



January 24, 2011

Sarah DeCosse
Disability Rights Section, Civil Rights Division
U.S. Department of Justice
1425 New York Avenue, N.W., Suite 4039
Washington, D.C. 20005

Re: *Comments and Response to the Advance Notice of Proposed Rulemaking regarding Nondiscrimination by State and Local Government and Places of Public Accommodations; Equipment and Furniture*
[CRT Docket No. 113; RIN 1190-AA64]

Dear Ms. DeCosse:

The National Restaurant Association (the Association) and the Retail Industry Leaders Association (RILA) herein submit this comment in response to the Advance Notice of Proposed Rulemaking (ANPRM) issued by the U.S. Department of Justice (hereinafter Department) on July 26, 2010, regarding its intent to issue regulations under the Americans with Disabilities Act (ADA) to address the accessibility of equipment and furniture used in places of public accommodation and programs and services offered by public entities.

INTRODUCTION

The National Restaurant Association is the restaurant industry's leading trade association. The restaurant industry employs 12.7 million Americans in 945,000 locations. The Association represents more than 380,000 of those businesses from restaurants and suppliers to educators and non-profits. Small businesses dominate the industry with more than seven out of 10 eating and drinking establishments being single-unit operators. Even larger chains are often collections of smaller franchised businesses. Furthermore, the business model of the restaurant industry produces relatively low profit margins of only 4 to 6 percent before taxes.

The Retail Industry Leaders Association (RILA) is the trade association of the world's largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

This rulemaking is of substantial interest to our members, particularly with respect to the Department's intent to establish accessibility requirements for electronic and information technology (EIT) equipment. While the Association and RILA support the goals and objectives of the ADA, we also are concerned that the regulation may establish requirements which no presently commercially available EIT devices fully satisfy. Any standards issued have to be achievable.

Additionally, the ANPRM indicates that the Department is considering establishing scoping requirements for the number of EIT devices that would have to be accessible, as well as "triggering events" for replacement or refurbishment of existing EIT or to add particular accessible features. We support the concept of a scoping requirement. Where a covered entity provides more than one of a particular type EIT device at a location, it should not be required to make all of them accessible.

This is consistent with the approach taken generally under both the 1991 and 2010 ADA Standards for Accessible Design, and the approach being proposed by the U.S. Access Board in its own ANPRM regarding such EIT as "self-service machines." See Draft Information and Communication Technology Standards and Guidelines ("Draft ICT Guidelines"), Section 220.2, available at <http://www.access-board.gov/sec508/refresh/draft-rule.htm> (last visited Jan. 20, 2011). The rationale behind such an approach "providing access, but also balancing the cost of compliance" is equally applicable in the context of EIT devices.

The Regulation Should Not Impose Requirements That Extend Beyond Commercially Available Solutions.

The ANPRM suggests that EIT will be defined broadly to encompass an array of devices. The restaurant and retail industries utilize a variety of EIT devices. In addition to point-of-sale ("POS") devices, such as card readers and signature capture pads, and interactive transaction machines ("ITMs"), such as self check-outs, these also can include ordering devices utilized in certain dining establishments, price scanners, product locators, gift registries and electronic and/or interactive informational displays or advertising provided by product manufacturers. These devices can be built-in or fixed, but some also may be portable "such as portable credit card readers brought to the restaurant table and hand-held scanners utilized in shopping and creating gift registries.

Retailers also may provide in-store computer terminals or other equipment at which customers may place orders and design/preview customized products. As with Web technology, which is the subject of a separate ANPRM, EIT technology also is ever-changing. The types of devices and functionalities are always evolving, presenting complex challenges in making such technology both accessible and affordable.

Although indicating that the Department will establish accessibility requirements for EIT devices, the ANPRM does not clearly identify what requirements it intends to impose. Under

Section 508 of the Rehabilitation Act, there presently are standards in place with respect to EIT used and procured by the federal agencies. *See* 36 C.F.R. Part 1194. As noted in the ANPRM, the U.S. Access Board previously issued an ANPRM to update the Section 508 Standards for EIT, accompanied by draft guidelines.

Those guidelines establish both technical criteria and performance criteria. The latter would broadly require EIT to be operable in a variety of modes. For example, EIT would have to provide at least one mode of operation by individuals without vision, with only limited vision, without perception of color, without hearing, with limited hearing, without speech, with limited manipulation, with limited reach and strength, without physical contact and minimizing photosensitive triggers. Draft ICT Guidelines, § 202.

To our knowledge, there are no EIT devices presently available in the commercial market that would meet all the applicable requirements set forth in the Draft ICT Guidelines. For example, while current POS devices such as card readers are available with tactile key pads, we are not aware of any such card readers that presently would offer audio or tactile output of the information displayed by that reader. To satisfy all the functional performance criteria, such devices arguably would be required to provide the following:

- Audio output for information displayed as text (or a tactile method, such as refreshable Braille pin pads).
- A minimum of two operating methods for the device. For example, while tactilely discernible operating controls would be required for individuals without vision, speech-operated devices arguably might be the only method of providing access for individuals without fine motor control and/or that would satisfy the performance criteria of not requiring physical contact.
- Adjustable text size.
- Adjustable volume control for audio output.

It would be particularly challenging to satisfy the requirement for a mode of operation that does not require physical contact. Completion of a transaction generally entails provision of a signature or alternatively input of a personal identification number (PIN); for privacy reasons these should not be voice-responsive features.

The lack of presently commercially available devices that would satisfy all the requirements in the Draft ICT Guidelines extends across the broad array of EIT devices provided in restaurant and retail facilities. Moreover, to the extent currently available devices exhibit some of these characteristics; such functionality typically does not extend throughout the complete transaction process. For example, although some models of self-service checkout equipment may feature audio output, this output typically does not extend to the card readers or card swipes through which payment is completed at such equipment.

Imposing requirements that covered entities presently would have no way of meeting, with no certain timetable as to when such devices would become commercially available, would be untenable. Additionally, certain covered entities utilize proprietary and customized software applications in operating their facilities and managing their sales activities. Any devices subsequently developed to satisfy the forthcoming EIT requirements also would have to be integrated with and compatible with such systems applications. This further complicates the research and development process to provide accessible devices.

For all the foregoing reasons, the regulation should make clear that compliance is limited to those circumstances where accessible solutions are commercially available. Places of public accommodation should not be required to provide accessibility exceeding that required to be provided by the Federal Government under Section 508.

Under Section 508, federal agencies' obligation to provide compliant EIT is contingent upon compliant devices being commercially available in the market place (or alternatively, developed in response to a government solicitation). 36 C.F.R. § 1194.2(b), Draft ICT Guidelines, § E108. Otherwise, the federal agencies are only obligated to procure the commercially available ICT that best meets the provisions set forth in the draft ICT Guidelines. 36 C.F.R. § 1194.2(b), Draft ICT Guidelines, § E108.

The Accessibility Requirements Imposed Should Take Into Account the Nature of the Device and Practical Limitations Regarding Its Use.

In proceeding with this rulemaking, we respectfully submit that in addition to commercial availability, the Department also must consider the following factors in setting accessibility requirements for EIT. First, the requirements should be tied to the nature of the device. Many of the EIT devices that arguably would be encompassed within the regulation (for example, card readers and signature capture pads), do not provide the same degree or range of functionality as ATMs, and are inherently more simplistic devices. For these devices, imposition of ATM-type requirements would be inappropriate and onerous.

Second, the regulation should permit alternative methods of compliance, such as providing staff assistance. Assistance generally is readily available for individuals (both with and without disabilities) in the restaurant and retail industries, including when using POS devices. While we understand the Department's concern about provision of tactile keys for entering PIN numbers, permitting wait staff or a sales clerk to provide other non-sensitive information, such as the balance charged is a reasonable alternative to providing audio output on such devices. In the context of auxiliary aids and services, assistance is readily recognized as a method for providing access.

For example, the Department has long held that retail facilities must provide assistance to individuals who require it, such as assisting those who are blind in collecting items for purchase. Similarly, having staff provide price information should be a recognized alternative to making price scanners communications accessible. In such a circumstance, the expense of retrofitting

such devices seems to clearly outweigh any marginal benefit to be derived in doing so, given that assistance already is being provided.

Finally, the accessibility standards established must take into account practical limitations external to the device itself that nevertheless may result in individuals with certain disabilities requiring some degree of assistance. For example, the barcodes with which products are labeled are not tactile. So even if the devices that rely on scanning such codes (such as self check-outs, price scanners, registries *etc.*) themselves were made fully accessible for individuals with vision impairments, such individuals nevertheless may still require assistance in utilizing such devices. Covered entities should not be required to bear the expense of adding accessible features if the addition of those features still would not permit the individual with a disability to operate the device independently.

The Accessibility Requirements Should Be Triggered Only When New EIT Devices Are Installed or Procured, or When Existing Devices Are Replaced.

The obligation to make EIT devices accessible should be triggered only by the installation or replacement of such devices. The U.S. Access Board's Draft ICT Guidelines will exempt pre-existing EIT devices from their requirements. Draft ICT Guidelines § E103.4.1. In the accompanying advisory, the U.S. Access Board acknowledges that premature replacement of ICT systems that are not near the end of their life expectancy, may impose significant difficulty or expense on an agency. This is no less true in the private sector than in the federal sector.

The Department should not impose a more onerous burden on places of public accommodation than is imposed on the federal agencies.

Precedence for such an approach does exist in the 2010 ADA Standards. For example, with respect to provision of visible emergency alarms, the exception to Section 215.1 of the Draft ICT Guidelines provides that in existing facilities, fire alarm systems are not required to incorporate visible alarms "except where an existing fire alarm system is upgraded or replaced, or a new fire alarm system is installed."

This exception was included based on concerns that existing fire alarm systems may not be capable of supporting visible alarms without upgrade of the alarm system's existing hardware and/or software. Similarly, many types of EIT devices may require hardware and/or software upgrades to incorporate accessible features. This may be particularly burdensome for those devices interacting with a facility's customized or proprietary software.

For these reasons, we respectfully submit that application of the accessibility requirements should be limited to EIT that is being upgraded or replaced, or is newly installed.

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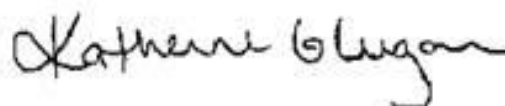
CONCLUSION

As noted previously, the National Restaurant Association and RILA support the goals and objectives of the ADA, and appreciate the patronage of our customers with disabilities. The forthcoming regulation, however, must be carefully balanced to increase access in a way that is mutually agreeable for companies and their patrons and can be accomplished in an economically feasible way.

Sincerely,



Angelo I. Amador
Vice President, Labor and Workforce Policy
National Restaurant Association



Katherine G. Lugar
Executive Vice President, Public Affairs
Retail Industry Leaders Association

* Teresa Jakubowski, Partner, Barnes & Thornburg LLP, was outside counsel for this comment.
** Michelle Reinke, Senior Policy Analyst, National Restaurant Association, significantly contributed to this comment.