FOOD MARKETING INSTITUTE

August 18, 2008

Ms. Grace C. Becker
Acting Assistant Attorney General for
Civil Rights
Office of the Attorney General
950 Pennsylvania Avenue, NW
Room 5541
Washington D.C. 20530

Re: US Department of Justice Notice of Proposed Rulemaking To Amend Its Regulation Implementing Title III of the Americans with Disabilities Act

Dear Ms. Becker:

The Food Marketing Institute[1] (FMI) appreciates the opportunity to comment on the Notice of Proposed Rulemaking ("NPRM") issued June 17, 2008, by the U.S. Department of Justice ("Department") to amend its regulation implementing title III of the Americans with Disabilities Act of 1990 ("ADA"), and to revise and update the Department's current Standards for Accessible Design ("1991 Standards"), 28 C.F.R. pt. 36, app. A, by adopting the revised ADA Accessibility Guidelines ("2004 ADAAG"), 36 C.F.R. pt. 1191, issued by the U.S. Architectural and Transportation Barriers Compliance Board ("Access Board") on July 23, 2004.

FMI and its members have a substantial interest in the NPRM and its impact on our industry and our customer base as a whole. Grocery stores and supermarkets serve a wide variety of people on a daily basis. FMI and its members support the goals of the ADA and recognize the importance of accessibility, for all individuals, as well as having a clear and consistent definition of "accessible." FMI has joined the U.S. Chamber of Commerce in submitting a collective comment that reflects the interests of business generally. FMI also writes separately to highlight those issues of particular concern to our members.

[1] FMI is a trade association representing the interests of food retailers and wholesalers. We have 1,500 members in the United States and around the world. FMI's U.S. members operate 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume represents three-quarters of all retail food store sales in the United States. FMI's retail membership encompasses a broad range of food retailers, including large multi-store chains, regional firms and independent supermarkets. Approximately fifty percent of FMI's members are qualified small businesses.

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1. Effective Date

FMI believes that a six month period for the effective date is inappropriately short, and urges the Department to adopt an 18 month period in the final rule. A six month period is simply too short for larger construction projects. Given the length of time involved from design and permitting to actual construction, a six month period creates a significant risk that 2004 ADAAG would go into effect after entities had already expended significant sums to design and permit a project, but before actual construction commenced, necessitating expensive redesign and construction delays.

For this same reason, FMI also encourages the Department to modify the proposed "triggering event" so that the date a permit application is completed remains a factor in determining when 2004 ADAAG will apply. The Department's current test for determining what constitutes "new construction" under title III of the ADA considers both the date a permit application is completed and the date a certificate of first occupancy is issued. 28 C.F.R. § 36.401(a)(2). By incorporating the date a permit application is complete, this test mitigated the risk that existing projects would be disrupted. It also brought the test into line with the approach followed under state and local building codes, which typically use the date of permit application to determine which edition of a building code governs a particular project. FMI therefore believes that it is critical to retain the date of permit application as one factor of the "triggering event," at least with respect to those construction projects that require a permit.

2. Safe Harbors

FMI appreciates that the proposed regulation contains multiple "safe harbor" provisions to mitigate the impact of 2004 ADAAG on existing facilities and qualified small businesses. While FMI strongly encourages the Department to retain safe harbors for existing facilities and qualified small businesses in the final regulation, we do note certain concerns with the particular safe harbors proposed.

a. Element-by-Element Safe Harbor

The proposed element-by-element safe harbor should be clarified in several respects. Of key concern is the fact that the safe harbor seemingly would not afford protection to elements in pre-ADA facilities that have been made compliant with the 1991 Standards to the extent "readily achievable," or in the case of alterations to the "maximum extent feasible," but are not in full compliance with the 1991 Standards. By utilizing the phrase "comply with the 1991 Standards," without any qualification, the proposed regulation appears to suggest that facilities have an obligation to further modify these elements pursuant to the requirements in 2004 ADAAG, even if such elements are not altered subsequent to the effective date of the regulation. FMI respectfully requests that the Department clarify this point in the final regulation. For these same reasons, the proposed safe harbor pertaining to path of travel, 28 C.F.R. § 36.403(a)(1), also requires clarification.

Additionally, the final regulation should include guidance regarding the concept of "element" for purposes of applying the safe harbor. For example, there are numerous requirements a water closet must satisfy in order to be considered compliant with the 1991 Standards, including requirements respecting seat height, distance from the side wall, location of the flush control, positioning of grab bars and clear floor space. Do the required clear floor space and the water closet constitute separate "elements" under the safe harbor, or is the clear floor space merely a characteristic of the water closet? The issue is significant in that mere replacement of a water closet should not trigger any obligation to modify the clear floor space, such as relocating an overlapping lavatory, where the clear floor space complies with the 1991 Standards. This issue is also important in the context of larger renovation projects. For example, in the context of remodeling a store, the restrooms may not be altered other than to install new finishes for a "like new" presentation. In some cases, old fixtures also may be replaced with newer fixtures. To the extent the layout and clear floor space within the existing restroom comply with the 1991 Standards, could the layout remain as is under the safe harbor, or would the facility be required to reconfigure the restroom to comply with 2004 ADAAG, including providing expanded clear floor space at the water closet? Assuming it is even technically feasible to do so, necessary modifications potentially would include moving walls, relocating plumbing pipes and relocating doors –the expense of which would not be insignificant. The cost of making such changes for two single-user restrooms (Men's and Women's) potentially could be more than $20,000.[2]

Finally, the Department should clarify which provisions in 2004 ADAAG represent "incremental changes" that are subject to the safe harbor, and which provisions represent "new" requirements that are not encompassed within the safe harbor. FMI appreciates that the matrix in Appendix 8 to the Department's Regulatory Impact Analysis, sets forth those changes that the Department considers to be "incremental changes" or "new." Although FMI has not thoroughly reviewed this matrix there appear to be omissions in the matrix. For example, § 904.4.2 of 2004 ADAAG requires knee and toe clearance at sales and service counters where only a forward approach is provided. Section 7.2 of the 1991 Standards does not contain any requirement for knee clearance at a sales or service counter. To the extent the matrix references sales and service counters, it does so only with respect to the fact that 2004 ADAAG permits a shorter counter length in certain circumstances. Yet another example is the requirement in § 904.4 of 2004 ADAAG that requires that the accessible portion of a sales or service counter extend the full depth of the counter. Section 7.2 of the 1991 Standards does not include this express requirement and the matrix does not reference it. It is therefore unclear whether the Department considers these requirements

[2] Given the difficulty posed for food retailers in reconfiguring single user toilet rooms to eliminate the overlap of lavatories with the clear floor space at water closets, FMI believes that this issue should be returned to the Access Board for further consideration. In the event that the Department chooses not to do so, however, the prohibition against lavatories overlapping the clear floor space of water closets should be made applicable only to facilities constructed after the effective date of the final regulation.

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"incremental changes" encompassed within the safe harbor or "new" requirements that are not. FMI respectfully submits that these provisions should be considered "incremental changes" encompassed within the safe harbor. Excluding these requirements from the safe harbor, with the result that sales and service counters that comply with the 1991 Standards would have to be brought into compliance with 2004 ADAAG, would result in significant cost to our industry.

Accordingly, the Department should further review and revise the matrix at Appendix 8 to ensure that all incremental changes and new requirements are reflected. The Department also should publish the revised matrix as an appendix to the final rule.

b. Qualified Small Business Safe Harbor

FMI strongly encourages the Department to retain a safe harbor for qualified small businesses in the final regulation, however, FMI has concerns with setting the maximum annual expenditure cap at 1% of gross revenue. Profit margins within our industry are very slim. Under the U.S. Small Business Administration's regulations, the maximum annual gross revenue for qualified small businesses within our industry is $25 million. 13 C.F.R. § 121.201. (NAICS Code 445110). For these food retailers, net profit (as a percentage of sales) averaged 2.39% in 2006-2007, 0.85% in 2005-2006 and 1.10% in 2005. Setting the annual expenditure cap at 1%, therefore, essentially offers no meaningful protection to the qualified small businesses within our industry. To avail themselves of the safe harbor, a small business essentially would have to spend all, or nearly all of its profit. A small business in our industry theoretically could have to spend up to $250,000 in a given year in order to receive any protection under the proposed safe harbor.

For these reasons, FMI urges the Department to incorporate an alternate formulation, such as a formulation based on net revenue, into the safe harbor. FMI recognizes that small businesses may differ with respect to whether a test based on gross revenue or net revenue is better suited given their particular circumstances. Accordingly, FMI would encourage the Department to offer alternative options for the small business safe harbor (one based on gross revenue and the other on net revenue), and allow small businesses to select the one on which they wish to rely.

FMI also understands that the Small Business Administration's Office of Advocacy has suggested that the Department consider structuring the safe harbor to permit a qualified small business to "roll-over" barrier removal expenditures in excess of the annual cap to the following year, or alternatively permit the qualified small business to average the expenditures made over a period of years, so that small businesses are not discouraged from conducting significant barrier removal in any given year. FMI believes that such a structure would greatly benefit small businesses.

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3. Employee Work Areas

FMI is concerned that the expanded requirements for employee work areas continues to obscure the distinction between the separate legal requirements under title I for employment and under title III for places of public accommodation and commercial facilities. Even though the Department characterizes the proposed expanded requirements for employee work areas as "minimal" and lacking "substantial impact," they set a precedent for the potential imposition of further expanded requirements in future rulemakings. For this reason, FMI believes that the current requirements for employee work areas set forth in the1991 Standards be retained, and that all other aspects of the work area be addressed within the reasonable accommodation process provided under title I.

FMI was pleased to note the Department's affirmation that areas used exclusively by employees for work (as distinct from employee common areas, such as restrooms and break rooms) are not subject to the requirements for readily achievable barrier removal. Given the significance of this issue to covered entities, as well as the degree to which the Department has relied on its interpretation to underscore the limited impact of the expanded requirements for employee work areas, this clarification should be included as an express exception within the barrier removal regulation, 28 C.F.R. § 36.304.

FMI offers the following comments with respect to the expanded requirements for employee work areas in 2004 ADAAG:

- Common Use Circulation Paths, § 206.2.8: FMI welcomes the Department's clarification in its summary analysis that only primary circulation paths, not all circulation paths would have to be accessible. Again, this clarification should be included in the text of either the regulation or 2004 ADAAG.

- Employee work areas less than 1000 square feet, Exception 1, § 206.2.8: FMI requests that the Department clarify the manner in which this exception will be applied. More and more, facilities tend to incorporate an open floor plan. Particularly for newer facilities in our industry, space often is defined by function with equipment such as cases and work counters (some of which may be fixed and some of which may be movable) used to define the space, as opposed to walls or partitions. For example, the deli area may be located adjacent to the bakery area, with the two respective employee work areas separated by a fixed counter, fixed slicing station, etc. In such circumstances it is unclear what approach the Department would follow in assessing whether the area fits within the exception. Would this count as two separate work areas, or a single work area?

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4. Self-Service Display Units

The current exception for self-service shelving and display fixtures, regardless of type, in mercantile settings should be retained. Section 4.1.3(12)(b) of the 1991 Standards expressly exempts all self-service shelves and "display units" in mercantile occupancies from reach range requirements. The exception set forth in Section 225.2.2 of 2004 ADAAG is limited only to "self-service *shelving*." The deletion of "display units" from this exception, coupled with the reduction in the allowable side reach range from 54" to 48" above the finished floor, will significantly and adversely impact grocers and food retail facilities. Food retail facilities utilize a variety of apparatus to display merchandise. In addition to shelving, such apparatus include racks, hooks and "retrievers." (Retrievers are spring-loaded devices that push merchandise forward. Certain types are designed to be used in conjunction with shelving while others can be used independent of shelving.)

FMI can perceive of no reason why these other types of self-service display units should be removed from the exception. Indeed, the International Building Code excludes self-service display units from reach range requirements. §1109.8.2 IBC-2003. Failure to correct this omission in 2004 ADAAG would significantly impact food retailers. The impact of having to provide lower display units would be substantial, even in new construction, as the availability and choice of products to display would be severely limited. Additionally, the specific manner, location or height at which foods are displayed is of commercial importance both to food producers and retailers. Accordingly, limiting the manner of display would adversely impact the overall commercial profitability of food retailers. The Department has long held that shelving and display units should not have to be reduced or eliminated if such changes would result in reduced display space or lost sales. The Department should reaffirm its commitment to this principal in the resulting regulation.

5. Equivalent Facilitation

FMI encourages the Department to more clearly define, and strengthen the provisions, regarding a public accommodation's ability to utilize equivalent facilitation, or alternative operational methods for providing accessibility. Although 2004 ADAAG retains the general provision permitting equivalent facilitation, the specific types of equivalent facilitation expressly sanctioned in the 1991 Standards have been deleted (e.g., providing an auxiliary counter in lieu of lowering a sales or service counter). Equivalent facilitation and/or alternative operational methods are important mechanisms by which food retailers provide accessibility. For example, display cases in deli departments typically exceed the 36" maximum height permitted for sales or service counters. Service is provided to customers with disabilities at the side or end of the case or, in facilities where this is not possible, the employee comes out from behind the case. The Department's final regulation should provide clearer criteria for establishing what constitutes an equivalent facilitation, as well as providing clearer guidance regarding the circumstances in which alternate operational methods can be used to provide accessibility.

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6. Equipment

The Department's commentary in the summary analysis creates confusion regarding accessibility requirements for equipment, whether fixed, built-in or free standing. In its Advance Notice of Proposed Rulemaking, the Department queried whether it should provide additional guidance regarding requirements for equipment, particularly with respect to free-standing equipment. In its summary analysis accompanying the NPRM, the Department notes that equipment is, and has always been, covered under its ADA title III regulation, including the provisions requiring modification of policies, practices and procedures, and barrier removal, notwithstanding the fact that no provision in the regulation specifically addresses equipment. The 1991 Standards contain only limited provisions regarding equipment, such as ATMs, vending machines and fare vending machines in transit facilities. The Department declined to add any more specific guidance addressing free-standing equipment, stating that covered entities could look to analogous requirements contained in 2004 ADAAG and other federal guidance, such as federal standards implementing section 508 of the Rehabilitation Act of 1973.

FMI is concerned that the Department's commentary on this point could be misconstrued as requiring that point-of-sale devices and self-service check-outs in food retail facilities be accessible for individuals with sensory impairments. While such equipment can be positioned on an accessible route and with the operable parts within reach range, providing "communications" accessibility is more challenging. Self-service checkouts typically incorporate touch screens. Although they may include audio output, navigating the screen itself may be difficult for individuals with sight impairments. Many types of point-of-sale devices also incorporate touch screen technology. Until such time as the technology exists to make such equipment accessible to individuals with sight impairments and the Department itself adopts specific standards by which to assess whether such equipment is accessible, the Department should not require that these devices be accessible to individuals with sight impairments. The Department's final regulation should make this point clear.

7. Service Animals

FMI believes that the proposed definition of service animal and the revised provisions regarding the respective rights and responsibilities of individuals with disabilities and covered entities regarding service animals provide much-needed clarity. The prior ambiguity regarding what qualifies as a legitimate service animal and a public accommodation's obligations to accommodate those animals, has generated many inquiries and much confusion within our industry. The delineation of circumstances in which a public accommodation can decline to admit a service animal, or request that it be removed from the premises, are particularly welcome. FMI strongly encourages the Department to retain these revisions in the final rule.

FMI also strongly encourages the Department to retain the requirement that service animals wear a leash, harness or other tether. Food retail facilities contain many enticements for animals,

including open displays of produce, salad bars, and in some facilities, even open buffets of hot foods. A leash or other tether is an important safeguard for ensuring that the animal stays under control. Additionally, the presence of such a leash or harness also can aid a public accommodation in distinguishing a legitimate service animal from a pet.

The proposed regulation regarding the limited inquiries a public accommodation may make, however, does not provide public accommodations with an adequate means for verifying that the animal is a legitimate service animal. Allowing facilities to inquire whether the animal is needed due to a disability and what particular task the animal performs are critical inquiries, but there is no independent means of verifying the veracity of the information received. Essentially, the public accommodation simply must take the individual's "word" that the animal is a service animal. Public accommodations should have more flexibility, particularly in those circumstances where the public accommodation has reasonable cause to believe that the animal is not truly a service animal.

8. Power-Driven Mobility Devices

FMI appreciates that the proposed regulation provides clearer definitions for what qualifies as a mobility aid, and also enables covered facilities to adopt policies that specify whether, and under what circumstances, use of power-driven mobility devices is reasonable. Safety concerns, however, must be paramount in assessing whether use of a particular type of device is reasonable. Electronic personal assistance mobility devices, whether they be carts or Segways®, present safety concerns that power wheelchairs do not given the greater speeds the former can attain. Consequently, they raise a host of tort issues that wheelchairs do not. Additionally, Segways® present a risk of fall that wheelchairs and scooters do not. According to information provided by the manufacturer, in the event the device loses "traction" (such as on slippery, wet or even loose surfaces) it can tip and fall – posing a risk not just to the user but also to nearby individuals. Although food retailers are ever vigilant to quickly address any food spills, they do occur. For this reason, FMI does not believe that such devices should be included within the definition of "wheelchair."

FMI notes that except for wheelchairs, power-driven mobility aids almost always will necessitate an assessment of whether they are being used as a mobility aid by a person with a disability or merely as a convenience by a non-disabled person. For this reason, the limited inquiry a public accommodation is permitted to make under the proposed regulation (it may inquire only if the device is required because of a disability), likely will prove inadequate for the facility to conduct any meaningful assessment.

In the final regulation, FMI also encourages the Department to give further consideration to the following points:

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- The regulation should clearly provide that public accommodations may adopt policies that require individuals using power-driven mobility devices to adhere to certain requirements in operating the device.

- The regulation should delineate those circumstances in which a facility may exclude individuals using power-driven mobility devices from the premises (for example, when the individual is operating the device in a reckless, destructive or otherwise hazardous manner posing a risk of harm to others or damage to property or merchandise). Such an approach would be similar to the manner in which the proposed regulation specifies the circumstances under which a service animal can be excluded from the premises.

- The regulation should make clear that motorized devices that use fuel or internal-combustion engines are not appropriate personal mobility devices for use in internal spaces, as exhaust can pose safety and health risks for individuals. Additionally, the combustible and flammable nature of fuels also make such devices potential fire hazards.

FMI appreciates the opportunity to provide comments on these very important issues and urges the Department to address them on the record. If you require any additional information, we would be pleased to assist in any way.

Sincerely,

Deborah R. White
Senior Vice President &
Chief Legal Officer

cc: John Wodatch

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