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United States Government Accountability Office
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January 13, 2011

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Lamar Smith
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

Subject: *Department of Justice: Nondiscrimination on the Basis of Disability by
Public Accommodations and in Commercial Facilities*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Justice (Department), entitled “Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities” (RIN: 1190-AA44). We received the rule on December 30, 2010. It was published in the *Federal Register* as a final rule on September 15, 2010, with an effective date of March 15, 2011. 75 Fed. Reg. 56,236.

The final rule revises the Department regulation that implements title III of the Americans with Disabilities Act (ADA), relating to nondiscrimination on the basis of disability by public accommodations and in commercial facilities. The Department is issuing this final rule in order to adopt enforceable accessibility standards under the Americans with Disabilities Act of 1990 (ADA) that are consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board, and to update or amend certain provisions of the title III regulation so that they comport with the Department’s legal and practical experiences in enforcing the ADA since 1991. Concurrently with the publication of the final rule for title III, the Department is publishing a final rule amending its ADA title II regulation, which covers nondiscrimination on the basis of disability in state and local government services.

Enclosed is our assessment of the Department's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the Department complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Samuel R. Bagenstos
Principal Deputy Assistant
Attorney General, Civil Rights Division
Department of Justice

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF JUSTICE
ENTITLED
"NONDISCRIMINATION ON THE BASIS OF DISABILITY
BY PUBLIC ACCOMMODATIONS
AND IN COMMERCIAL FACILITIES"
(RIN: 1190-AA44)

(i) Cost-benefit analysis

The Department's final regulatory impact analysis (RIA), estimates the benefits and costs for all new (referred to as "supplemental") requirements and revised requirements across all types of newly constructed and existing facilities. The Department states that the final rules increase social resources and thus represent a public good because monetized benefits exceed monetized costs—that is, the regulations have a positive net present value (NPV). The Department notes that under every scenario assessed in the final RIA, the final rules have a positive NPV. According to the Department, the final RIA's first scenario examines the incremental impact of the final rules using the "main" set of assumptions (*i.e.*, assuming a primary baseline (the original 1991 ADA Standards), that the safe harbor applies, and that for title III entities barrier removal is readily achievable for 50 percent of elements subject to supplemental requirements). Under this set of assumptions, the Department states that the final rules have an expected NPV of \$9.3 billion (7 percent discount rate) and \$40.4 billion (3 percent discount rate).

Additionally, the Department states that the RIA recognizes that additional benefits are likely to result from the new standards. According to the Department, many of these benefits are more difficult to quantify. The Department explains that among the potential benefits that have been discussed by researchers and advocates are reduced administrative costs due to harmonized guidelines, increased business opportunities, increased social development, and improved health benefits.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The Department states that the final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The Department explains that section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1503(2), excludes from coverage under that Act any proposed or final federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, the Department states that this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

The final regulations were issued using the notice and comment procedures found at 5 U.S.C. § 553. On September 30, 2004, the Department published an advance notice of proposed rulemaking (ANPRM). 69 Fed. Reg. 58,768. The Department received over 900 comments covering a broad range of issues. After careful consideration of the public comments in response to the ANPRM, on June 17, 2008, the Department published an NPRM covering title III (73 Fed. Reg. 34,508) and an NPRM covering title II (73 Fed. Reg. 34,466). A public hearing was held on July 15, 2008, in which 45 individuals testified in person or by phone. By the end of the 60-day comment period, the Department had received 4,435 comments addressing a broad range of issues many of which were common to the title II and title III NPRMs, from representatives of businesses and industries, state and local government agencies, disability advocacy organizations, and private individuals, many of which addressed issues common to both NPRMs.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule does not contain any paperwork or recordkeeping requirements and does not require clearance under the Act.

Statutory authorization for the rule

The Department states that the final rule is authorized under 28 U.S.C. §§ 509, 510, 5 U.S.C. § 301, and section 306 of the Americans with Disabilities Act of 1990, Public Law 101-336 (42 U.S.C. § 12186).

Executive Order No. 12,866 (Regulatory Planning and Review)

The final rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Department has evaluated its existing regulations for title II and title III section by section, and many of the provisions in the final rule for both titles reflect its efforts to mitigate any negative effects on small entities.

Executive Order No. 13,132 (Federalism)

The Department states that the ADA and the 2010 Standards set minimum civil rights protections for individuals with disabilities that in turn may affect the implementation of state and local laws, particularly building codes. According to the Department, the 2010 Standards address federalism concerns and mitigate federalism implications, particularly the provisions that streamline the administrative process for state and local governments seeking ADA code certification under title III. The Department notes that the final rule preempts state laws affecting entities subject to the ADA only to the extent that those laws conflict with the requirements of the ADA, as set forth in the rule.