



655 15<sup>th</sup> Street, N.W.  
Washington, DC 20005-5701  
Tel: (202) 452-8444  
Fax: (202) 429-4519  
E-mail: [fmi@fmi.org](mailto:fmi@fmi.org)  
Website: [www.fmi.org](http://www.fmi.org)

May 15, 2000

Office of Technical and Information Services  
Architectural and Transportation Barriers Compliance Board  
1331 F Street, NW  
Suite 1000  
Washington, DC 20004-1111

**Re: ADA Accessibility Guidelines; Docket No. 99-1**

Dear Sir or Madam:

The Food Marketing Institute (FMI) respectfully submits the following comments in response to the Architectural and Transportation Barriers Compliance Board's (Access Board's) proposed rulemaking, which would revise accessibility guidelines for buildings and facilities that are covered by the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA). 64 Fed. Reg. 62247 (Nov. 16, 1999).

**A. Background**

For your information, 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 proposed rulemaking 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. Thus, we can unequivocally state that our industry has extensive experience in matters relating to 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 customers 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 shoppers. This ongoing commitment to better serve all customers gives the proposed ADA Accessibility Guidelines special significance as our supermarket members continue to strive to make their stores more convenient and accessible, as well as enjoyable, places in which to shop for 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 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.

## **B. Analysis of Key Sections**

### **1. Section 202: Existing Buildings and Facilities**

Section 202 seeks to apply the updated and revised ADA Accessibility Guidelines (ADAAG) to existing buildings and facilities as well as to newly constructed buildings. FMI endorses the concept of applying the revised ADAAG to newly constructed buildings. However, adequate lead time must be provided. In this regard, FMI recommends that the ADAAG incorporate the 30-month time frame that was granted for new construction when the Department of Justice (DOJ) issued its final regulations implementing the ADA on July 26, 1991. 56 Fed. Reg. 35408 (July 26, 1991); *see, also*, 42 U.S.C. § 12183(a)(1) (30 month implementation period for new construction).

Existing buildings and facilities, however, should not be subject to the new ADAAG because of the frequency with which it is being changed. The current ADAAG requirements have only been in effect for about seven years and, during that time, many supermarkets have invested substantial resources to comply with these standards. Therefore, FMI believes that it would be inherently unfair to subject existing stores to the new ADAAG standards. The current ADAAG remains a very valuable standard that serves to promote a high degree of accessibility for public places of accommodation.

2. Section 203.3: Employee Work Areas

The ADA is divided into separate subchapters or titles, each of which governs separate issues. Title I, "Employment," addresses issues of discrimination by employers against employees or prospective employees. In this regard, employers must make reasonable accommodations to the known limitations of an otherwise qualified individual with a disability, including architectural modifications, unless the accommodation would impose an undue hardship on the business operation. 42 U.S.C. § 12112(b)(5). Employees and applicants are provided with a right of action against covered entities who discriminate against them by failing to accommodate their limitations. The Equal Employment Opportunity Commission (EEOC) is charged with promulgating and has promulgated regulations implementing Title I. See 29 C.F.R., Part 1630.

In contrast, Title III, "Public Accommodations and Services Operated by Private Entities," prohibits privately operated public accommodations from discriminating against individuals with disabilities. Title III places an affirmative duty on public accommodations to remove architectural barriers, to construct new facilities that are readily accessible, and to make existing buildings more accessible when they are altered. The Department of Justice is charged with and has promulgated regulations implementing Title III. See 28 C.F.R., Part 36.

In devising the statute, Congress very clearly separated the duties owed to employees with disabilities and to the public at large with disabilities. Although a business that falls within the statutory "public accommodation" definition clearly has obligations to both employees and the public, the scope of each obligation imposed by the law is very different. The obligations of a "public accommodation" to its employees are spelled out in Title I; the duties owed to disabled members of the public are set forth in Title III. These duties should remain separate and should not be confused. The legislative history of the ADA makes this mandate abundantly clear:

Title III is not intended to govern any terms of conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by Title I of this legislation.

H.R. Rep. 485 (II), 101<sup>st</sup> Cong, 2d Sess. 99, reprinted in 1990 U.S. Code Cong. & Admin. News 267, 382.

To assist in implementing Title III, Congress directed the Access Board to issue ADAAG. 42 U.S.C. § 12204. ADAAG is not intended to address Title I. Unfortunately, as discussed more fully below, the Advisory Committee has recommended modifications that disregard the difference between Title I and Title III obligations.

a. “Accessible Route”

Under current ADAAG Section 4.1.1(3), employee work areas are required to be accessible so that individuals (other than employees) with disabilities can “approach, enter and exit” the areas. Under the current guidance, work areas are not required to be constructed to permit maneuvering within the work area or to be constructed or equipped to be accessible. Moreover, the current ADAAG does not require an accessible route to individual work stations within a work area.

However, the ADAAG Advisory Committee has recommended that ADAAG be amended to require an accessible route to each individual work station. While the Access Board has not included this Advisory Committee recommendation in its proposed rulemaking, the Board is actively considering its inclusion in the final regulations. 65 Fed. Reg. at 62251. The Access Board is also soliciting comments on the impact of requiring access to individual work stations.

FMI is opposed to the Advisory Committee’s recommended amendment to require individual work stations to be located on accessible routes. Work stations in grocery stores are often restricted to employee access. Therefore, making these routes “accessible” would be a theoretical exercise at best, since the public would not be allowed to use them. Employee-only work stations include stock rooms, storage areas, kitchens, food preparation stations, and the pharmacy department. To the extent that members of the public are prohibited from using these routes, and the routes are only used by employees, these routes are “conditions of employment” governed by Title I; ADAAG, which only has jurisdiction over Title III issues, cannot require that these routes be made accessible to the public.

The Access Board argues that employee spaces used for purposes other than job-related tasks, such as break rooms, lounges, and locker rooms are not considered “work areas” and therefore must be fully accessible. 65 Fed. Reg. at 62251. These places are, however, properly considered “conditions” or “privileges” of employment. See 42 U.S.C. § 12112(a). Therefore, they are governed by Title I.

As one of the bases for its recommendation, the Advisory Committee noted that requiring work stations to be along accessible routes would make the ADAAG consistent with model building codes. 65 Fed. Reg. at 62252. Although consistency may be helpful under some circumstances, it cannot be attained when Congress has not provided the necessary authority to do so. Therefore, consistency with model building codes is insufficient to support the change requested.

FMI is opposed to any regulatory requirements regarding work station accessibility. A work station accessibility requirement would result in significant economic hardship for supermarkets, especially with respect to the check-out lanes at the front-end of the store. Check-stand work stations are tightly designed for the purpose of expediting customer transactions and their food purchases while maintaining a high

degree of security over the cash register. Moreover, check-stands and work stations located in departments where food is prepared should be granted as much flexibility as possible in terms of their design so that the work station accurately corresponds to and helps facilitate all of the tasks and duties that are to be performed by employees.

b. Visual Alarms.

Additionally, the Access Board is proposing to require the installation of visual alarm coverage where audible alarm coverage is provided in employee work areas. FMI supports the use of both visual and audible alarms in those areas of a supermarket that are open to the general public because store personnel may not know if a hearing impaired customer is in the store. However, FMI objects to imposing this same requirement for employee work areas, especially if there are no hearing impaired employees working at the facility. Visual alarms should only be considered along with other equally effective alternatives when the need arises to accommodate an employee with a hearing impairment as required under Title 1 of the ADA.

3. Section 216.2: Permanent Designations

FMI endorses the clarification in the Access Board's proposed new ADAAG relating to permanent signage. Under this proposed change, the Access Board defines permanent designations as rooms or spaces where the designation, such as a public restroom, are not likely to change over a period of time. This important clarification will greatly reduce any confusion over whether certain signs in a grocery store, such as merchandise information signs that are placed above a grocery aisle, would need to meet various ADAAG requirements. Merchandise type signs are not permanent, and are changed on a frequent basis when new grocery items are displayed or when the format of the store is reconfigured. Accordingly, the ADAAG should not apply to these types of signs and the proposed clarification by the Access Board is appropriate.

4. Section 219.2: Required Systems

Section 219.2 states that an assistive listening system must be provided in each assembly area where audible communication is integral to the use of the space and audio amplification is provided. Thus, 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.” We would expect the that the snack bars, food courts, or cafes present in some 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. Therefore, these areas should not be required to have assistive listening systems. Moreover, although “audio amplification” is not defined, we would not expect the public address system that might reach an in-store assembly area to constitute “audio amplification” for purposes of ADAAG Section 219.2. We respectfully request that the Board clarify this point.

5. Section 227.2.1: Sales and Service Counters -- Identification

With regard to check-out lanes (aisles), FMI supports the Access Board’s proposal to exempt the posting of the International Symbol of Accessibility over each accessible check-out lane when all check-out lanes in a supermarket are accessible. This common sense amendment will eliminate unnecessary signage in grocery stores. We urge its adoption.

6. Section 229.1: Depositories, Vending Machines, Change Machines

Proposed ADAAG Section 229.1 would require that at least one of each type of vending machine at a 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 only requires vending machines and similar equipment to be located along an accessible route. As supermarkets often have vending machines as a convenience to their customers, FMI has grave reservations regarding this particular proposed ADAAG requirement.

First and foremost, this proposed change is unnecessary since Title III of the ADA permits flexibility so that facilities may choose among permissible options for providing goods and services to persons 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 racks. The same principle should apply to vending equipment in grocery stores; that is, stores should be allowed the option of having store personnel provide personal assistance. In fact, certain states are enacting legislation that requires store employee assistance for certain consumer purchases, such as tobacco products from vending machines.

Second, if the proposal is adopted, some grocery stores may be forced to abandon their vending machines if they cannot be located in space adequate for wheelchair turning or if the costs of retrofitting old machines or investing in new ones with controls located within specified reach ranges are prohibitive. Ultimately, this will result in fewer options for all customers.

Third, the ADAAG implements Title III of the ADA and is intended to ensure that “buildings and facilities” are accessible to those with disabilities. See 65 Fed. Reg. at 62248; 42 U.S.C. § 12182(b)(2); *see, also*, H.R. Rep. No. 485, 101<sup>st</sup> Cong., 2d Sess. 154, reprinted in 1990 U.S. Code Cong. & Admin. News 267, 422 (purpose of ADAAG to ensure that *buildings, facilities, and vehicles are accessible* in terms of *architecture and design*, transportation and communication to individuals with disabilities (emphasis added)); *id.* at 437 (describing prohibited acts of discrimination by public accommodations as “failure to remove *architectural barriers . . . that are structural in nature*” (emphasis added)). Thus, the ADAAG standards should only apply to fixed or built-in equipment and fixtures that are part of architectural or mechanical components of a building or facility, rather than to equipment and machines that are movable and can be placed anywhere within a facility. ADAAG does not have the authority to and should not develop standards for movable vending equipment.

7. Section 308: Reach Ranges

Section 4.2.6 of the current ADAAG establishes a requirement that the maximum high side reach allowed shall be 54 inches and the low side reach shall be no less than 9 inches above the floor. The Advisory Committee has recommended that the side reach range, including obstructed reaches, should now be limited to 48 inches maximum and 15 inches minimum.

The Access Board has decided not to include this recommended change in the final regulations citing the need for further research before modifying the reach range requirements. FMI supports the Access Board’s decision to retain the current ADAAG governing side reach ranges. The current ADAAG has been widely adopted in many areas of the grocery store in terms of customer self-service equipment and self-service food counters. FMI’s supermarket members report that the current ADAAG reach range requirements are working well, allowing most individuals with disabilities to use self-service equipment and to make selections from self-service food counters. Therefore, changing the reach requirements is unnecessary and would impose expenses on businesses without any commensurate benefit for persons with disabilities.

8. Section 904.4: Sales and Service Counters

a. Counter (§ 904.3.2)

Proposed Section 904.3.2 requires the counter surface height to be 38 inches above the finished floor or ground and the top of the counter edge protection to be no more than 2 inches above the top of the counter surface. We recommend that the Access Board clarify that these requirements, when applied in a grocery store, only apply to those areas where consumers place their grocery items on the counter top for scanning by a cashier. The requirement should not apply to “work areas” or areas that need not be

accessed by the general public, such as the area where groceries are bagged. Requiring these areas to conform with the counter height requirements may impair their proper functioning.

b. Point of Sale and Service Counters (§ 904.4)

Section 904.4 of the proposed regulations differs from the current ADAAG in that no distinction would be made between service counters with cash registers and service counters that do not have point-of-sale equipment. This would mean that all service counters would be required to have a portion of the counter accessible to accommodate either a parallel approach (36 inches long by 36 inches maximum height above the finished floor) or a forward approach (30 inches minimum length by 36 inches maximum height from the finished floor).

The Access Board is proposing to eliminate the current distinction between service counters with cash registers and those that do not have such equipment because the Advisory Committee considers the difference to be insignificant. FMI strongly disagrees: such a change would have a major impact on grocery stores and their ability to serve consumers both with and without disabilities. Numerous departments within a supermarket would be affected including deli, seafood, prepared foods, bakery, meat, floral and others where counters and display cases exceed the maximum height of the proposed new ADAAG. In these situations, counter heights and display cases are specifically designed and built to showcase specialized food items and to keep certain perishable or prepared foods at specified temperature settings in order to avoid spoilage and contamination. Typically, customers order or select the items they want from a department and pay for them in the check-out lane at the front-end of the store.

When the Access Board issued its final accessibility guidelines implementing the ADA in 1991, the Access Board recognized that not all retail establishments are alike. In recognition of the many unique products and services that retailers offer, especially supermarkets, the Access Board allowed for several options for service counters without cash registers, one of which is equivalent facilitation. This approach has worked extremely well because it gives grocery stores the option to follow the accessibility guidelines governing service counters or to serve customers by other means, such as at the end of the counter.

FMI, therefore, objects to the proposed change because it is unnecessary and because it will result in significant expenses because many service counters and display cases in supermarkets would no longer be in compliance. In fact, the economic impact for grocery stores will be excessive in that departmental display cases and service counters often include refrigeration, heating and cooking fixtures, moving shelves, rotisseries, special lighting, and plumbing. Thus, under the current ADAAG standard, when a supermarket is being remodeled, the store may elect to continue using its existing display cases and fixtures, while the proposed regulations would require the replacement

of such counters and display cases. We urge the Access Board to preserve the current ADAAG 7.2 standard for sales and service counters.

\* \* \*

FMI appreciates the opportunity to comment on this proposed rulemaking and we ask that our views be given careful consideration.

Sincerely,

A handwritten signature in black ink that reads "Tim Hammonds". The signature is written in a cursive style with a large, sweeping flourish at the end.

Tim Hammonds  
President and CEO