Specific Issues

The next section of the DOJ document is a discussion of reduced scoping for specific areas they have already identified as potentially troublesome. The only one that appears to even remotely apply to parking facilities is "equipment issues." However since the requirements applicable to parking equipment really haven't been substantively changed, it probably isn't a major area of concern to us. The examples they give are "previously owned" ATMs and amusement rides that facility owners may wish to relocate from current fixed positions to new ones. Technically under the alteration rules, they would have to buy new ones rather than relocate existing ones that don't comply with the new requirements.

Title II Complaints

Title II applies to local governments (both state and municipal, including agencies such as public universities, park districts, etc.) There are substantially different requirements regarding existing facilities under ADA if the building is owned by a public entity. These entities are required to make their "programs and services" accessible unless it is an "undue burden" which is a broader requirement than "removing barriers where readily achievable," which was applicable to private entities. A public entity for example would have to show that it is an undue burden to add two accessible entries to existing public swimming pools without any.

One of the issues that the DOJ intends to address in this rule making is that of complaint investigation under Title II. The original rules required the DOJ to investigate all complaints regarding Title II violations. It has received many more complaints regarding violations of Title II than it has the resources to investigate. The DOJ believes it must have greater discretion to prioritize complaints and direct its resources to the most critical issues. The DOJ has discretion to not investigate all complaints under Title III. Any complainant under either Title II or III has the right to pursue a lawsuit to full completion; the DOJ just doesn't have the obligation to investigate and attempt to resolve every complaint filed with it under Title III before the complaint winds its way through the court system.

Regulatory Issues

This section is primarily focused on soliciting estimates of the cost of compliance with the proposed DOJ rules for private entities. All federal agencies issuing "rules" are required to do a cost-benefit analysis if a proposed regulatory action is deemed to be economically significant for private entities. Note that the Access Board did this for the incremental costs of the standards as they apply to new construction and alterations before they published ADAAG /ABAAG, but that it wasn't done for all the issues relating to existing facilities under either Title II or Title III, such as swimming pool entry retrofits. Submittal of this data will greatly influence decisions regarding reduced scoping, exceptions and safe harbors. If a hotel owner knows what it cost to lower its light switches from 60" to 54", it ought to submit it so that the DOJ can understand the cost of requiring them to go back and lower them all to 48". They specifically asked for data for a number of building types, but parking is not included. It would appear that there is a preconceived opinion at DOJ that the parking changes are not particularly expensive. Even so, if any parking organization that has an ability to submit documentation of costs of the proposed rules regarding existing conditions it should submit it so as to prevent our being one of only a few design areas not given safe harbor, for example.