

CHANGES TO ADA GUIDELINES "ON HOLD" PENDING A REGULATORY REVIEW BY THE OBAMA ADMINISTRATION

ADA lawyer advises a "wait and see" approach to implementing any building plans based on the proposed guidelines

by Martin H. Orlick

This article was published on February 20, 2009

On January 20, 2009, in a memo to all heads of executive departments and agencies, Chief of Staff Rahm Emanuel communicated President Obama's directive that all proposed or final regulations not yet published in the *Federal Register* were to be withdrawn, pending the review and approval by the new administration. This regulatory review includes the proposed new guidelines under Title III of the Americans with Disabilities Act (ADA) of 1990.

BACKGROUND – NEW GUIDELINES PROPOSED BY THE ACCESS BOARD

The ADA was signed into law on July 26, 1990, by former President George H.W. Bush. Former President George W. Bush was intent on updating the new ADA guidelines while he was in office, as part of his father's legacy.

The proposed changes are to the American with Disabilities Act Accessibility Guidelines (ADAAG) which were adopted by the Department of Justice (DOJ) in 1991. Over the years, the ADAAG has been amended. The proposed new guidelines contain the most sweeping amendments to date. Since 2004, the Access Board -- which is charged with developing and promulgating design accessible requirements for the built environment, transportation facilities and telecommunications equipment -- has been involved in a substantial review, analysis and development of the guidelines, in an attempt to address the significant technological, legal and practical changes that have occurred over the years.

The proposed changes to ADAAG were released by the DOJ, which is charged with enforcing the ADA, and published in the *Federal Register* on June 17, 2008. The Access Board and the DOJ received comments from

government agencies, technical experts, architects, communities, state and local officials, and industry groups, such as the American Hotel & Lodging Association which offered substantial input.

CHANGES WOULD AFFECT HOTELS, RESTAURANTS, RETAIL, FINANCIAL INSTITUTIONS, RECREATIONAL FACILITIES, FITNESS CENTERS AND OTHERS

If enacted as proposed, the new guidelines could cause all businesses which are open to the public -- particularly hotels, restaurants and retail properties -- to build new facilities to standards and to retrofit their properties regardless of whether they are in compliance with current ADA guidelines. It may also force changes to be made to websites so that shopping online and making hotel and restaurant reservations can be fully available to vision impaired customers. More technical refinements are proposed for financial institutions such as "talking ATM's" and more stringent requirements for online banking. New guidelines are also proposed for the health and fitness industry and recreational facilities. For others, like utility companies, new requirements for public rights-of-way could cause significant changes to be made.

SAFE HARBOR PROVISION

A significant proposal by the DOJ is the "safe harbor" for certain existing Title III-covered facilities. The safe harbor proposal, if adopted, exempts certain covered facilities from barrier removal obligations under the proposed guidelines if the facilities comply with the 1991 Standards. A safe harbor provision would

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mitigate the impact of the proposed regulations on existing facilities. Whether the safe harbor provision will look any different than what has been proposed, after review by the new regulators, is unknown.

STAY TUNED

New ADA rules that require significant capital expenditures, coupled with the current credit crisis, may be a formula for a perfect storm for

many businesses. It is not known when the new ADAAG will go into effect and whether the guidelines will be any different than the recent proposal. When new regulators have reviewed the proposed changes and industry comments, and new action is taken, we will inform you.

If you would like to discuss the ADA and how the new guidelines might affect your business, please contact us.



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