April 4, 2012

Disability Rights Section
Civil Rights Division
U.S. Department of Justice
1425 New York Avenue, N.W.
Suite 4039
Washington, D.C. 20005

RE: RIN 1190-AA69
Notice of Proposed Rulemaking
"Delaying the Compliance Date for Certain Requirements of the Regulations Implementing Titles II and III of the Americans with Disabilities Act"

To Whom It May Concern:

I am writing on behalf of the National Multi Housing Council (NMHC) and the National Apartment Association (NAA) in response to the March 20, 2012 Notice of Proposed Rulemaking by the Department of Justice (DOJ) relative to the compliance date extension for certain requirements in the 2010 Americans with Disabilities Act (ADA) Standards for Accessible Design. This delay relates to the provision for accessible entry and exit for existing swimming pools and spas. This proposal extends the effective date 60 days and seeks comment on the DOJ's proposal to further extend the compliance deadline until September 17, 2012.

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.

For the reasons outlined below, we support and appreciate the Department's decision to extend the compliance date for 60 days. We also support a longer term extension to reflect the time necessary for the Department to engage in additional rulemaking to further define what may be interpreted as "new" obligations contained in the January 2012 DOJ Guidance.

Apartment Industry Commitment to Accessibility

The apartment industry demonstrates 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 and outside elements. Ongoing obligations are also imposed on property owners to make reasonable modifications and accommodations in policies and services for those in need of such alterations. Our members diligently attempt to adhere to both of these statutes but have been challenged by the complex and confusing guidance, standards, regulations, building codes and statutory language

that direct compliance requirements. Confusing rules can lead to a complaint of alleged non-compliance and thus trigger a long, tedious and expensive legal process.

January 2012 DOJ Guidance Introduces a "New" Requirement

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. Final rules were published in the Federal Register, along with the new and updated 2010 Standards for Accessible Design ("2010 Standards") on September 15, 2010. However, the most recent guidance published by the DOJ in January of 2012, ADA 2010 Revised Requirements: Accessible Pools – Means of Entry and Exit, offers a different interpretation relative to the type of pool lift required in a swimming pool to achieve the barrier removal requirements of the ADA.

This Guidance makes it a requirement that a "fixed" pool lift be installed to the extent that it is readily achievable (i.e. easily accomplished and able to be carried out without much difficulty or expense). Readily achieved is not easily defined; it is not clear exactly how much effort and expense is required to meet this standard. If not readily achievable, alternatives may be considered such as a portable lift that complies with the 2010 Standards.

The DOJ's conclusion that fixed, permanent lifts are required to satisfy the barrier removal requirements of the ADA cannot be found in the rulemaking record. In fact, quite the opposite was proposed. In the June, 2008 Notice of Proposed Rulemaking (NPRM), DOJ proposed in Section 36.304(d)(4)(ii) to exempt existing swimming pools with fewer than 300 linear feet of swimming pool wall from the obligation to provide an accessible means of entry. The Department ultimately eliminated this provision from the final rule after reviewing and considering the comments received. However, it demonstrates the range of provisions considered and that had the Department felt the need to differentiate between a fixed versus a portable lift, the opportunity to do so was available to them and they declined to act.

Other 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.

Therefore, to publish guidance six weeks out from the expected compliance date with 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 comment. 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.

Similar Regulatory Challenges in Pool Safety Can Inform ADA Compliance Efforts

While many areas within the apartment community do not meet the definition of "public accommodations", apartment owners have significant obligations to meet accessibility requirements under Fair Housing Amendments Act. The ADA overlaps some of these obligations in those areas of the property deemed "public accommodations", i.e. areas open to the public such as leasing offices, the

lobby, the parking lot, etc. Our industry has experienced first hand the challenges created when clear direction is not provided by federal agencies relative to regulatory obligations early in the process.

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.

Our industry recently experienced the impact of a costly, confusing and time consuming pool safety regulation that has left pool operators frustrated by the lack of clarity and rethinking the value of pools in their communities. We suggest the lessons learned should inform future rulemaking. The Virginia Graeme Baker (VGB Act) Pool and Spa Safety Act required all public pools be equipped with drain covers meeting a new performance standard intended to reduce the incidence of entrapment and evisceration. While the goals of the VGB Act are laudable and certainly supported by NMHC and NAA, meeting the compliance requirements were challenging at best and impossible in some instances. The compliance date did not allow adequate time for manufacturers to meet the demand for the certified covers.

This was further complicated when in May of 2011 the CPSC announced a voluntary recall of certain pool and in-ground spa drain covers. They were incorrectly rated for protection against body entrapment by independent third party laboratories. As a result, any pool outfitted with a recalled product was ordered to close until a certified replacement cover could be installed. This meant that apartment owners were forced to close Memorial Day weekend, traditionally the time of year most pools open for the summer. Ever mindful of the seriousness of these product safety issues, our members took the necessary steps to identify whether they were affected by the recall and close their pools until such time as replacement covers could be manufactured, delivered and installed. In some cases, this took up to six months. It is important to note that, much like in the experience of the pool drain covers, the pool lift manufacturers report a limited capacity to meet the demand for pool lifts.

This was soon to be followed by the CPSC's revocation of an interpretive rule on certain drains deemed "unblockable". This reversal will require impacted owners to replace drain covers, reengineer systems, install new devices and/or simply close their pools. Pool owners who relied on the earlier CPSC guidance will now be penalized. We share this information to impress upon the DOJ the importance of clear, direct guidance relative to compliance obligations. To introduce any level of uncertainty that can be otherwise avoided is not only harmful to the regulated community but also may result in the offering of fewer services that are deemed too risky and costly to operate.

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. However, given the recent DOJ Guidance that requires covered pools to have a fixed lift unless it is not "readily achievable" is a material departure from the rulemaking record. As with any regulatory change, the affected business operators must plan financially and operationally to meet the new requirements imposed on them. Given the pre-2012 DOJ Guidance, it is likely that business owners have already placed orders from the range of lifts currently available on the market today. 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 fixed and portable as "ADA compliant" underscoring the assumption that pool lifts need not be fixed. To enforce against the 2012 Guidance will penalize those operators who responsibly complied with the law.

Therefore, we 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 both benefit from such a process.

Thank you for your consideration.

Sincerely,

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