

**Before the
U.S. DEPARTMENT OF JUSTICE
Civil Rights Division
Disability Rights Section**

In the Matter of)	
)	
Department of Justice, Civil Rights Division)	CRT Docket No. 106
)	
Notice of Proposed Rulemaking)	AG Order No. 2968-2008

COMMENTS OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS

John Fithian
President and CEO

G. Kendrick Macdowell
Vice President and General Counsel

National Association of Theatre Owners, Inc.
750 First St., NE, Suite 1130
Washington, D.C. 20002
(202) 962-0054

Steven John Fellman

Galland, Kharasch, Greenberg,
Fellman & Swirsky, P.C.
1054 Thirty-First Street, N.W., Suite 200
Washington, D.C. 20007-4492
(202) 342-5294

August 18, 2008

COMMENTS OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS

I. Introduction

The National Association of Theatre Owners (NATO) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) regarding the Americans with Disabilities Act (ADA) published by the Department of Justice (DOJ or Department) in the *Federal Register* on June 17, 2008.

NATO is the largest motion picture exhibition trade organization in the world. NATO represents movie theaters in all 50 states and several foreign countries. NATO represents the largest movie theater chains in the United States as well as over 500 smaller operators, totaling over 30,000 of the 39,000 motion picture screens in the United States. NATO is headquartered in Washington, D.C., and maintains a second office in North Hollywood, California. Further information about NATO is available at www.natoonline.org.

NATO and its members have long been committed to making motion picture theaters as accessible as possible to all Americans, including those with disabilities. NATO testified in favor of passage of the ADA when the legislation was first debated in Congress. When the ADA Standards for Accessible Design (ADA Standards) were first promulgated by the DOJ, NATO prepared and circulated an ADA Compliance Manual to assist theater owners in designing ADA compliant theaters. Since the ADA Standards became effective, NATO and its members have continued to work closely with the Access Board, the ANSI A117 Committee, the DOJ, state and local authorities, other industry standards groups, and disability rights groups to clarify and implement the requirements of the ADA.

The great majority of NATO members are small businesses operating fewer than 20 screens. The typical NATO member has no construction department, no in-house architect, no staff attorneys, and no regulatory affairs specialists. For most NATO members, the owner/operator is solely responsible for regulatory compliance, including ensuring that new construction, renovations, and alterations meet the requirements of the ADA.

Revisions to the DOJ standards and the process for implementing them, must strike an appropriate balance between the congressional intent to increase the accessibility of public accommodations for persons with disabilities, and the equally important congressional intent to provide operators of public accommodations with clear regulations that will make ADA requirements understandable, compliance affordable, and avoid expensive litigation over ambiguities.

II. Responses to NPRM Questions

Question 1: The Department believes it would be useful to solicit input from the public to inform us on the anticipated costs or benefits for certain requirements. The Department therefore invites comment as to what the actual costs and benefits would be for these eight existing elements, in particular as applied to alterations, in compliance with the proposed regulations (side reach, water closet clearances in single user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses), as well as additional practical benefits from these requirements, which are often difficult to adequately monetize.

Answer 1: Theaters built by NATO members generally are required to comply with the International Building Code (IBC). Thus, we do not anticipate significant additional costs for theaters related to the eight elements listed in Question 1. However, significant costs would be incurred by the motion picture theater industry if proposed Section 36.406(f)(4) is applied retroactively. We address that issue below. Moreover, given the cottage industry of litigation over technical ADA violations, which costs owners of public accommodations many millions of dollars in frivolous litigation, NATO recommends that the DOJ consider a notice requirement as a condition precedent to commencing ADA litigation.

Question 2: The Department would welcome comment on whether any of the proposed standards for these eight areas (side reach, water closet clearances in single user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses) should be raised with the Access Board for further consideration, in particular as applied to alterations.

Answer 2: See response to Question 1.

Question 3: The Department would welcome information from operators of auditoriums on the likelihood that their auditoriums will be altered in the next fifteen years, and, if so, whether such alterations are likely to include accessible and direct access to stages. In addition, the Department would like specific information on whether, because of local law or policy, auditorium operators are already providing a direct accessible route to their stages. (The Department is also interested in whether having to provide a direct access to the stage would encourage operators of auditoriums to postpone or cancel the alteration of their facilities.) The Department also seeks information on possible means of quantifying the benefits that accrue to persons with disabilities from this proposed requirement or on its importance to them. To the extent that such information cannot be quantified, the Department welcomes examples of personal or anecdotal experience that illustrate the value of this requirement.

Answer 3: Motion picture theaters used to be built with stages at the front of the theater. Many of these older theaters still exist, especially in small towns where the population will support an older theater of limited size but attendance does not justify building new modern theaters. Since very few motion picture theaters built within the last decade have been built with stages, there would be no effect on such facilities if stages had to be fully accessible. In most of the older motion picture theaters that do have stages, the stages are not used on a regular basis. In many of the older theaters, the stage is removed when a renovation occurs. Therefore, we do not believe that requiring a motion picture theater to make a stage accessible when the theater is renovated would involve significant costs for our industry. However, requiring the small number of older theaters that do have stages to make those stages accessible prior to a renovation would be an undue financial burden and provide no benefit to persons with disabilities.

Question 5: The Department seeks information from arena and assembly area administrators on their experiences in managing ALS. In order to evaluate the accuracy of the assumptions in the RIA relating to ALS costs, the Department welcomes particular information on the life expectancy of ALS equipment and the cost of ongoing maintenance.

Answer 5: Since 1991, motion picture theaters have been required to have assistive listening systems. The 1991 DOJ Standards currently require that the number of headsets equal 4% of the number of seats in an auditorium. The 2004 ADAAG modifies the requirement by permitting a motion picture theater that has multiple auditoriums in the same facility controlled by the same management to base the number of assistive listening system headsets on the total number of seats in the facility rather than the number of seats in each auditorium. It has been over 16 years

since the 1991 standards became effective and the experience of the motion picture theater industry is that assistive listening device headsets are very rarely used. At the time the ADA was enacted, NATO advised the DOJ that the required number of headsets greatly exceeded what was actually needed for disabled patrons. The DOJ responded that once hearing-impaired patrons realized that assistive listening systems were available, they would be widely used. Our experience over 16 years flatly contradicts that assumption. In most multiplex motion picture theaters, our reports indicate that fewer than 5 headsets are used per week. Under the 1991 standards, a multiplex with eight 200-seat auditoriums and four 300-seat auditoriums must have 112 headsets available. Less than 1% of these headsets are used in any given week. Thus, in most motion picture theaters, many boxes of unopened headsets sit on shelves somewhere in storage. It is a waste of hundreds of thousands of dollars every year.

It makes no sense to require theaters to purchase and maintain headsets that will never be used. We recommend that the DOJ adopt an exception to the 2004 ADAAG. Under the exception, if a facility can demonstrate that assistive listening device headset usage is significantly below the number of headsets required, the facility should be permitted to stock only the actual number of headsets required by its patrons. Facilities making use of such an exception could be required to monitor usage and purchase additional headsets if patron demand demonstrated an insufficient number of headsets.

Most motion picture theaters currently use infrared assistive listening systems. The system includes an emitter for each auditorium, which provides the audio output, and headsets, which are generally made available to patrons either at the box office or at the guest services counter within the theater. The emitter has a life span of 3-4 years. We are unable to report the life span of a typical headset because they are rarely used. (Indeed, a typical fate for a headset is battery damage from non-use, rendering it inoperative.) A typical headset costs between \$50-\$60. A hearing-aid-compatible headset is somewhat more expensive but generally under \$100.

Requiring that 25% of all ALS receivers be hearing aid compatible would involve a significant cost. However, if the requirement were modified to permit motion picture theaters to replace

non-compatible headsets with compatible headsets as the headsets needed to be replaced, the transition could occur on a reasonable basis without undue cost.

Question 8: Please comment on the proposed definition of other power-driven mobility devices. Is the definition overly inclusive of power-driven mobility devices that may be used by individuals with disabilities?

Answer 8: Motion picture theaters proudly accommodate mobility-impaired patrons. The doors entering the theater are accessible. The box office and concession counter are accessible. The path of travel from the box office to concession counter to the theater auditorium is accessible. Each auditorium has wheelchair seating spaces. The theater restrooms are accessible.

Power-driven mobility devices, such as battery-operated wheelchairs and battery-operated mobility scooters, can be operated safely within the confines of a typical motion picture theater and do not present a problem.

However, requiring theaters to permit use of devices such as golf carts, electric personal assistive mobility devices (EPAMDs), and gasoline-powered devices within the confines of an enclosed theater would cause major access, health, and safety problems. The limited width of theater doors and aisles may be insufficient to service larger devices such as golf carts. In the event of an emergency which required quick egress from the auditorium, a golf cart might block the ability of theater patrons to exit the theater promptly.

EPAMDs present additional problems. An EPAMD could not be parked in wheelchair viewing space without obstructing the viewing experience of the patron sitting behind the wheelchair space. NATO does not think that EPAMDs should be permitted in indoor facilities such as theaters.

NATO strongly recommends that the DOJ not require facilities such as motion picture theaters to admit mobility devices such as EPAMDs, golf carts, and gasoline-powered devices.

Question 9: Should the Department clarify the phrase “providing minimal protection” in the definition or remove it?

Answer 9: NATO recommends that the DOJ expand the definitions of “providing minimal protection” to make it clear that if the only function of the “service animal” is to scare away potential attackers, the animal does not qualify as a service animal.

Question 10: Should the Department eliminate certain species from the definition of “service animal”? If so, please provide comment on the Department’s use of the phrase “common domestic animal” and on its choice of which types of animals to exclude.

Answer 10: NATO recommends eliminating certain species from the definition of “service animal.” NATO supports the DOJ’s use of the phrase “common domestic animal” and its choice of which types of animals to exclude.

Question 11: Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the “common domestic animal” prong of the proposed definition?

Answer 11: NATO believes that the Department should impose a size or weight limitation for “common domestic animals.” Unusually large animals pose significant safety and comfort problems for theater personnel and other patrons. There was a reported incident at a movie theater where a person with a disability had a Bull Mastiff as a service animal. The dog weighed well over 200 pounds and had a tendency to slobber. The person with the disability brought the dog to the theater to attend a weekend matinee of a G-rated movie. Before the box office opened, a line of patrons, many of them small children, waited to purchase tickets. The size of the animal coupled with the fact that it slobbered, scared many of the children in line. Further, once the dog was admitted to the theater, it not only filled the space on the floor in front of the person with the disability, but also filled the floor space in front of the seat next to the seat occupied with the person with the disability. There is a limited amount of floor space between the rows of a motion picture theater. A service animal has to be a reasonable size in order to fit in that floor space and not block the floor space provided for the legs of persons in the seats on either side of the person with the disability. Unusually large service animals cause significant

safety and comfort issues, especially if the theater is crowded. NATO welcomes the DOJ addressing the issue of large service animals.

Furthermore, NATO members report widespread abuse of the ADA regulations involving service animals. Frequently, theater patrons enter a motion picture theater carrying a small dog in a shoulder bag, modified knapsack, or some type of a purse. If a theater employee asks if the small dog is a service animal, the patron will answer that the animal is a service animal. Sometimes the patron will volunteer that the animal has been trained to perform a certain task such as alerting the patron to a potential seizure. Once such a response has been given, the theater operator has no alternative but to admit the patron with the small dog. The theater is not permitted to request that the patron verify the information provided, even though the theater may be fairly certain that the animal does not qualify as a service animal and the patron is not in fact disabled. If the theater chooses not to admit the patron with the alleged service animal, it faces significant liability. NATO believes that the regulations should provide a means through which operators of public facilities can verify that animals described by persons as service animals are in fact service animals. The most obvious and cost-effective solution would be to require all service animals to wear some kind of discernible licensure or certified tag so that theater personnel could easily and unambiguously verify that the animal is in fact a certified service animal.

Question 12: As explained above, the definition of “wheelchair” is intended to be tailored so that it includes many styles of traditional wheeled mobility devices (e.g., wheelchairs and mobility scooters). Does the definition appear to exclude some types of wheelchairs, mobility scooters, or other traditional wheeled mobility devices? Please cite specific examples if possible.

Answer 12: The definition of “wheelchair” needs to be more specific to avert abuse of the wheelchair accommodation and to provide theater personnel with a readily ascertainable basis for excluding certain unreasonable devices. The definition of “wheelchair” should include the length, height, and width ranges for a “wheelchair.”

Motion picture theaters provide specific wheelchair spaces for patrons in wheelchairs. The wheelchair spaces are designed to meet the requirements of the ADAAG. These requirements

provide adequate space for the wheelchair to enter the designated wheelchair seating area and to exit the area. In certain configurations, two wheelchair spaces are placed side by side. In the DOJ Standards, it should be clear that for purposes of indoor facilities such as motion picture theaters, the dimensions of a wheelchair must be such that the device fits within the scope of the area designed for wheelchair users. To permit oversized devices to use these spaces creates logistical problems. If a wheelchair user has a device which takes more than the space allocated for a single wheelchair, the device may not be able to fit into the wheelchair space. Further, if there are two wheelchair spaces side by side, the oversized device may take more than a full space with the result that no other wheelchair user can access the space. Finally, even if the width of the device fits within a space, if the length of the device exceeds the space, then a wheelchair located in a space next to the space with the oversized wheelchair may not be able to comfortably enter or exit the adjacent wheelchair space. We recognize that new technology may make new types of devices available for people with mobility impairments. However, the dimensions of these devices must be such that they fit within the space limitations for wheelchair locations established in the DOJ Standards.

Questions 13: Should the Department expand its definition of “wheelchair” to include Segway®?

Answer 13: Segway® should not be required to be admitted into motion picture theaters. If the Segway® is parked in a wheelchair location, the Segway® will block the view of the person in the seat behind the wheelchair location. If the user of a Segway® intends to transfer into a chair in the theater, there is no place in the theater to store the Segway®. If the Segway® is stored outside of the auditorium, in the event of an emergency, theater personnel cannot get to the person dependent upon the Segway® and assist that person in exiting. Moreover, if stored within the theater, Segway® becomes a trip hazard and a safety issue for other patrons.

Question 14: Are there better ways to define different classes of mobility devices, such as the weight and size of the device that is used by the Department of Transportation in the definition of “common wheelchair”?

Answer 14: NATO recommends defining the different classes of mobility devices and listing the places where each of such class of devices must be admitted. As noted earlier, in a motion

picture theater setting, a building is accessible for “wheelchairs” provided that the “wheelchair” can fit through the doorways, roll down paths of travel, maneuver in restroom areas, and fit in wheelchair spaces, all of which meet the requirements of the ADA Standards. Devices beyond the size definition included in the ADA Standards cause problems for full access. For example, as noted earlier, an extra-wide “wheelchair” may take up more than a normal wheelchair space in an auditorium. The device may also not roll through door frames or permit the user to enter an accessible restroom stall. The regulation should make it clear those facilities that meet the standard requirements for accessibility do not become “inaccessible” because a person with mobility impairment chooses to use a “wheelchair” or other mobility device that exceeds the dimensions of the typical wheelchair.

Question 15: Should the Department maintain the non-exhaustive list of examples as the definitional approach to the term “manually powered mobility devices” that should be considered for specific inclusion in the definition, a description of those devices, and an explanation of the reasons they should be included.

Answer 15: NATO believes that the Department should maintain the non-exhaustive list of examples as the definitional approach to the term “manually powered mobility aids.”

Question 16: Should the Department adopt a definition of the term “manually powered mobility aids”? If so, please provide suggested language and an explanation of the reasons such a definition would better serve the public.

Answer 16: NATO does not believe that there is a need to adopt a definition of the term “manually powered mobility aids.”

Question 20: If an individual resells a ticket for accessible seating to someone who does not need accessible seating, should the secondary purchaser be required to move if the space is needed for someone with a disability?

Answer 20: This is not a significant problem for movie theaters. Motion picture theaters generally sell seating on a first come, first served basis. Although some tickets are purchased online, the majority of the tickets are purchased at the box office on the date the person attends

the movie. A person who purchases a ticket for a movie, whether at the box office or online, purchases the right to be admitted to the showing and not the right to sit in a particular seat.

The typical modern stadium-style auditorium has fewer than 300 seats and 4 or 5 wheelchair spaces. These wheelchair spaces meet current ANSI standards and are located on a riser in the rear 70% of the auditorium seating and provide an unobstructed view of the screen. It is extremely rare to have all the wheelchair spaces in an auditorium occupied during the showing of a movie. An informal survey of NATO members indicates that theaters do not receive complaints from wheelchair patrons that wheelchair spaces are unavailable when they arrive.

Generally, motion picture theaters do not experience a situation where an individual or a ticketing organization purchases a number of seats for a theater showing and then attempts to resell those seats.¹ Since facilities such as motion picture theaters which do not have reserved seating do provide persons with disabilities the same access as all other persons, proposed Section 36.302(f) should be modified to ensure that this section applies only to facilities selling reserved ticketing.

A very small, but growing, number of motion picture theaters do have reserved seating in a section of the auditorium. Patrons can purchase tickets at the box office or online and select the seat that they prefer. Normally, companion seating is delineated on the seating chart available at the box office or online. Problems do occur when an individual who is not accompanying a person in a wheelchair purchases a companion seat. If the purchase is made at the box office, the attendant can advise the patron that the seat is a companion seat. However, if the purchase is online, the theater cannot control the purchase. Under such circumstances, NATO believes that the individual who purchases a companion seat but is not accompanying a person with a disability should be requested to move in the event that a person with a disability appears with a companion within ten minutes of the time the show is scheduled to start or prior to the time that all other seats in the reserved section are sold.

¹ Such an event would be limited to the opening of a blockbuster and would likely occur no more than once a year.

Question 21: Are there particular concerns about the obligation imposed by the proposed rule, in which a public accommodation must provide accessible seating, including a wheelchair space where needed, to an individual with a disability who purchases an “inaccessible” seat through the secondary market?

Answer 21: The situation described in Question 21 has not been experienced in the motion picture theater industry.

Question 22: Although not included in the proposed regulation, the Department is soliciting comment on whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches described above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices, and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold, accessible seating can be released to the general public?

Answer 22: As indicated above, motion picture theaters generally do not experience situations where a wheelchair patron purchases a ticket for a movie and enters an auditorium and finds that a wheelchair space is not available. However, there are situations where a wheelchair user and a companion will enter a theater on a Saturday night just before the movie is scheduled to begin and find that although a wheelchair space is available, the companion seat is occupied by a person who does not qualify as a “companion.”

Motion picture theaters generally mark companion seats. The methods of marking these seats include placing signage on the seats labeling the seats as “companion seats,” placing a ribbon marked “companion seat” across the companion seat, and placing a cloth cover marked “companion seat” over the companion seat. However, ushers are generally not assigned to each auditorium to monitor who uses companion seats. Many theaters have adopted a policy of not objecting to a patron who is not a “companion” nevertheless using a companion seat if all of the other seats in the theater are occupied or if the seat has remained vacant until ten minutes before the scheduled beginning of the show. NATO recommends that the DOJ acknowledge that such a policy is reasonable. Such specific guidance immeasurably aids the smooth implementation of ADA accommodations and averts on-site disagreements and disruptions. In auditoriums where all available tickets for seating have been sold, even if such an event occurs earlier than 10

minutes before show time, theaters should be permitted to sell companion seats to patrons who are not accompanying persons with disabilities. In any event, unoccupied “companion” seats should be available to any patron starting 10 minutes before the posted show time.

Question 23: Is the proposed rule regarding the number of tickets that a public accommodation must permit individuals who use wheelchairs to purchase sufficient to effectuate the integration of wheelchair users with others? If not, please provide suggestions for achieving the same result with regard to individual and group ticket sales.

Answer 23: Motion picture theaters usually do not restrict the number of tickets that an individual can buy to any performance. In the rare case of a premier or the opening of an extremely popular movie, a patron may only have the opportunity to buy a limited number of tickets. However, as a general rule, if an individual comes to the box office and asks to purchase all the available seats in any auditorium in the theater, the box office attendant would happily comply with this request.

Question 24: Should the Department require that, one year after the effective date of this regulation, public accommodations exhibit all new movies in captioned format at every showing? Is it more appropriate to require captioning less frequently? Should the requirement for captioning be tied to the conversion of movies from film to the use of a digital format? Please include specifics regarding how frequently captioning should be provided.

Answer 24: For several reasons, NATO strongly urges restraint with respect to any rulemaking in the area of captioning. The legislative history of the ADA makes unambiguously clear that captioning is not a required accommodation. While movie theaters have nevertheless made significant strides in accommodating deaf and hearing-impaired patrons, captioning technology is very dynamic and subject to salutary market forces that rulemaking could easily distort or altogether thwart. In the emerging digital arena, NATO members are very active in development of both standards for interoperability and the captioning technologies themselves. The digital transition holds great promise for captioning, but it is at an early and vulnerable stage and premature government involvement could abort significant strides. Both open and closed captioning currently entail significant costs—the former primarily as a function of demonstrable rejection of captioned movies by patrons without a hearing disability, and the latter primarily as a

function of the substantial cost of the technology itself. We ask that the DOJ observe these developments and resist any temptation to impose early mandates. We develop these positions further below.

A. The Department Cannot Require Movie Captioning Because the ADA Does Not Impose or Permit Such a Requirement.

Title III of the ADA prohibits operators of public accommodations from discriminating against disabled persons “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations.” 42 U.S.C. § 12182(a). In particular, the ADA prohibits a public accommodation from discriminating against disabled persons by: (1) denying the disabled the opportunity to participate in or benefit from the goods or services provided, 42 U.S.C. § 12182(b)(1)(A)(i); (2) providing goods and services to the disabled that are not equal to those afforded other individuals, 42 U.S.C. § 12182(b)(1)(A)(ii); or (3) providing goods or services that are different or separate from those provided to others, unless doing so is necessary to meet the needs of the disabled, 42 U.S.C. § 12182(b)(1)(A)(iii).

A public accommodation may be required to make reasonable modifications in its policies, practices, or procedures when necessary to provide its goods and services to the disabled. *See* 42 U.S.C. § 12182(b)(2)(A). In addition, a public accommodation may be required to provide auxiliary aids in connection with its goods and services to meet the needs of the disabled. *Id.*

Congress directed the DOJ to promulgate specific regulations to implement the ADA and to provide more specific guidance regarding the obligations imposed on public accommodations. 42 U.S.C. § 12186(b). These regulations require a public accommodation to make reasonable modifications to its policies, practices, or procedures when necessary to provide its goods and services to the disabled, unless doing so would fundamentally alter the nature of the goods and services provided. *See* 28 C.F.R. § 36.302.² Section 36.307 makes clear that the “reasonable modifications of policies, practices and procedures” and “auxiliary aids and services”

² 28 C.F.R. § 36.303 further requires that a public accommodation make available necessary auxiliary aids or services, unless doing so would fundamentally alter the nature of the goods or services provided or result in an undue burden to the operator of the public accommodation.

requirements are only intended to ensure the nondiscriminatory availability of the goods or services already offered by a public accommodation. A public accommodation is not required by Title III of the ADA to provide different or modified goods or services to meet the special needs of the disabled. Section 36.307 provides that:

(a) This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.

(b) A public accommodation shall order accessible or special goods at the request of an individual with disabilities if, in a normal course of its operation, it makes special orders on request for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business.

(c) Example of accessible or special goods include items such as Braille versions of books, books on audio cassettes, closed-captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.

28 C.F.R. § 36.307. Thus, the plain language of the Regulations implementing the ADA demonstrates that a public accommodation is not required by Title III to change the nature of the goods or services it offers in order to meet the special needs of disabled persons.

In conjunction with the promulgation of the Regulations, DOJ prepared a section-by-section analysis of its Regulations under Title III. *See* Preamble to Regulation of Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, July 26, 1991, published as Appendix B to the DOJ's ADA Regulations at 28 C.F.R. Part 36 (hereinafter "Appendix B"). In Appendix B, DOJ analyzed each provision of the ADA Regulations in depth and gave illustrations intended to clarify the application of each provision.

DOJ's analysis of section 36.307 leaves no doubt that a public accommodation is not required to change the nature or mix of the products or services it offers to meet the special requirements of the disabled:

Section 36.307 establishes that the rule does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility

features that are designed for, or facilitate use by, individuals with disabilities. As specified in Section 36.307(c), accessible or special goods include such items as Braille versions of books, books on audio-cassettes, close-captioned video tapes, special sizes or lines of clothing and special foods to meet particular dietary needs.

The purpose of the ADA's public accommodation requirements is to insure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a book store, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Braille or large print books. Similarly, a video store must make its facilities and rental operations accessible, but it is not required to stock close-captioned video tapes. The Department has been made aware, however, that the most recent titles in video tape rental establishments are, in fact, closed caption.

28 C.F.R. Part 36, Appendix B, Subpart C, discussion of § 36.307. Accordingly, just as a bookstore is not required to sell Braille books, and a video store is not required to sell captioned video tapes, theater owners are not required by the ADA to exhibit captioned films to meet the special needs of hearing impaired individuals. Indeed, this principle applies with even greater force to movie theaters because in the retail store examples, Braille books and captioned video tapes would simply constitute additional inventory, whereas a captioned movie is the only "inventory"—in its auditorium—for all patrons.

In its analysis of the "reasonable modification" requirement under § 36.302, DOJ also made clear that the "reasonable modification" and "auxiliary aid" requirements are subject to the limitations contained in Section 36.307.

The rule enunciated in Section 36.307 is consistent with the "fundamental alteration" defense to the reasonable modification requirement of Section 36.302. Therefore, 36.302 would not require the inventory of goods provided by a public accommodation to be altered to include goods with accessibility features. For example, Section 36.302 would not require a book store to stock Braille books or order Braille books, if it does not do so in the normal course of its business.

28 C.F.R. Part 36, Appendix B, Subpart C, discussion of Section 36.302.

Finally, the Appendix to section 36.303 states unequivocally that “Movie theatres are not required by § 36.303 to present open-captioned films.” 28 C.F.R. Pt. 36, App. B(C) (1992).

DOJ’s interpretation of Title III of the ADA to *not* require a public accommodation to change the nature or mix of the products or services it offers is shared by the United States Architectural and Transportation Barriers Compliance Board (the “Access Board”). Congress mandated that the Attorney General’s regulations be consistent with the minimum guidelines established by the Access Board. 42 U.S.C. § 12186(c).

The Access Board has addressed the issue of captioning for motion pictures on two occasions. In April 2001, the Access Board issued a technical bulletin addressing available and developing technologies for exhibiting closed caption motion pictures. *See* Technical Bulletin #8: Theatrical Movie Captioning Systems, April 20, 2001. While indicating that the voluntary adoption of closed captioning for motion pictures would be beneficial to severely hearing-impaired persons who cannot be helped by ALDs, the Access Board made clear in the accompanying April 20, 2001 Press Release that “[c]aptioning [is] ... not required by the Board’s ADA Accessibility Guidelines.”

In connection with its efforts to comprehensively revise and update the ADAAG, the Access Board again addressed the issue of movie captioning in its draft final guidelines published on April 2, 2002. The Access Board confirmed that the “ADAAG, and the DOJ’s Regulations, do not require captioning of movies for persons who are deaf.” *See* Draft Final ADA and ABA accessibility Guidelines, April 2, 2002, at 125. Moreover, the Access Board determined not to include such captioning requirements in its revised and updated guidelines.

B. Courts Have Repeatedly Held That the ADA Does Not Require a Public Accommodation to Change the Nature, Content or Mix of the Products or Services It Offers.

In interpreting Title III of the ADA, courts have recognized that the purpose of the ADA is to “regulate the *availability* of the goods and services that a place of public accommodation offers as opposed to the *contents* of goods and services offered by the public accommodation.” *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1012 (6th Cir. 1997) (emphasis added).

Accordingly, the courts have repeatedly found that, while a public accommodation must ensure that the disabled have reasonable access to its products or services, it is not required to alter the nature or mix of goods that it generally provides. *See, e.g., McNeil v. Time Ins. Co.*, 205 F.3d 179, 188 (5th Cir. 2000) (“In sum, we read Title III to prohibit an owner, etc., of a place of public accommodation from denying the disabled access to the good or service.... But the owner, etc., need not modify or alter the goods and services that it offers in order to avoid violating Title III”); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 1999) (finding that Title III “does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided”); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (“We conclude that section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled”); *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 457-58 (6th Cir. 1998) (rejecting construction of ADA which would “compel a video store to stock closed caption video tapes because ordinary tapes are worth less to a deaf person than to one with normal hearing”).

In *Doe*, the Seventh Circuit succinctly described why the distinction between access and content is fundamental to a reasonable construction of the ADA:

The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress proposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its intentions clearer and would at least have imposed some standards. It is hardly a feasible judicial function to decide whether shoe stores should sell single shoes to one-legged persons and if so at what price, and how many Braille books the Borders or Barnes and Noble bookstore chains should stock in each of their stores.

179 F.3d at 560. Among the examples the court invoked to support its holding that the ADA does not require an owner of a public accommodation to alter the product which he makes available on a nondiscriminatory basis was “a movie theatre’s refusal to provide a running translation into sign language of the movie’s soundtrack.” *Id.*

The Fifth Circuit applied similar reasoning in holding that the ADA does not require a business to alter or modify the goods or services it offers in order to satisfy the ADA:

We acknowledge that it is literally possible, though strained, to construe “full and equal enjoyment” to suggest that the disabled must be able to enjoy every good and service offered to the same and identical extent as those who are not disabled. Construed in this manner, the statute would regulate the content and type of goods and services. That would be necessary to ensure that the disabled’s enjoyment of goods and services offered by the place of public accommodation would be no less than, or different from, that of the non-disabled. But such a reading is plainly unrealistic, and surely unintended, because it makes an unattainable demand.

* * *

Furthermore, were we to try to construe the statute in this manner, its application would force impracticable results. If the blind must be able to enjoy all goods and services to the same extent as the sighted, bookstores would be forced to limit the selection of books they carried because they would need to stock braille versions of every book. Shoe stores would reduce the styles available to their general customers, because they would need to offer special shoes for people with foot deformities in every style sold to the non-disabled. Sporting goods stores might have to close altogether. Restaurants would have to limit their menus to avoid discriminating against diabetics. After all, to offer food to the public that a diabetic could not eat would, in the literal words of the statute, deny the diabetic the full and equal enjoyment of the goods of the restaurant compared to those with no limitations on their diets.

By citing such examples, we do not mean to make the statute sound ridiculous. We do this to illustrate that the language of the statute can only reasonably be interpreted to have some practical, common sense boundaries. Based on the language of the statute, we simply see no non-arbitrary way to distinguish regulating the content of some goods from regulating the content of all goods.

McNeil, 205 F.3d at 187.

Although the DOJ’s NPRM briefly addresses some of the cases that have construed the ADA in regards to theater owners’ alleged obligations to provide captioned movies, it does not address the most recent and the most compelling decision on the subject. In *Arizona v. Harkins Amusement Enterprises, Inc.*, 2008 WL 19222979 (D. Ariz. 2008), the court addressed a suit by the state asserting that theater operators were obligated to provide captioned movies. The defendant moved to dismiss the complaint on the grounds that the requested captions would alter

the content of its services and therefore fall outside the scope of the ADA. *Id.* at *2. After engaging in an exhaustive review of the Act, the regulations, and the case law construing the Act, the court held that captioning was not required.

In reaching its decision, the *Harkins* court expressly considered and rejected plaintiffs' arguments that the provision of captions would not alter the contents of the films because: 1) Harkins would not be required to show any movies that it would not otherwise show at its theater; 2) the auxiliary aids requested would only require Harkins to provide a "functionally equivalent service for people with sensory disabilities;" and 3) film studios provide captions with select movies at no additional costs on a separate CD-ROM disk. *Id.* at *4. In rejecting the plaintiffs' first argument, the court held that

merely because Harkins would not be required to show movies it would not otherwise offer does not mean that providing captions and descriptions would not change the contents of its services. Movie theatres offer motion pictures to the public in specific formats which combine audio and visual elements. However, Plaintiffs' request would require Harkins to alter the form in which it normally provides its services . . . Captioning changes audio elements into a visual format . . . Persons with sensory disabilities are not 'excluded, denied services, segregated or otherwise treated differently than other individuals' because they are offered the same form of services as other members of the public. *See* 42 U.S.C. § 1218(b)(2)(A).

Id. at *4 (citations omitted).

The court similarly rejected the plaintiffs' argument that the auxiliary aids would only require Harkins to provide a "functionally equivalent service for people with sensory disabilities." The court recognized that while the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment" of services, this language must "be interpreted to have some practical, common sense, boundaries." *Id.*, quoting *McNeil v. Times Ins. Co.*, 205 F.3d at 187.

The unvarnished and sober truth is that in many, if not most, cases, the disabled simply will not have the capacity or ability to enjoy the goods or services of an establishment "fully" and "equally" compared to the non-disabled. There would seem to be no statutory boundary if the ADA regulates the content of services.

Id. (citations omitted).³

Finally, the court held that a movie theater is not required to change the content of the services it offers merely because additional content is offered to theaters free of charge. “The expense a public accommodation incurs to provide auxiliary aids and service goes to the undue burden limitation in § 12182(b)(2)(A)(iii), not the scope of the ADA’s prohibition against discrimination in § 12182(a).” *Id.*

In reaching its conclusion, the *Harkins* court noted that its holding was consistent with the legislative history of the ADA. “The House Committee Report states: ‘Open-captioning, for example, of feature films playing in movie theatres, is not required by this legislation.’” *Id.* at *5, *citing* H.R. Rep. No. 101-486(II) at 108 (1990), as *reprinted* in 1990 U.S.C.C.A.N. 303, 391. The holding is also consistent with the ADA’s regulations and guidelines. “Movie theatres are not required by § 136.303 to present open-captioned films.” *Id.* at *6. Finally, the court recognized that its decision was consistent with the overwhelming weight of authority in cases construing the Act. Accordingly, the court held that:

Given the language of § 12182(b)(2)(A)(iii), the reasoning in *Weyer, McNeil, and Doe*, the legislative history, and the ADA regulations and guidelines, the Court concludes that the ADA does not require *Harkins* to provide captions nor descriptions. Section 12182(b)(2)(A)(iii) requires public accommodations to ensure that persons with disabilities have access to the services they provide (utilizing auxiliary aids and services if necessary), but does not require public accommodations to alter or modify the content of the services.

Id.; *see also* *Cornilles v. Regal Cinemas, Inc.*, 2002 WL 31440885 (D.Or.), *aff’d in relevant part*, 2002 WL 31460787 (D.Or. 2002) (denying plaintiffs’ suit to require close captioned movies); *Todd v. America Multi-Cinema, Inc.*, 2004 WL 174686 at *4 (S.D. Tex. 2004) (rejecting

³ The court also recognized that nothing in the ADA’s § 12182(b)(2)(A)(iii) governing auxiliary aids was intended to extend the scope of the ADA. *Id.* at *3. Quoting the Fifth Circuit in *McNeil*, the court held that:

The provisions in §§ 12182(b)(1)(A)(i)-(iii) concerning the opportunity to benefit from or to participate in a good or service do not imply that the goods or services must be modified to ensure that opportunity or benefit. Rather, this section only refers to impediments that stand in the way of a persons’ ability to enjoy the goods or services in the form that the establishment normally provides it. *Id.*

plaintiff's argument that defendants must provide captioning in all movies and at all movie theatres on undue burden grounds and because "[e]qual access does not mean equal enjoyment... [T]he plaintiff has not offered any or significant rebuttal evidence that precludes summary disposition of the case on the basis that access has been granted as a matter of law.").

In the NPRM (73 F.R. 34531), the DOJ states: "While the Department has not required that the movie theatre industry caption its presentations, during the mid-1990's, as closed captioning became available, the Department began requiring in certain settlement agreements that presentations be closed captioned. See Agreement Between Walt Disney World Co. and the United States (January 17, 1997)."

It is unclear what point the DOJ wishes to advance by citation to the Disney settlement. But if it is to call into question the history of *not* requiring captioning of movies, then the citation is misdirected for several reasons. The Disney settlement is not a motion picture industry settlement. The settlement covered theme parks owned and operated by Disney. These theme parks have attractions that display the same event or film, over and over 365 days a year. The event or film is produced and/or owned by Disney. The entertainment displays at a theme park cannot be equated to the exhibition of a motion picture in a movie theater. Movie theaters show films that are owned by distributors and licensed to the theaters pursuant to a film licensing agreement. Theater operators are expressly forbidden to change the nature of the presentation and cannot provide any type of captioning without written permission from the distributors. Further, a Disney attraction shows the same event or film for a lengthy period of time, often several years. Movie theaters change pictures, often every two weeks. There is no comparison. Moreover, despite substantial ADA litigation with several NATO members, the DOJ has never even raised the issue of mandatory captioning with NATO or its members, much less included a mandatory captioning provision in any settlement.

The NPRM cites the *Ball* case (*Ball v. AMC Entertainment*, 246 F. Supp.2d 17, DDC 2003) as supporting a requirement that motion picture theaters make closed captioned films available. The case supports no such requirement. The *Ball* case was decided on a motion for summary judgment. Plaintiffs argued that the ADA required motion picture theaters to show open

captioned and closed captioned films. The Court rejected plaintiffs’ claims regarding open captioning, noting, “Since the installation of RWC [rear window captioning] has become the key concern in this case, Plaintiffs’ request for open captioning will not be considered.” 246 F. Supp.2d at 21 n.13.

The Court then ruled that from a summary judgment standpoint, the Court could not conclude that the ADA or the DOJ regulations “explicitly forbid” requiring theaters to show closed caption films. The Court never ruled whether the ADA required theaters to show closed captioned films and, if so, under what conditions. The case settled before trial so these issues were never addressed or decided.

The ADA’s distinction between providing equal access to products or services offered by a public accommodation, as opposed to altering or tailoring the products or services that are offered to meet the special needs of the disabled, is directly applicable here. Imposing the requirement that theaters show captioned movies would not constitute equal access to the product or service that NATO members currently provide in their theaters—non-captioned first run movies. Instead, it would compel theater operators to provide a different type of product more suitable for deaf patrons—precisely the type of relief the above-cited cases found beyond the scope of the ADA’s requirements.⁴

C. Although the ADA Does Not Require Motion Picture Theaters to Exhibit Captioned Movies, NATO and Its Members Have Long Supported Efforts to Make Cinemas More Accessible to Deaf and Hard of Hearing Patrons.

For nearly two decades, NATO and its members have actively supported movie access for deaf and hard-of-hearing patrons. NATO helped develop the first open caption film program with our partners in the movie studios and at InSight Cinema (formerly “Tripod”). In this program, film prints with open captions have been distributed and circulated among volunteer motion picture exhibition companies for advertised screenings. After closed captions for film were introduced

⁴ Because the ADA does not require movie theatres to otherwise change the nature, content, or mix of the products and services provided, NATO has not addressed the undue burden issue. It is worth noting, however, that in instances where NATO members voluntarily show captioned and non-captioned films at the same time in the same theatres, the attendance at the non-captioned movies always far exceeds the attendance at the captioned film. Even when the availability of captioned films is widely publicized, deaf patrons rarely attend captioned showings.

with the WGBH Rear Window® Captioning System, many NATO members installed closed caption systems in select auditoriums for the exhibition of those movies distributed with captions, and publicly advertised the availability of closed caption first run films.

D. Despite the Efforts of the Movie Distributors, Exhibitors, and Technology Providers, Wide-Scale Implementation of Captioning in the Film Era Has Been Difficult.

Open and closed captioned screenings in the film era have encountered limited success for several reasons. The production of open captioned prints is expensive. Movie studios have only been able to distribute a limited number of prints for a limited number of movie titles. Even more problematic, open captioned screenings draw few deaf and hard-of-hearing patrons to the cinema and drive hearing patrons away. When NATO members offer first-run versions of the same film in two auditoriums, one with open captions and one without, very few patrons attend the open captioned screening even if the other auditorium is crowded.

Closed captioned screenings do not produce the same disincentive for attendance by hearing patrons, but there is some indication that even the use of the Rear Window device has a negative impact on attendance in the auditoriums equipped therewith. Moreover, despite advertising by theater companies and by WGBH of the availability of closed captioned movies in designated cinemas, usage surveys by exhibitors that have installed these systems show that they are rarely used. Closed captioning in the film era, moreover, imposes significant cost burdens on the exhibitors, as the cost of the equipment enormously exceeds the negligible additional revenues generated.

E. With the Advent of Digital Cinema, the Industry Is Making Great Progress Toward the Goal of Greater Access, and NATO and Its Members Are at the Forefront of These Developments.

Digital cinema constitutes the greatest technological transition in the cinema industry since the advent of the “talkies.” For the past one hundred years, movies have been distributed and projected on celluloid film prints. Today, the industry has begun the transition to digital distribution and projection. Approximately 5,000 of the 38,600 movie auditoriums in the United States have digital projection systems. Installation rates will accelerate in the near future as

technical standards are completed and as the various parties agree to business models for further implementation. At some point after digital implementation, film prints will cease to exist and all movies will be distributed and exhibited in digital format.

At the same time, the industry is developing specific technology standards and equipment vendors are creating viable options for increasing access in the digital cinema world. Digital cinema cannot solve the problem of open caption movies—as hearing patrons will not accept open captioned screenings regardless of the projection technology used. But digital cinema may reduce the cost burden of closed captioning and audio description compared to the film world. Thus, digital cinema may greatly facilitate disabled patrons' access to movies.

Digital Cinema Initiatives, a joint venture of the six major Hollywood studios, released version 1.0 of its Digital Cinema System Specification in July 2005. NATO released version 1.0 of our Digital Cinema System Requirements in February 2006, and version 2.0 in February 2008. (See www.natoonline.org/Digital.htm.) Section 3 of NATO's requirements specifically call for disability access by requiring that digital cinema servers be capable of playing narrative audio tracks and closed caption tracks when included in content distribution.

The publication of user requirements informs system providers, product developers, and formal standards committees of what exhibitors will want from vendors. The Society of Motion Picture and Television Engineers (SMPTE) constitutes the main standards body for digital cinema. In late 2006 NATO petitioned SMPTE to conduct a study effort of closed caption systems for theatrical use. NATO's technology consultant, Michael Karagosian, chaired that committee. By March of 2007 the study effort was completed and a full-fledged standards effort for closed captions began. The primary goal of the standards effort is to produce the minimum uniformity required among diverse equipment manufacturers that will allow a competitive closed caption market to thrive. With standards in place, new innovations in personal display technologies can be introduced in the future without changing the closed caption distribution method or changing the digital cinema servers. This goal of interoperability is critical to optimizing the development of competitive technologies and ensuring their smooth implementation.

The SMPTE 21 DC Ad Hoc Group for Closed Captions continues its activity today. Committee participants include multiple providers of closed caption systems, multiple providers of closed caption content (e.g., movies), and multiple providers of digital cinema servers. (Digital cinema servers must receive the closed caption content and synchronize it with sound and picture.) The committee's first step was to produce mastering and distribution standards for closed captions. Draft documents are in their first ballot cycle at this time. The group's next step is to produce a standard for connecting third party closed caption systems to digital cinema servers. To better understand how the standards will apply, the block diagram below illustrates the workflow for closed caption distribution and display.

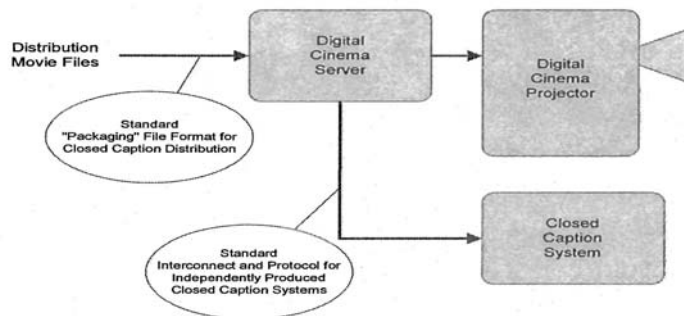


Figure 1. Closed Caption Workflow in Digital Cinema
(Note: Closed Caption System can be that of WGBH, PCS, or other vendor.)

To date, the only closed caption system in full production is WGBH's Rear Window® captioning system. Competitive closed captioning systems are also emerging. One such system to be installed in theaters on an experimental basis is from Personal Captioning Systems (PCS). PCS wirelessly transmits captions into the theater auditorium, which are displayed on cup-holder-mounted personal digital assistants (PDAs). Other technologies in development include head-worn optics that display wirelessly-transmitted text in one's field of view while watching the movie. USL/Emagin and Sightline are developing variations on this approach. The illustrations below show how two possible closed caption systems work in digital cinema.

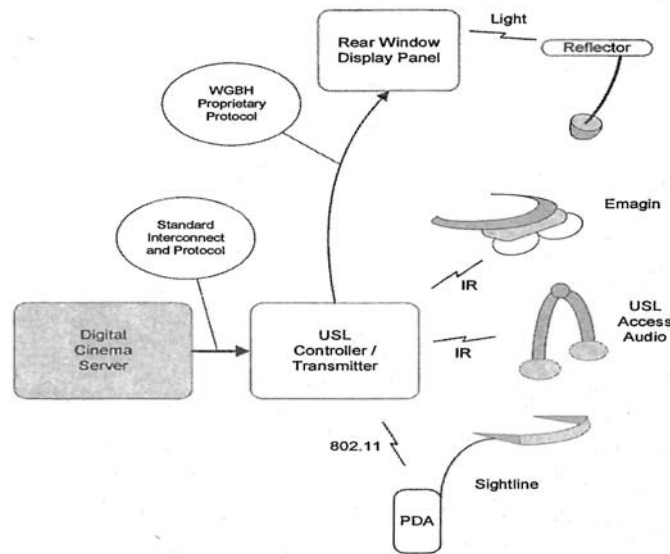


Figure 2. USL Proposed Controller/Transmitter Product for Closed Captions & Access Audio in Digital Cinema

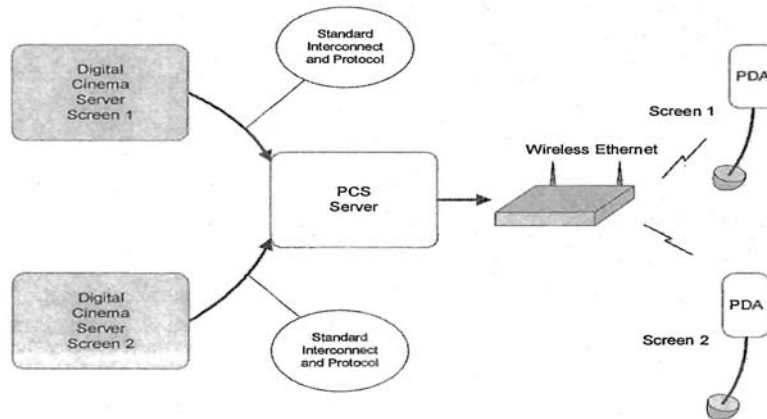


Figure 3. PCS in Digital Cinema Application

Leading NATO members are working very closely with access equipment companies by providing technical guidance, cinema testing locations, design requirements, and other collaborative efforts. One leading member is working with USL and Emagin, and another with PCS. NATO members have also organized hands-on demonstrations of prototype equipment to representatives of the disabled community and to industry participants at large.

At the same time, NATO has taken the lead public advocacy position within the broader movie and equipment industry. Most recently in May 2008, for example, before the Department's NPRM was published, NATO distributed an open letter (also available at

www.natoonline.org/Digital.htm) to movie distributors and equipment vendors calling for support of greater access in digital cinema to motion pictures for deaf and hard-of-hearing patrons, as well as the blind and visually impaired. The letter described developing technologies and ongoing standards efforts, and suggested steps to be taken by the collective industry.

NATO and our members seek wider access to cinemas in the evolving digital cinema world. We stand ready to provide any additional information or technical briefings that the Department may desire.

F. DOJ Regulation at This Juncture Would Distort or Altogether Thwart Meaningful Progress.

Any requirement of captioning or audio description at this juncture would require significant expenditures for film-based equipment adaptations that will become obsolete in the near future. Regulations now would also divert attention and resources from new technologies that hold the best promise of wide-scale access, and instead return the industry's focus to technologies that have proven to be overly costly and unacceptable to the industry's hearing-impaired patrons. We strongly recommend that the Department refrain from regulation, and instead monitor these developments in new access technologies. NATO looks forward to assisting the Department in that regard.

Question 25: Should the Department require that, one year after the effective date of this revised regulation, a public accommodation will exhibit all new movies with narrative description? Would it be more appropriate to require narrative description less frequently? Should the requirement for narrative description of movies be tied to the use of a digital format? If so, why? Please include specifics regarding how frequently narrative description should be provided.

Answer 25: The same analysis provided in response to Question 24 relating to captioning applies to Question 25 involving "narrative description."

Additionally, narrative description requires writing a new script. Narrative description is not part of a motion picture. It is a separate product and indeed must have a separate copyright. As other

interested parties are likely to address, narrative description therefore poses separate legal and logistical problems.

The ADA does not require theaters to show movies with “narrative descriptions.” However, as we indicated in our Answer to Question 24, the digital transition holds promise for narrative description. The Committees working on standards for captioning are also dealing with narrative description.

We strongly recommend that the DOJ monitor the developments in the new technologies and resist any temptation to impose mandates.

Question 46: Should the Department adopt a presumption whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during the previous tax year, the entity spent at least one percent (1%) of its gross revenues on barrier removal? Why or why not? Is one percent (1%) an appropriate amount? Are gross revenues the appropriate measure? Why or why not?

Answer 46: Question 46 proposes a safe harbor for small business. NATO supports the concept of a safe harbor for small business. However, NATO does not believe that a formula based on gross revenue is fair. There are many very small independent motion picture theaters operated in small towns throughout the United States. These theaters typically have one or two screens. Generally they are the only form of public entertainment available in the town. In most instances, the theater owner owns the building in which the theater is located and has operated the facility for many years. Attendance at these theaters is usually marginal. One can expect to see total attendance averaging 250 people per screen per week. The typical ticket price would be approximately \$6.00 and average concession revenue \$2.00 per patron. Gross revenue of these theaters would be in the area of \$100,000 per screen. In many instances, the theater is run as a “Mom and Pop” enterprise and if you take into account the number of hours that Mom and Pop spend operating the theater, they earn less than the minimum wage. Although these theaters may have annual gross revenue of \$100,000 per screen, approximately \$78,000 of that gross revenue is from box office admissions. These theaters are licensed by film distributors to show movies. Under standard licensing agreements, it can be estimated that more than 50% of the box office revenue would go directly to the distributor. Many small franchise operations, whether they be

restaurants, ice cream stores, or similar types of facilities have the same type of arrangement whereby a percentage of the facility's gross revenue goes directly to the franchisor as part of the franchise fee. We recommend that for the purposes of determining gross revenue, a small business be permitted to deduct any amount paid directly to a supplier, distributor, or franchisor as a license fee or franchise fee, from total revenue in order to get "gross revenue" for ADA purposes.

NATO recommends giving small business a choice of formulas. One formula could be based on 1% of gross revenue. The second formula could be based on after-tax revenue. A number such as 3% of after-tax revenue would give fair recognition to the fact that marginal businesses such as the small theaters that are so important to rural and small-town America simply cannot afford to spend 1% of their gross revenue on ADA improvements.

Question 47: Are there types of personal mobility devices that must be accommodated under nearly all circumstances? Conversely, are there types of mobility devices that almost always will require an assessment to determine whether they should be accommodated? Please provide examples of devices and circumstances in your responses.

Answer 47: Today's motion picture theaters are designed to meet recognized accessibility standards including building codes, ANSI Standard A117.1, various life safety codes, and the DOJ Standards. Most of these standards have been developed based on certain assumptions regarding the height, width, depth, and functionality of a standard wheelchair. Door width, concessions stands and admission booths, drinking fountains, restroom facilities, aisles, hand rails, and auditorium wheelchair spaces are all designed to be accessible based on the parameters that have been established for a "standard" wheelchair. The use of personal mobility devices that exceed the size and functionality features of a "standard" wheelchair may not be possible in a motion picture theater environment. For example, a motorized device that is significantly wider than a standard wheelchair may not be able to fit through accessible doorways. A mobility device that is significantly lower than a "standard" wheelchair may result in the device user having difficulty accessing toilet facilities. Within the theater auditorium, a mobility device that is substantially wider or longer than the "standard" wheelchair might not be able to fit in one of the wheelchair spaces. Further, even if such a device did fit in a wheelchair space, it might

overlap into the adjoining space and thus effectively occupy two spaces for two wheelchair patrons. Finally, theaters are designed to give all patrons a reasonable opportunity to exit the facility during an emergency. The widths of ramps and aisles have been designed by code in recognition of the number of people that will be seated in the facility, and the number and nature of the exits available. Normally, the larger the auditorium, the greater the required capacity for egress in times of emergency. An oversized mobility device will restrict egress in times of an emergency and may violate life safety codes. Finally, devices that are too high such as EPAMDs and mobility devices with a seat that is significantly higher than the standard wheelchair seat, will pose significant disruption problems in a motion picture theater setting. In a theater, the sight lines are drawn so that the person in any row has the ability to see the screen looking over the head (or between the shoulders in the case of continental seating) of the person in front. If a mobility impaired person drove an EPAMD into a movie theater and parked the EPAMD in a wheelchair space, the person using the EPAMD would have nowhere to sit. If that person stood on the EPAMD, he or she would block the view of the people in the row behind the wheelchair space. Even if the person left the EPAMD upright and moved into a companion seat, the handle of the EPAMD would still block sight lines. Similarly, if a person in mobility device that had a seat significantly higher than a seat in a standard wheelchair moved into a wheelchair space in a motion picture theater, that person would block the sight lines of the person in the row behind the wheelchair space.

In an environment such as a motion picture theater, set parameters for mobility devices are necessary. NATO recommends that mobility devices used by persons with disabilities in the setting of a motion picture theater be limited to devices which fall within the size parameters of a “standard” wheelchair.

Question 48: Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?

Answer 48: Motorized devices that use fuel or an internal combustion engine should not be permitted inside a closed environment such as a motion picture theater. These devices emit

carbon monoxide gases that create health and safety hazards for other patrons when used in a closed facility. These devices have a disruptive noise level when used in a confined space such as a motion picture theater auditorium. The use of such devices in a theater may violate local codes and zoning ordinances.

Question 49: Should personal mobility devices used by individuals with disabilities be categorized by intended purpose or function, by indoor or outdoor use, or by some other factor? Why or why not?

Answer 49: Personal mobility devices used by individuals with disabilities should be categorized by intended purpose or function, and by indoor or outdoor use. See NATO's responses to Questions 47 and 48 explaining the reasons for this position.

Question 50: The Department proposes using the start of construction as the triggering event for applying the proposed standards to new construction under title III. The Department asks for public comment on how to define the state of construction and the practicality of applying commencement of construction as a triggering event. Is the proposed definition of the start of construction sufficiently clear and inclusive of different types of facilities? Please be specific about the situations that are not covered in the proposed definitions, and suggest alternatives or additional language. In addition, the Department asks that the public identify facilities subject to title III commencement of construction would be ambiguous or problematic.

Answer 50: NATO strongly objects to the proposal that standards apply to all new construction that begins six months after publication of the final rule. In building a new motion picture theater, it often takes several months to prepare the plans and once the plans are prepared, they must be submitted to local building code authority for approval. The approval process can be quite lengthy—and beyond the control of the theater owner. During the course of approval, plans must often be modified and resubmitted. If the proposed new construction requirements became effective for new construction which began six months after the date of publication of the final rule, the plans for almost every major construction project which have been submitted to code authorities would have to be withdrawn because there would be no guarantee that code approval would be obtained and authorization to begin construction granted within a six month window. A minimum of twelve months is required in order to avoid the redesign of all plans currently under development. The cost of redrafting, redesigning and delaying the opening of

major construction projects would be astronomical. Not only would there be direct costs, but there would be potential losses involving defaults on construction loans, requirements for obtaining new financing, and potential defaults on options to buy land based on construction beginning within a certain time period. A twelve-month grace period after the effective date must be provided.

In the NPRM, the triggering event for applying the new standards to new construction is “commencement of construction.” This is not acceptable. Many motion picture theaters are not built as free-standing structures but as part of shopping malls. Construction on the mall will begin many months or even years prior to the time that work begins on the interior of the theater. If plans for the theater are approved more than 12 months after the publication of the Final Rule, or if construction of the theater is started more than 12 months after the publication of the Final Rule, the new standards should apply. It is important to distinguish between the specific public accommodation, i.e., the theater, and the mall or larger box structure that may house several independently leased or owned public facilities.

III. Comments on Additional Issues

A. Accessible Means of Egress

Under the current Standards and the ADAAG, if a facility has more than one means of egress, 50% of the number of means of egress must be accessible. Under this Standard, if a facility has two means of egress (as is typical in a motion picture theater), one means of egress must be accessible. Under the revised ADAAG and the Proposed Standards which will incorporate the revised ADAAG, 60% of the means of egress must be accessible. Under this Standard, if there are two means of egress, both must be accessible. This change would apply only to new construction and renovations. Existing facilities which comply with the current Standard and the current ADAAG would be grandfathered. However, a problem arises in connection with renovations within the theater. If the renovations involve a portion of a path of travel to an existing non-accessible means of egress, the motion picture theater operator would be required to make the inaccessible means of egress accessible. This could involve a cost greatly in excess of the cost of the renovations. NATO recommends that no additional accessible means of egress be

required if the cost of making the means of egress accessible exceeds 20% of the cost of renovation.

B. Automatic Ticketing Machines

Many theaters currently use automatic ticketing machines in the theater lobby. These machines only sell theater tickets; they are not ATMs. These automatic ticketing machines are accessible but they do not “talk.” To our knowledge, “talking” ticketing machines are not generally available from vendors of this type of equipment. The 2004 ADAAG is confusing in its discussion of what types of ATMs/ticketing machines must have “talking” abilities. The final rule should make it clear that ticketing machines, such as those found in theater lobbies, which do not fall within the definition of “ATMs,” do not need to have the capacity to “talk.”

C. State Certification

When the ADA was enacted in 1991, Congress recognized the need to involve state building departments in the ADA compliance effort. As a result, the legislation included a procedure whereby a state could submit its building code to the DOJ to determine if the state building code met ADA requirements. If the state building code did meet the ADA requirements, the DOJ is authorized to certify the code as being in compliance.

Following this procedure, the DOJ has certified many state building codes as complying with the DOJ Standards and has issued press releases indicating that builders whose facilities are determined to be in compliance with certified state building codes can be assured that the facilities comply with the ADA.

Unfortunately, however, the DOJ has taken the position that even if a state inspector has determined in writing that a building meets all of the requirements of a certified state ADA statute or building code, the DOJ will not be bound by that determination. As a result, builders have no way to get government confirmation that a proposed structure meets ADA requirements.

Unlike state building departments, which approve construction plans and have inspectors that visit job sites, the DOJ will not review a set of proposed plans and make a determination of whether the plans meet the requirements of the ADA. Although the DOJ has established an ADA hotline, the individuals staffing the hotline are quick to point out that any opinions that they provide are not binding on the DOJ. Further, the hotline staff will not review plans.

There is a simple way to increase compliance with the ADA Standards and at the same time provide operators of public facilities with a means of ensuring that their plans are ADA-compliant. The DOJ could establish a training program for state building inspectors in states that have ADA regulations that the DOJ has certified of meeting federal ADA Standards. In these states, the certified inspectors could review plans prior to construction and inspect job sites during the construction process.

When the project is completed, the inspector could re-inspect and then certify that the project meets state and federal requirements. The benefits flowing from such a program would be monumental. The disabled community would be able to know that major construction projects meet ADA requirements. Owners and operators of public facilities will be able to know that their projects meet ADA requirements. The DOJ would save money in nationwide enforcement costs. Disabled individuals would have better access to more facilities. Owners and operators of public facilities would lower costs by achieving certainty without expensive litigation.

In the past, the DOJ has argued that the ADA is a civil rights statute and not a zoning law. The Department has argued that it is not authorized to totally abdicate its enforcement authority to state building inspectors. In Question 30 of the NPRM, however, the Department asks whether play areas and recreation areas that meet specific state or local standards governing such areas be subject to a safe harbor from compliance with applicable requirements of the 2004 ADAAG. If such a concept is viable for state and local standards for play and recreational areas, it is certainly viable for state building codes that the DOJ has certified to meet ADA requirements.

Compliance with such codes should provide a safe harbor from complying with the 2004 ADAAG and the DOJ standards specifically addressed in the Code.

NATO believes that this program would be widely adopted in states throughout the United States. It would become the most meaningful way of guaranteeing that public facilities are fully accessible.

IV. Wheelchair Seating in Stadium-Style Theaters

During the past decade, the motion picture theater industry has been subject to extensive DOJ litigation regarding the meaning of Section 4.33.3 of the DOJ Standards as applied to stadium-style motion picture theaters. At issue is one sentence in Section 4.33.3. That sentence provides:

Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those who are members of the general public.

There is no conflict with regard to the meaning of the phrase “wheelchair areas shall be an integral part of any fixed seating plan.” There is no conflict with regard to the “choice of admission prices” phrase as movie theaters charge one admission price for all seats as a general rule.

The sole issue involves the meaning of the phrase “lines of sight comparable.” These four words have resulted in major lawsuits that have reached the First, Second, Fifth, Sixth, and Ninth Circuit Courts of Appeals. Many millions of dollars have been spent litigating a resolution to the meaning of these four words. The results, regrettably, are inconclusive.

In 1999, NATO petitioned the Attorney General to begin a rulemaking proceeding to define where wheelchair seating should be placed in stadium-style motion picture theater auditoriums. We wanted clarity. NATO proposed a specific rule that would place wheelchair seating in the stadium portion of the auditorium at least one-third of the way back from the screen, centered horizontally, and including appropriate companion seating. The Attorney General denied the petition for a rulemaking proceeding claiming that the DOJ would soon be proposing a set of revised ADA Standards. It is now almost ten years later. During that ten-year interim, in lieu of either a specific rulemaking or revised ADA standards, the DOJ sued our largest members. The

result has been a series of conflicting district and appellate court decisions regarding the meaning of Section 4.33.3. The one constant in all of the decisions is the conclusion that the phrase “lines of sight comparable” is at a minimum ambiguous. Yet the litigation and the absence of clarity persisted.

In the ANPRM published September 30, 2004 (69 F.R. 58768), the DOJ included an extensive discussion of stadium-style seating. The DOJ noted that the “lines of sight comparable” language requires a qualitative comparison, not just access. It further noted that the meaning of “lines of sight comparable” has been explained in Section 221.2.3 of the 2004 ADAAG which in turn provides that wheelchair locations must have viewing angles substantially equivalent to or better than viewing angles available to other spectators.

NATO submitted substantial comments in response to the questions raised in the ANPRM. NATO pointed out that the regulations do not define “viewing angles” or how to measure “viewing angles.” NATO argued that neither the regulations, the ADAAG, nor the ANPRM included any means of making a qualitative comparison of what makes one viewing angle better than another viewing angle or what makes one seat in the middle of a movie theater a better or a worse seat than a seat in the row directly in front of or the row directly behind the seat in question.

As an example, NATO asked what parameters were used by the DOJ in determining that placing wheelchair locations in the top 60% of the seating of a stadium style theater would be preferable than placing wheelchair locations in the middle 50% of the seating area of such auditoriums. NATO emphasized the need for a new regulation with specific parameters that could be clearly understood by theater designers, code officials, disability rights groups, and if necessary, judges.

In the NPRM, the DOJ recognized the need to establish a bright-line test as guidance for designers building stadium-style motion picture theaters. However, rather than revising Section 4.33.3 or explaining how one makes a qualitative determination of the meaning of the language “lines of sight comparable” the DOJ proposed a supplemental standard, Section 36.406(f)(4). The DOJ indicated that this “supplemental” section is not a substantive change in the basic

regulation as set out in Section 4.33.3 as defined by Sections 221 and 802 of the 2004 ADAAG. The DOJ said that Section 36.406(f)(4) is designed to enable theater operators who are uncertain as to the meaning of Section 4.33.3 to comply with a bright-line test and eliminate any ambiguity as to whether the design of any new theater meets the test established by the “lines of sight comparable” language.

NATO strongly believes that there is still a need to rewrite Section 4.33.3. There is nothing in the record of this rulemaking that provides any basis for making a qualitative comparison of what is the “best” seat in a movie theater and what is the “worst” seat in a movie theater or why one viewing angle is better than another. There is no listing of the criteria to be considered in making such a comparison. The language contained in the 2004 revised ADAAG adds further confusion rather than further clarity.

Nevertheless, NATO supports a bright-line test as guidance for motion picture theater designers. With regard to the specific bright-line test proposed in Section 36.406(f)(4), NATO has the following comments:

1. Scope of Application. The regulation should specify that this test applies specifically and only to stadium-style motion picture theater auditoriums of 300 or fewer seats. In the ANPRM, the ANSI A117.1 Standard, and in the 2004 ADAAG, it is clear that the vertical dispersion requirements are only eliminated in stadium-style auditoriums of 300 or fewer seats.
2. Calculation of Viewing Angle. The Department should specify that the vertical viewing angle referenced in Section 36.406(f)(4) is measured by drawing a line from the eye of a person sitting in the wheelchair space to the top of the screen and another line from the eye of that person perpendicular to the screen.
3. 70% versus 60%. Section 36.406(f)(4)(i) should be revised to include a seventy-percent (70%) test rather than a sixty-percent (60%) test. In its response to the ANPRM, NATO explained that the 70% figure had been adopted by ANSI as the unanimous consensus position. Moving wheelchair locations back to meet the 60% criteria would generally result in moving

wheelchair locations back one or two rows within the auditorium. Generally the wheelchair location will be moved back between 3.5 and 8 feet. If a theater has 12 inch risers, moving back two rows will increase the elevation of the wheelchair location by 24 inches. Most modern building codes require a dual means of egress from the wheelchair locations. In a motion picture theater, the second means of egress is provided by an exit at screen level. Therefore, it is necessary to provide a ramp from the wheelchair location to the screen exit. The ramp must have a slope of 1 in 20 (or a slope of 1 in 12 feet if handrails are provided). To move the wheelchair patrons up two feet in the auditorium requires an additional 24 to 40 feet of ramping to the screen exit. This space is often not available in a small auditorium and creates major construction issues. The DOJ has not indicated or placed in the record of this rulemaking any evidence to support its statement in the ANPRM that the 70% rule would not provide “an equivalent viewing experience.” In sum, the back-60%, rather than back-70%, requirement would be arbitrary, unsupported by the record, provide negligible if any measurable benefit to disabled patrons, and nevertheless cause substantial cost and logistical burdens.⁵ NATO accordingly recommends that the bright-line test include a 70% rather than a 60% test.

4. Retroactivity. Of tremendous importance to NATO and its members, we urge the DOJ to state clearly in the preamble of a final rule that any bright-line test is not intended to be applied retroactively. As the Department is well aware, many existing theaters may comply with Section 4.33.3, but not with the bright-line test set forth in the NPRM.

If the Department proceeds with the bright-line test set forth in the NPRM, or adopts a modified bright-line test, NATO recommends that the following language be set forth in the Preamble for the Final Rule:

As stated in the ANPRM and the NPRM, the requirements for the location of wheelchair seating in stadium-style motion picture theaters were established in Section 4.33.3 of the 1991 ADA standards. These requirements have been further defined in Sections 221 and 802 of the 2004 ADAAG, which the Department is adopting as part of these final regulations.

⁵ The fact that some NATO members agreed to settle expensive ADA litigation with the DOJ and include a back-60% requirement for future construction testifies to the tenaciousness of DOJ litigators, but does not establish any rational basis for imposing that requirement by universal rule.

The motion picture theater industry has petitioned for a prospective bright-line test that could be applied to new construction as a guideline or safe harbor for use when designing stadium-style motion picture theaters. Disability rights groups and code officials have also requested a bright-line test. In response to these requests, the Department is adopting Section 36.406(f)(4) as set forth in the NPRM. This section is intended as a bright-line test to be applied to new construction. This section has only prospective, not retroactive, application.

As noted in the ANPRM, in 2003, ANSI Standard A117.1 was revised to include a bright-line test for location of wheelchair seating in motion picture theaters. The ANSI bright-line test has a back-70% parameter rather than the back-60% parameter set forth in Section 36.406(f)(4). Although the Department does not intend to challenge facilities built before the effective date of the revised DOJ Standards that are in compliance with the ANSI A117.1 bright-line test, the Department will be recommending that ANSI further revise its standards to comply with Section 36.406(f)(4).

Any attempt to apply the bright-line test retroactively would have a disastrous financial impact on our industry and would result in yet more litigation on this massively-litigated subject. As the intent of the bright-line test is to encourage compliance and avoid litigation, NATO strongly recommends that the Preamble to any Final Rule clearly and succinctly state that this test is not designed to be applied retroactively.

5. Large Format Presentations. There are certain motion picture theater auditoriums that are specifically designed for large format presentations such as IMAX presentations. In such auditoriums, many seats do not afford patrons a full view of the screen. Line of sight measurements in these auditoriums are not comparable to line of sight measurements in the typical stadium-style theater auditorium. In establishing regulations governing motion picture theaters, DOJ should consider auditoriums designed for large format presentations separately from standard stadium-style auditoriums.

V. Conclusion

NATO thanks the DOJ for providing this opportunity to comment on the NPRM. We believe that the Department needs to further consider the issues of wheelchair locations and captioning in

the motion picture theater environment. Much progress has been made in these areas and even more progress can be expected in the near future. We ask that the Department accept the positions set forth in these comments and work with us to continue to improve access to motion picture theaters.

Respectfully submitted,

National Association of Theatre Owners, Inc.

By:

G. Kendrick Macdowell
Vice-President, General Counsel
& Director of Government Affairs
National Association of Theatre Owners, Inc.
750 First Street, NE, Suite 1130
Washington, D.C. 20002
(202) 962-0054