



April 24, 2012

Subcommittee on the Constitution  
Committee of the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Franks and Ranking Member Nadler:

On behalf of the National Multi Housing Council (NMHC) and the National Apartment Association (NAA), we are encouraged by the Subcommittee's decision to hold today's hearing. The subject matter, The Department of Justice's Guidance on Access to Pools and Spas under ADA, is a critical one for property owners impacted by the revised Rules and Standard. Given the uncertainty introduced by the January 2012 Guidance, our organizations supported the Department's decision to extend the compliance date for 60 days as well as its subsequent Proposed Rule to extend the compliance deadline until September 17, 2012. The issues raised in the DOJ Guidance are new and significant and therefore interested parties should be granted the opportunity to weigh in publicly to express their views. Therefore, the Department should use this time to engage in a formal rulemaking process as required under the Administrative Procedures Act. Absent a rulemaking, the DOJ should rescind this Guidance.

NMHC and NAA represent the nation's leading apartment firms. Our combined memberships are engaged in all aspects of the industry, including ownership, development, management and finance. NMHC represents the principal officers of the industry's largest and most prominent firms. NAA is the largest national federation of state and local apartment associations with 170 state and local affiliates comprised of more than 50,000 members. Together we represent approximately six million apartment homes.

### **Apartment Industry Commitment to Accessibility**

The apartment industry maintains a strong and ongoing commitment to providing persons with disabilities an accessible housing environment. As you are aware, owners of apartment properties must comply with not only the Americans with Disabilities Act (ADA), but also the Fair Housing Amendments Act (FHAA), which mandates significant construction and design features for accessibility within the residential unit, outside elements and common areas for all properties built after 1991. For older properties, ongoing obligations are also imposed on property owners to make reasonable modifications and accommodations in policies and services upon request. Our members diligently work to adhere to these statutes but have at times been challenged by the complex and confusing guidance, standards, regulations, building codes and statutory language that direct compliance requirements. Confusing rules can lead to complaints of non-compliance thus triggering a long, tedious and expensive legal process regardless of whether or not a violation actually took place. This should not be the desired result of any federal law seeking to increase the accessible environment for the disabled community.

## January 2012 DOJ Guidance Introduces a “New” Requirement

While the DOJ’s revised rulemaking implementing the ADA for Title II (state and local government services) and Title III (public accommodations) as well as the Standards for Accessible Design has been

ongoing since 2004, the Guidance at issue here was not published until January 2012. The ADA 2010 Revised Requirements: Accessible Pools Means of Entry and Exit, offer a different interpretation relative to the type of pool lift required in a swimming pool to achieve the barrier removal requirements of the ADA.

In this Guidance, the DOJ concludes that fixed, permanent lifts are required to satisfy the barrier removal requirements of the ADA. However, this cannot be found in the rulemaking record. Evidence that fixed lifts were not contemplated as the only means to barrier removal is found in Section 242.2 of the 2010 Standards. The 2010 Standards define the scoping and technical requirements for accessible means of entry into swimming pools:

- *“accessible means of entry shall be swimming pool lifts complying with 1009.2;”*
- Section 1009.2 sets specifications for pool lift location, seat location, clear deck space, seat height, seat width, footrests and armrests, operation, submerged depth and lifting capacity. (There is nothing to indicate that a pool lift meeting all of the stated technical requirements must be a permanent lift. In fact, portable lifts are also designed to meet all of the stated requirements.)

The Guidance offers some flexibility to the extent a “fixed” pool lift is not readily achievable (i.e. easily accomplished and able to be carried out without much difficulty or expense). While it is not clear exactly how much effort and expense is required to meet the “readily achievable” standard, the Guidance states, if not readily achievable, alternatives may be considered such as a portable lift that complies with the 2010 Standards.

## The Administrative Procedures Act (APA) Mandates a Public Notice and Comment Period

The release of the DOJ Guidance just six weeks prior to the expected compliance date specifying these new requirements, calls into question the Agency’s adherence to the Administrative Procedures Act (APA). The APA sets out very clear notice and comment procedures when promulgating a legislative rule. If this is a new requirement, the public should be permitted the opportunity to. The agency can be informed by the insight of those with specific expertise in the capabilities and technologies of pool lifts, including their benefits and risks, the regulated community relative to costs and operations considerations and most importantly the disability community.

In those situations in which an apartment pool becomes a public accommodation, i.e. opens its facility to the public, or may be subject to additional accessibility regulations that follow the new 2010 Standards, it is critical that the obligations are clear and reflect the intent of the Statute. Sufficient flexibility for business operators is critical to avoid unintended consequences associated with a “one size fits all” approach to compliance, such as a closing of pools. A balance must be sought between achieving accessibility for those in need of it and ensuring the safety of children and others who otherwise might be harmed by an unattended “fixed” pool lift. These issues should be fully vetted before implementing new rules.

## Conclusion

We would like to reiterate our support for the goals of the ADA and underscore our industry's commitment to provide homes and communities that are accessible to the needs of the disabled through compliance with both the Fair Housing Amendments Act and the ADA. As with any regulatory change, the affected business operators must plan financially and operationally to meet the new requirements imposed on them. It is likely that business owners have already placed orders from the range of lifts currently available on the market. Portable lifts are very popular given their relative ease of use and the ability to store when not in use or when the pool is closed. Manufacturers currently market various types of lifts, both permanent and portable as "ADA compliant" highlighting the understanding that pool lifts need not be fixed. To enforce against the 2012 Guidance will penalize those operators who believe they responsibly complied with the law.

Therefore, we urge the Subcommittee to encourage the Department to advance a notice and comment rulemaking process as required by the APA to fully examine the issues associated with requirements for a fixed, permanent lift versus portable varieties. We are confident this process will yield a rich record of data, studies and evidence to support the ultimate position of the agency and provide clear guidance to the regulated industries. These industries and the disabled community will benefit from such a process.

Thank you for your consideration

Sincerely,



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National Multi Housing Council



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cc: Members of the Subcommittee on the Constitution