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ANPRM
Disability Right Section
U.S. Department of Justice
1425 New York Avenue, NW
Washington, DC 20530

Re: Non-Discrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; CRT Docket No. 2004-DRS01; AG Order No. 2736-2004

Dear Sir or Madam:

The Food Marketing Institute (FMI) respectfully submits the following comments in response to the Department of Justice's (DOJ) advance notice of proposed rulemaking (ANPRM) which begins the process necessary for the adoption of accessibility guidelines issued by the Architectural and Transportation Barriers Compliance Board for buildings and facilities that are covered under Title III of the Americans with Disabilities Act (ADA) and the Architectural Barriers Act of 1968 (ABA). 69 Fed. Reg. 58768 (Sept. 30, 2004).

FMI is a non-profit association conducting programs in research, education, industry relations and public affairs on behalf of its 1,500 members and their subsidiaries. Our membership includes food retailers and wholesalers, as well as their customers, in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with combined annual sales volume of $300 billion, which accounts for more than half of all grocery sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms and independent supermarkets. Our international membership includes 200 members from 60 countries.

Recognizing that roughly 80 million Americans visit their neighborhood grocery stores each week and that the typical shopper will make 2.2 trips per week to a supermarket, this ANPRM is of significant interest to FMI's membership. The supermarket industry has long dedicated itself to meeting a wide range of consumer needs and expectations, and our members continually strive to respond to consumers' changing wants by offering additional amenities such as home delivery, banking services

and prescription drugs. Thus, we can unequivocally state that our industry has extensive experience in responding to consumer needs as well as in matters relating to accessibility and public accommodation.

In fact, we know that access and accommodation are extremely important to shoppers. FMI's Trends research, a yearly survey of consumer attitudes, has documented the key reasons why consumers select a particular grocery store. Overwhelmingly and consistently, our consumers tell us that they want and expect courteous and friendly employees, convenient locations, quick and efficient check-out lanes, quality and selection of goods and services, low prices, and a convenient, accessible store layout that facilitates shopping in the least amount of time.

FMI's Trends research additionally shows that our industry is, in fact, responding to the diverse needs and wants of today's shoppers. This ongoing commitment to better serve all customers gives the ANPRM relating to the adoption of the ADA Accessibility Standards special significance as our supermarket members continue in their efforts to design and make their stores more convenient and accessible, as well as more enjoyable places for consumers to shop for their groceries. Reflective of our industry's commitment to the important tenets of accommodation and accessibility that are the core principles of the ADA, FMI partnered with the U. S. Department of Justice (DOJ) in 1993 to develop educational and informational materials specifically tailored for the supermarket industry. Extensive information on the ADA Accessibility Guidelines was included in these materials so that grocery stores would be able to identify and eliminate barriers that restrict or limit accessibility. As a result, neighborhood grocery stores have made and continue to make significant economic investments to improve access and eliminate barriers for individuals with disabilities.

General Issues

The Justice Department is seeking comments on the effective date for the application of the revised ADA Standards for facilities that will be newly constructed or altered following the publication of a final rule. DOJ notes that, when the ADA was enacted into law in 1990, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. For example, the ADA requirements for new construction under Title III were not applicable for eighteen months after promulgation.

Recognizing that the newly proposed Access Board guidelines are extensive -- close to 300 pages -- and will potentially make hundreds of changes to the current guidelines, FMI urges the Department to adopt Option I, under which the effective date of the revised ADA Standards would be l8-months after the publication of a final rule. The supermarket industry will need at least 18 months to become familiar with the new ADA Standards that will affect new store construction and major alterations of existing facilities.

On the question of a "triggering event" that compels compliance with the new ADA Standards, FMI encourages DoJ to recognize that substantial investment is made in a facility at the design stage when much work is done to comply with ADA standards. This investment occurs even if it takes a permitting office several months to issue a building permit. Accordingly, facilities for which design has been completed should not need to comply with the new standards, even if a permit has not yet been granted. If DoJ needs a "bright line" standard, the Agency could consider the design complete at the time that the design is submitted to the permit office.

Revised ADA Standards: Existing Facilities

One of the most important issues on which DOJ is soliciting comments is the potential effect that the new or changed ADA standards will have on the continuing obligation of public accommodations to remove barriers in existing facilities to the extent that removal is readily achievable. The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In other words, it must be inexpensive and easy to do. The Americans with Disabilities Act (P.L. 101-336) defines the term "readily achievable" as follows:

"(9) READILY ACHIEVABLE. –The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

(A) the nature and cost of the action needed under this Act;
(B) the overall financial resources of the facility or facilities in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of employees; the number, type and location of its facilities; and
(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographical separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity."

FMI strongly supports the application of the statutory "readily achievable" principle to whether barrier removal constitutes an undue financial burden for certain places of public accommodation. In this regard, FMI reiterates comments made to DoJ in 1991 urging the agency to incorporate the language from the statute directly into the final guidelines and regulations.

This standard was created for the purpose of minimizing the impact of barrier removal expense on existing facilities and DoJ must enforce the statutory standard as intended. In other words, DoJ must not assert that over time compliance with the new

construction standard is readily achievable. This position nullifies the intended distinction between existing facilities and new construction that Congress expressly provided in the statute.

Safe Harbor Provisions

With the impending issuance of revised ADA Standards, the Justice Department is contemplating a safe harbor provision for any element of an existing facility that is in compliance with the specific scoping and technical specifications of the current ADA Standards. FMI strongly supports the safe harbor option because it recognizes the fact that the facility was in compliance with current ADA standards at the time of the building's construction. We, therefore, urge the adoption of the safe harbor provisions and that the safe harbor provisions apply to the entire facility as opposed to a particular element of the facility. This would be of particular importance to supermarket companies that have entered into settlement agreements and/or consent decrees with respect to matters of public accommodation and accessibility. FMI further recommends that the Department clarify in its final regulations that the new ADA standards do not require any retrofitting for existing facilities, such as supermarkets, that comply with the current ADA Standards.

Clearly, any mandate for retrofitting existing facilities would be unreasonable and an undue burden, especially for those companies and individual stores that are experiencing financial difficulties due to competition and changing demographics in the marketplace. The current ADA Standards continue to represent a very valuable benchmark that promotes a high degree of accessibility for places of public accommodation; the costs associated with imposing the new ADA Standards on existing facilities that comply with current standards would outweigh any additional accessibility enhancement for individuals with disabilities.

Employee Work Areas

Another very significant issue that must be carefully resolved by the Justice Department is the potential application of the revised ADAAG accessibility requirements to employee work areas. While Title III of the ADA covers accessibility for places of public accommodation, employee work areas are, by definition, not public areas. Title I of the ADA addresses issues of discrimination and accommodation for employees and prospective employees in work areas. In this regard, employers are obligated to make reasonable accommodation to the known limitations of an otherwise qualified individual with a disability, including architectural modifications, unless such accommodation would impose an undue hardship on the business operation. In turn, employees and applicants are provided with a right of action against those employers who employ 15 or more employees and who have discriminated against these individuals by failing to make a reasonable accommodation. Recognizing the fact that Congress provided for a "small business" exemption under Title I which governs matters of accommodation for

employees, FMI believes that it would be entirely inappropriate to impose Title III requirements on matters of accommodation for employees, prospective employees and employee work areas since Title III has no "small business" exemption.

As written, the Access Board's final rule may be interpreted to require an accessible route for employees with disabilities to approach, enter and exit the work area. In general, FMI supports this concept as it would apply to certain public spaces within a grocery store where employees interact with shoppers on the selling floor. FMI further supports excluding any application of the ADAAG requirements to individual work stations. It is also our position, however, that individual work stations do not need to be located on an accessible route because as we previously stated these are issues relating to employment, employees and "reasonable accommodation" that are already properly addressed under Title I of the ADA.

Moreover, the expansion suggested by the Access Board would be very costly from an employer compliance perspective, and its inclusion as part of a final rulemaking on public accommodations clearly would not translate to increased accessibility for persons with disabilities when these individuals are shopping at their neighborhood supermarkets. Additionally, an accessible route to restricted employee work areas where individual work stations are located, such as stock rooms, storage areas, kitchens, food preparation stations, customer service desks, and the pharmacy department, among others, simply makes no sense since customers are not permitted in these areas of the store, *regardless of whether they have disabilities.*

For example, stock rooms, storage areas, areas where deliveries are made from trucks and where products are inventoried and kept until they are displayed for retail sale should not be required to be accessible at all times under any final regulations or standards that would be issued by the Access Board or DOJ. Due to the nature of the supermarket business, especially at busy times of the year such as from Thanksgiving through the Christmas holidays, the volume of products being received, stored and prepared for display, means that this employee work area off the selling floor does not lend itself to continuous accessibility.

Thus, FMI urges the Department of Justice to instruct the Access Board to clarify that stock rooms and storage areas do not have to maintain a circulation path for common use at all times. These same issues that we have repeatedly raised with respect to stock rooms and storage areas equally apply to warehouses and distribution centers. Shoppers – *with or without disabilities* --, are not allowed into warehouses or distribution centers. To the extent that these areas must be accessible, they must be so in relation to employees and so are properly governed by Title I of the ADA and not Title III. Therefore, we urge DOJ to advise the Access Board that warehouse facilities need not maintain a circulation path for common use at all times.

Automatic Teller Machines: DOJ seeks comments on the issue of previously owned fixed equipment, such as ATMs. Many supermarkets purchase previously owned ATMs for cost saving reasons. This type of equipment is typically built into or permanently attached to a new store or an existing facility as part of a renovation so that ATM banking services can be offered to shoppers. Our members are concerned that the Justice Department might subject all fixed equipment -- either previously owned or new -- to the revised ADA standards.

Accordingly, FMI urges DoJ to follow its traditional approach under which the installation of previously owned equipment in a store is considered an alternation, rather than new construction. Under this approach, only the elements of the facility that are actually altered, such as the route to the equipment, the mounting height, or the entrance that provides access to the equipment must comply with the revised ADA standards. FMI strongly concurs with this position and urges its adoption in the final regulations.

Vending Machines: FMI further supports the Department's decision not to apply the new ADA standards to free-standing, mobile or portable equipment, such as soda vending machines, change machines and other non-permanent equipment. However, as stated in previous comments to the Access Board, FMI has strong reservations regarding the proposed requirement that at least one of each type of vending machine at a place of public accommodation comply with Section 309, which mandates certain accessibility features, including specified reach ranges and design requirements. This is a major departure from the current ADAAG, which requires vending machines and similar equipment to be located along an accessible route, but does not specify design features.

The supermarket industry views this potential change as unnecessary since Title III of the ADA permits flexibility so that facilities may choose among permissible options for providing goods and services to individuals with disabilities. For example, in lieu of requiring grocery stores to lower their shelves, store personnel may assist customers by retrieving food items from inaccessible shelves or display cases. This same principle should apply to vending equipment; that is, grocery stores should be allowed to have their employees provide personal assistance to shoppers with respect to vending machine transactions. If DoJ ultimately decides to apply Section 309 to free-standing equipment, it should be limited to new store construction in terms of the issuance of final rules that would be applicable to vending machines.

Reach Ranges: As proposed, the Access Board's final rule would lower the maximum reach range from 54 inches to 48 inches based on difficulties that individuals are alleged to have in terms of accessing ATMs, vending machines and gas pumps. These types of equipment can be found in many supermarkets and their adjacent fuel stations throughout the United States. FMI supports the Access Board's decision to exempt operable parts of existing fuel dispensers from the lower 48 inch side reach height. This exemption makes good common sense in terms of current gas pump design and avoids significant costs if gas pumps currently in use would have to be retro-fitted.

On a separate but very important issue relating to reach ranges, FMI is extremely concerned about the application of the lower 48-inch reach range as it might apply to customer self-service check-out equipment and to self-service food counters. In particular, FMI is concerned about how a lower reach range would affect self-scanning equipment at the front end of the store as well as point-of-sale equipment where a shopper swipes a credit card to complete a sales transaction.

According to our members, the current ADAAG reach range requirements work well in the supermarket context, allowing most individuals with disabilities to use self-scanning equipment, point of sale devices, or pin pads, as well as to make selections from self-service food counters. Therefore, FMI recommends that the rulemaking exclude this type of equipment from the lower reach range requirements. As we have previously mentioned in our comments, when a shopper needs assistance, a store employee will offer to help by retrieving an item from a high store shelf or carrying and loading a customer's groceries into their car or van. By the same token, if a shopper has difficulty in completing a transaction at a point of sale device or pin pad, a store employee can provide appropriate assistance. With regard to check-out lanes that have self-scanning equipment, lower reach ranges should not apply to the extent that an individual with a disability has the option to go to another check-out lane that has a cashier who would scan their purchasers.

Section 106.5 Alterations. Under the Access Board's proposal, resurfacing circulation paths or vehicular ways would be considered an "alteration," thereby triggering additional obligations to come into compliance with the current ADAAG standards or possibly the new standards. To the extent that supermarkets have parking lots for shoppers, these areas need to be resurfaced periodically as a result of vehicular traffic and weather conditions that cause deterioration of asphalt. As such, parking lot resurfacing is properly considered maintenance of the property and not an alteration. The same would apply to the interior of a grocery store in situations where either floor tile, a portion of carpeting or floor boards need to be replaced due to wear and tear or as a result of stains that cannot be removed by cleaning solvent. Thus, we urge the Department to clarify that these examples of routine maintenance within the supermarket industry should not be considered alterations.

Public Entrances: Proposed Section 206.4.1 would require 60 percent of public entrances to be accessible; the current ADAAG standards require 50 percent of public entrances to be accessible. If finalized as proposed, the impact on the supermarket industry would be substantial, at least in part because the current ADAAG standard results in fractions being rounded up to the next whole number. For example, if a supermarket has two entrances, under the current standard, one must be accessible; however, under the proposed standard, both entrances would have to be accessible.

The proposed change in public entrance requirements would significantly increase construction or remodeling costs. For example, some of our members operate urban stores that are set in older structures with numerous entrances that are converted from a previous use into a supermarket. In terms of new store construction, supermarkets are now going into mixed-use developments where a grocery store is being designed as part of a building structure that includes residential units or office space. A multi-level grocery store design may not lend itself to the new Access Board's formula that 60 percent of all public entrances must be accessible. We, therefore, urge the Department to retain the current ADAAG standard of 50 percent of all public entrances. In our view, this is a reasonable standard that properly balances the need for accessibility without unduly burdensome costs.

Parking Spaces: Section 208.2.4 would require an increase in the number of accessible parking spaces from one in eight to one in six that must be set aside specifically for vans. FMI acknowledges that vans are becoming more popular as a means of transportation for shopping. However, the proposed scoping change will have a significant impact on new store construction.

In the supermarket industry, sites are often selected and land purchased several years before actual store construction is begun. With the trend toward larger store formats and planning for adequate parking to accommodate all shoppers, our members are worried that this particular requirement may reduce overall parking capacity or drive up costs for the project to the extent that additional land will have to be purchased to meet the new van space formula. To minimize either of these potential problems adequate lead time is critical. Thus, as stated above, FMI strongly recommends that DoJ allow at least 18 months after the final rule is published before the new ADAAG Standards take effect.

Required Systems: Section 219.2 requires an assistive listening system to be provided in each assembly area where audible communication is integral to the use of the space and audio amplification is provided. According to the Access Board's Standards, three prerequisites must be met before a facility will be required to provide assistive listening systems:

(1) the area of interest must be an "assembly area;"
(2) audible communication must be integral to the use of the space; and
(3) audio amplification must be provided.

ADAAG Section 106.5 defines an assembly area as "a room or space accommodating a group of individuals for recreational, educational, political, social, civic or amusement purposes, or for the consumption of food and drink." Snack bars, food courts, sit-down restaurants, delicatessens, or cafes that are now commonly featured in many supermarkets might qualify as assembly areas. However, we do not believe that "audible communication is integral to the use of" these in-store eating facilities other than the fact

that there may be low level background music that is being played over a store speaker system. Thus, FMI requests that the regulations clarify that in-store restaurants, such as the examples that we have listed, are not assembly areas that would require the presence of an assistive listening system.

Service Counters: FMI once again seeks clarification from the Justice Department regarding the application of Section 904.4 to service counters. Numerous departments within a supermarket have display cases that should not be considered service counters. For example, the deli department, seafood, prepared foods, bakery, meat, floral and other specialized areas of the store all often have display cases that are specifically designed and built to showcase all the different food items for shoppers and to keep certain perishables or prepared foods at specified temperature settings in order to avoid spoilage and contamination. These cases are often higher than 36 inches.

Nonetheless, the proposed service counter height limitations should not apply to these display cases. Typically, customers will select an item from a self-service display case or will place an order with a department employee who will then remove the food item from the display case and hand it to the shopper. In most situations, there is no cash transaction, check writing or use of credit cards in these departments as the customer will pay for their selections in the check-out lane at the front-end of the store. Thus, there is no overriding need to limit a portion of the counter for all departments within a supermarket to a specified height of 36 inches.

When the Access Board issued its original accessibility guidelines implementing the ADA in 1991, the Access Board recognized that not all retail establishments are alike. In acknowledging the fact that retailers offer a wide range of unique products and services in many different settings, especially supermarkets, the Access Board wisely allowed for several options for service counters where cash transactions are not conducted, one of which is equivalent facilitation. "Equivalent facilitation" has worked extremely well because it provides grocery stores with the option of either following the new Accessibility standards that will govern service counters or to serve customers by other means, such as at the end of the counter or display case.

The new guidelines should continue to recognize the policy of equivalent facilitation. Otherwise, a strict application of the new ADA Standard to grocery stores will likely result in significant and unnecessary expenses because most service counters and display cases would no longer be in compliance and could be subjected to retro-fitting requirements. New service counters and display cases would also have to be redesigned for new store construction or major renovations. Redesign would be challenging because the display cases would need to meet the new ADA standard while accommodating all necessary features for proper food storage and handling such as to refrigeration, heating and cooking features, moving shelves, rotisseries, special lighting, sliding glass doors, cabinetry and plumbing. Thus, FMI considers application of the new ADA standard to grocery store service counters and display cases where cash transactions

do not take place to be a potentially excessive expense. We urge the Department of Justice to direct the Access Board to preserve the current ADAAG 7.2 standard for supermarket service counters and display cases.

Additionally, the proposed revisions as set forth in Section 904.2 will require supermarkets to provide knee and toe clearance if there is only a forward approach to a sales or service counter. In terms of our industry, this requirement does not consider the impact that the new standard will have on glass display cases that also serve as a counter where shoppers place orders or ask for a food item from the display case. If supermarkets are to comply with this requirement, these glass display cases would have to be substantially altered, retrofitted, redesigned or eliminated in their entirety. Such an end-result would mean a substantial loss of display fixtures, and in turn, a loss of valuable sales space in each affected department. The Access Board previously dismissed such concerns because the Access Standards permit a parallel approach to counters. A parallel approach, however, is burdensome for retailers who operate smaller grocery stores and for all supermarkets during busy seasonal sales periods such as Thanksgiving through New Years as a parallel approach infringes on the availability of valuable space on the selling floor. Thus, the parallel approach is not a practical alternative. Accordingly, we recommend that the Department exclude retail grocery stores from the proposed knee and toe clearance requirements.

Tactile Signs: Section 703.4.2 of the Access Board's new standards specified mounting height and location of tactile signs in relationship to doors in places of public accommodation. In general, our members can achieve the standards required, except for the requirement that stores place the tactile sign 9 inches centerline from the door edge as opposed to 7 inches, which is the current standard practice. This two inch difference may pose compliance problems in tight hallways or remodels as the standard requires a clear floor area of 18 inches by 18 inches. Signs placed adjacent to the doorframe are readable. Accordingly, there is no need to require 9 inch placement.

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FMI appreciates the opportunity to respond to the ANPRM on the revised Access Board guidelines. Although we are pleased to see that some of the issues raised by our industry in the past have been addressed, numerous important issues remain unresolved. For example, the Access Board continues to attempt to impose Title III requirements on workplace areas, which are clearly controlled by Title I of the ADA. Although the Access Board claims that the revised guidelines will have minimal economic impact on employee work areas, FMI strongly disagrees. In fact, as written, the new guidelines will have a significant adverse impact on such critical matters as work flow and productivity in relationship to the essential functions of the job. These issues are extremely important to the food retail and distribution industry, which is highly labor intensive.

Accordingly and for the reasons stated more fully above, we respectfully request that the Department of Justice refer the revised ADA Standards back to the Access Board for redrafting reflective of the foregoing issues. If you have any questions concerning our comments, please do not hesitate to contact us at 202 220 0600.

Sincerely,

Deborah White
Vice President &
Associate General Counsel,
Regulatory Affairs