



Department of Justice

STATEMENT

OF

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BEFORE THE

COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION

UNITED STATE HOUSE OF REPRESENTATIVES

CONCERNING

**THE DEPARTMENT OF JUSTICE'S GUIDANCE ON ACCESS TO POOLS AND
SPAS UNDER THE ADA**

APRIL 24, 2012

**Statement of the U.S. Department of Justice
Before the House Committee on the Judiciary’s
Subcommittee on the Constitution
Hearing on Pool Accessibility
April 24, 2012**

The Department of Justice appreciates the opportunity to submit this statement for the record of the Subcommittee’s April 24, 2012 hearing on the Department’s Guidance on Access to Pools and Spas Under the Americans with Disabilities Act (ADA) and related legislation. In this statement, the Department will address misunderstandings about the pool access requirements of the Department’s revised ADA regulations and explain how the bills currently being considered by this Committee would undermine a thorough and transparent regulatory process which solicited and considered input from all interested stakeholders on multiple occasions, revise the long-established legal framework of the ADA, and unnecessarily impair the civil rights of people with disabilities. The Department would have been pleased to testify at the hearing itself had it received sufficient notice to enable it to do so.

I. Introduction

The ADA prohibits state and local governments (title II) and public accommodations (title III) (including hotels, resorts, swim clubs, and sites of events open to the public) from discriminating against people on the basis of disability. As these requirements apply to existing pools, they are intended to ensure that, over time, people with disabilities can enjoy the same activities—such as swimming in a hotel pool, participating in a community swim meet, or taking private swim lessons—with the same independence, ease, and convenience as everyone else. Many people with mobility disabilities have long been excluded from these activities, not because they were physically unable to swim, but because there was no way for them to get into or out of a swimming pool. This reduced them to mere bystanders, sitting at the side of the pool to watch people without disabilities, including their families and friends, enjoy the therapeutic and recreational benefits of swimming. The Department’s revised ADA regulations, which were published in 2010 after extensive notice and comment, adopted revised ADA Accessibility Standards that for the first time included requirements for accessible entry to swimming pools. These requirements apply to new construction and alterations of swimming pools, as well as to existing pools through the application of the title II program access¹ requirements and title III barrier removal requirements.

¹ Section 35.150(b)(1) of the title II regulation, which addresses program accessibility in existing facilities, provides state and local governments with flexibility to use other means such as acquisition or redesign of equipment, or reassignment of programs or services to accessible buildings, in lieu of making structural alterations to facilities when they are providing program accessibility in their existing programs, services, or activities.

Consider the following scenarios:

- A parent with a mobility disability finds herself with an hour for a family swim. She, like any other parent, wants to be in the water with her children, but before she can go swimming, she must do the following: find hotel staff that a) knows where the lift is and can easily access it; b) knows how to set up or install the lift; c) is available and not otherwise engaged in other work; and d) can install the lift in a timely manner. Even if all this could be done in a short period of time, the experience and use of the amenities would be significantly different for her and her family than for other guests without disabilities.
- A businessman with a mobility disability checks into his hotel after a long day on the road and wants to get some exercise before preparing for the next day's meetings. If only one staff person is on duty, or available staff do not have the physical capacity to transport and set up the lift, then the likely result will be that this guest will be denied access to this amenity, which is otherwise readily available to guests without disabilities.

The Department believes there are compelling reasons why these bills should not be passed. Specifically, modifying or repealing the regulatory requirements as they apply to pools would do the following:

1. Undercut the thorough regulatory process to which the rules were subject;
2. Unnecessarily undermine the longstanding legal framework for readily achievable barrier removal provided in the statute; and
3. Compromise the civil rights provided by the ADA to people with disabilities;

H.R. 4256 proposes to extend for one year the deadline for compliance with the revised ADA title III regulation as it applies to the accessible means of entry to pools, including swimming pools, wading pools, saunas, steam rooms, spas (or so-called "hot tubs"), wave pools, lazy rivers, sand bottom pools, other water amusements, or any other man-made body of water subject to the ADA (hereinafter "pools"). H.R. 4256 also requires the Attorney General to amend the ADA regulations within 60 days of the effective date of the legislation to (1) allow places of public accommodation to use a portable pool lift (i.e., a non-fixed, movable lift) on request by a person with a disability even where it is readily achievable for the entity to provide a fixed, permanent lift, and (2) allow places of public accommodation to use one portable lift to share between pools if that entity has more than one pool or water feature. H.R. 4200 proposes to amend the text of the ADA to prohibit the Attorney General or any official of the Federal Government, from enforcing the regulations as they apply to accessible means of entry to pools. The effect of this bill would be to essentially repeal the provisions of the 2010 Standards for Accessible Design ("2010 Standards") as they apply to pools, leaving individuals with disabilities without the ability to safely and independently access pools owned or operated by public entities and

public accommodations.

This statement seeks to clarify the requirements of the ADA on pool accessibility and address the serious misunderstandings that have arisen in connection with them. Because the hearing focused on the application of the Department's revised requirements to public accommodations under title III, these comments will, for the most part, focus on issues related to public accommodations.

II. Background on Department's Revised ADA Regulations

Title III of the ADA prohibits discrimination by places of public accommodation, which include, for example, restaurants, hotels, retail stores, doctors' offices, and theaters. Title III requires newly constructed and altered business facilities to be fully accessible to people with disabilities, applying the 2010 Standards. In addition, title III requires businesses to remove accessibility barriers in existing facilities when it is readily achievable to do so.

The Department of Justice published its revised final regulations implementing the ADA for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010. The revised regulations update the general nondiscrimination provisions implementing the ADA; with some exceptions, revisions to these general nondiscrimination provisions have been in effect since March 2011. The revised regulations also adopt revised design requirements for new construction and alterations, known as the 2010 ADA Standards for Accessible Design ("2010 Standards"). The 2010 Standards update requirements for accessible fixed or built-in elements that were originally covered in the 1991 ADA Accessibility Guidelines ("1991 Standards") and also establish new ("supplemental") requirements for a variety of recreational facilities, including requirements for accessible means of entry for swimming pools.

The 2010 Standards are based in large part on the 2004 ADA and Architectural Barriers Act (ABA) Accessibility Guidelines, which were adopted by the United States Access Board ("Access Board") in 2004 as the culmination of a decade-long effort to revise its 1991 ADA Accessibility Guidelines. *See* 69 FR 44083 (July 23, 2004). The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the guidelines issued by the Access Board, 42 U.S.C. 12134(c), 12186(c).

The 2010 Standards require that newly constructed or altered pools have an accessible means for people with disabilities to enter and exit. The 2010 Standards also provide technical specifications for when a means of entry and exit is accessible, such as, for pool lifts, the location, size of the seat, lifting capacity, and clear floor space. In addition, the title III regulation provided that as of March 15, 2012, public accommodations must use the 2010 Standards as the benchmark for their ongoing obligation to remove architectural barriers in existing facilities to the extent such compliance is readily achievable. 28 CFR 36.304(d)(2).² However, with respect to the readily achievable barrier removal obligations for

² The title III rule requires covered entities to apply the alterations provisions of the regulations when removing barriers, but only to the extent that it is readily achievable to do so. 28 C.F.R. 36.304(d).

existing pools, the Department delayed the compliance date for the specific requirements in the 2010 Standards relating to accessible means of entry into existing pools until May 21, 2012. The delay was provided in order to give pool owners and operators, many of whom misunderstood the application of the barrier removal obligation to their existing pools, additional time to comply with the requirements.

Because the 2010 Standards include requirements for accessible means of entering and exiting pools, businesses are required by the regulation to make their existing pools accessible, but only to the extent it is readily achievable. To determine whether providing an accessible means of entry and exit is readily achievable, businesses must use the same general barrier removal analysis that has applied to other elements in existing facilities covered by the ADA Standards, since they were first issued in 1991. Both the ADA statute, which Congress passed in 1990, and the Department's ADA title III regulation, which was originally published in 1991, set out a case-by-case analysis to be used in determining whether removing barriers is readily achievable. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. 28 C.F.R. § 36.104. Specifically, the regulations provide at § 36.104 that in determining whether an action is readily achievable, public accommodations must consider the following factors:

- (1) The nature and cost of the action;
- (2) The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

The readily achievable factors are purposefully individualized to assess a particular entity's ability to remove barriers in its existing facilities, and this approach was designed to balance the ADA's mandate to provide equal access for persons with disabilities alongside businesses' legitimate financial and operational concerns.

III. The Regulatory Process was Thorough and Transparent

The regulatory requirements at issue in both these bills are the result of a comprehensive six-year regulatory process by the Department, which included the issuance of an Advance Notice of Proposed Rulemaking (“ANPRM”) (2004), a Notice of Proposed Rulemaking (“NPRM”) (2008), and a day-long public hearing on the proposed rule (2008). The Department received over 900 comments during the 2004 ANPRM. During the course of the 2008 NPRM alone, the Department received over 4,435 written comments from individuals with disabilities, disability advocacy groups, state and local governments, and the business community, including the American Hotel & Lodging Association (“AH&LA”), the Asian American Hotel Owners Association (“AAHOA”), and swimming pool owners and operators. In addition to this lengthy rulemaking process, the pool requirements were also subject to an additional public notice and comment period in 1999 during the Access Board’s rulemaking on its recreation guidelines.

The record clearly establishes that the Department made clear throughout the regulatory process that the ADA Standards apply to fixed or built-in elements, not portable, non-fixed elements. For example, in 2004 when the Department began the process of revising its regulations as a result of the Access Board’s revised ADA/ABA Guidelines, it dedicated an entire section of its ANPRM to discussing the fact that the ADA Standards only applied to fixed and built-in elements. In a section of the ANPRM entitled “Application of ADA Standards and ADA to Free-Standing Equipment,” the Department stated that “the revised *ADA Standards will apply directly only to fixed equipment*—as described above, equipment that becomes built into the structure of a facility—and not to free-standing equipment.” 69 Fed. Reg. 58768, 58775 (Sept. 30, 2004) (emphasis added). When the Department issued its NPRM in 2008, it once again reiterated that the ADA Standards applied to fixed elements. In a section of the NPRM entitled “Section 36.406(b) Application of Standards to Fixed Elements,” the Department proposed regulatory text to clarify that “the requirements in the proposed standards (and the 2004 ADAAG) prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to people with disabilities.” 73 Fed. Reg. 34508, 34543 (June 17, 2008). In 2010, the Department adopted the regulatory text proposed in the NPRM providing that “[t]he 1991 Standards and the 2010 Standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site.” 28 C.F.R. §§ 35.151(d), 36.406(b). In addition to the notice the Department provided in its rulemaking process regarding the application of the ADA Standards to fixed elements, the Access Board also made it clear throughout its rulemaking process for the ADA Accessibility Guidelines – including the pool access guidelines included in the 2004 ADA/ABA Guidelines – that the Guidelines only applied to fixed elements.³

³ In the preamble to the Access Board’s ADA/ABA Accessibility Guidelines, on which the Department’s 2010 Standards are based, the Access Board makes clear that the guidelines apply to fixed elements.

Comment. In the proposed rule, the term “fixed” had been removed as a modifier of certain elements covered by the guidelines, such as tables and storage. This was removed, along with references to elements that are “built-in.” Some

Accordingly, the technical assistance document issued by the Department in January 2012 regarding pool access requirements was not the first time that the Department had disclosed that the pool access requirement of the 2010 Standards applied to fixed elements so stakeholders had ample opportunity during the regulatory process to raise concerns regarding the requirement for fixed elements for pool access.

As part of its final rule, and in compliance with the Small Business Regulatory Enforcement Fairness Act (SBREFA) and Executive Order 12866, the Department issued its Final Regulatory Impact Analysis (RIA), which provided an analysis of the costs and benefits of adopting the changes contained in its rules. The Department's RIA looked at costs with respect to fixed and built-in elements when analyzing the provisions of the 2010 Standards. With respect to existing pools, the RIA provided cost estimates for the barrier removal requirements for both "the pool lift equipment *and* installation costs." See Final Regulatory Impact Analysis of the Final Revised Regulations Implementing Titles II and III of the ADA, Including Revised ADA Standards for Accessible Design at p. 283 (July 23, 2010) (emphasis added), available at http://www.ada.gov//regs2010/RIA_2010regs/ria.htm. See also RIA at 59-60.

H.R. 4256 and H.R. 4200 attempt to substantively change the Department's regulation, and in so doing, undermine the thorough and transparent rulemaking process underlying the revised ADA regulations. However, the regulations at issue here were subject to a comprehensive regulatory process, which included multiple opportunities for all stakeholders to present facts and comments for the Department to consider in determining whether it should adopt the proposed ADA Standards, including the pool access provisions. During the comment process, the Department did not receive any comments that raised questions about the basis for the Access Board's decision to include fixed pool lifts as an accessible means of entry for pools in its revised ADA/ABA Guidelines. In this regard, the Department received no requests to revisit the Access Board's conclusion that fixed lifts were an important—and safe—means for providing access to pools for persons with disabilities, and no persuasive information that would support a different conclusion. Accordingly, after extensive and multiple comment periods, the pool access requirements were adopted as part of the 2010 Standards. Any attempt to rewrite these

comments argued that this change could be interpreted as broadening the scope of the guidelines to cover elements that are not fixed or built-in.

Response. References to "fixed" and "built-in" were removed for editorial purposes of clarity and consistency. While the scope of the guidelines does not extend to elements that are not fixed or built-in, the Board believes that such clarification can be appropriately addressed in the regulations that implement the enforceable standards based on the Board's guidelines. 69 Fed. Reg. 44084, 44089 (July 23, 2004). This approach was consistent with the application of the previous version of the guidelines, the 1991 ADA Accessibility Guidelines, which also provided that "[t]hese guidelines [were] intended to address only that equipment that is fixed or built into the structure of the building." 56 Fed. Reg. 35415, 35408 (July 26, 1991). With regard to the specific recreation provisions of the revised guidelines, which include the pool access requirements at issue, the Board has stated that "[t]he guidelines apply to 'fixed' facilities and elements. *They do not cover equipment that is frequently moved.*" See Accessible Sports Facilities: A Summary of Accessibility Guidelines for Recreation Facilities at p. 7 (June 2003), available at <http://www.access-board.gov/recreation/guides/pdfs/sports.pdf> (emphasis added).

regulations and circumvent the regulatory process is especially concerning given that this rule implements statutory civil rights guarantees.

IV. The Proposed Legislation Would Unnecessarily Change the Long-Established Legal Framework of the ADA

Both the ADA and the title III regulation require public accommodations to remove accessibility barriers when it is readily achievable to do so. The ADA Standards provide the benchmark for readily achievable barrier removal in existing facilities. *See, e.g.*, 28 C.F.R. § 36.304(d) - “Except as provided in paragraph (d)(3) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in §36.402 and §§36.404 through 36.406 of this part for the element being altered.” Thus, an existing pool must provide a fixed lift or other element that complies with the ADA Standards if it is readily achievable to do so. The same approach to fixed versus portable accessibility elements has been in place for 20 years. (“Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable.” 28 C.F.R. §36.304(e); *see also* Title III Final Rule, 56 Fed. Reg. 35544, 35598 (July 26, 1991)). The Department, in technical assistance, has made clear that the same approach applies to pool lifts (March 2011 ADA Update: A Primer for Small Businesses," March 16, 2011, at 10, available at <http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm>. (“Therefore, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so. For example, a hotel must determine whether it is readily achievable to make its swimming pool accessible to people with mobility disabilities by *installing* a lift or a ramp as specified in the 2010 Standards.”) (emphasis added)).

The statute and regulations provide specific factors to be considered in making the readily achievable determination. The factors are necessarily individualized to assess a particular entity’s ability to remove barriers to their existing facilities—e.g., the nature and cost of the action; the overall financial resources of the covered entity; and legitimate safety concerns. Changing the regulation is unnecessary, as the readily achievable barrier removal framework already provides covered entities the option of using a portable, non-fixed lift if it is not readily achievable to install a fixed lift. Moreover, installing a lift of any type may not be required for some entities under the barrier removal analysis. Thus, the current regulations reasonably balance the access needs of individuals with disabilities against legitimate and sometimes competing safety and feasibility concerns.

To override the readily achievable barrier removal analysis, as H.R. 4256 would do, undercuts a 21-year statutory requirement. As stated above, the barrier removal requirements have been in place since the ADA was enacted in 1990. At that time, Congress made a conscious effort to address the concerns of businesses. To that end, it decided there should be no one-size-fits-all answer to what constitutes “readily achievable” under the ADA. Again, among the key factors to be considered are the nature and cost of the needed action, all the resources available to the covered entity, and the impact on the operation of the site, including legitimate safety requirements that are necessary for safe operation.

Thus, determining whether removal of a particular barrier is readily achievable will vary from business to business and sometimes from one year to the next for the same business. Changing economic conditions can be considered in determining what is readily achievable. We note that this standard is not new. Regulated entities of all sizes have successfully applied this standard for years because the standard provides the flexibility for each public accommodation to tailor its response to the ADA Standards to take into account its specific circumstances.⁴

Businesses will not be harmed by the Department's regulations for several reasons. First, to assist businesses with complying with the ADA, Section 44 of the Internal Revenue Code allows a tax credit for small businesses and Section 190 of the Internal Revenue Code allows a tax deduction for all businesses. 26 U.S.C. §§ 44, 190. The tax credit is available to businesses that have total revenues of \$1,000,000 or less in the previous tax year or 30 or fewer full-time employees. This credit can cover 50% of the eligible access expenditures in a year up to \$10,250 (maximum credit of \$5,000). The tax credit can be used to offset the cost of undertaking barrier removal and alterations to improve accessibility; providing accessible formats such as Braille, large print and audio tape; making available a sign language interpreter or a reader for customers or employees, and for purchasing certain adaptive equipment. The tax deduction is available to all businesses with a maximum deduction of \$15,000 per year. The tax deduction can be claimed for expenses incurred in barrier removal and alterations. Second, hotels and other public accommodations will not be required to close their existing pools. Title III of the ADA does not require that a public accommodation close its facility if measures needed to comply with the applicable ADA Accessibility Standards are not easily accomplishable or able to be carried out without much difficulty or expense—whether it is an entrance to a basement restaurant, an inaccessible playground, or an inaccessible swimming pool. Similarly, covered entities will not be in violation of the ADA if they are unable to acquire a lift because of a manufacturing backlog. The lack of availability of a compliant lift because of limitations in manufacturing capacity would demonstrate that it is not readily achievable to comply with the requirements, until such time as a lift becomes available. Third, safety and an increased risk of injury is a concern that was considered during the rulemaking process. However, the rulemaking record reveals no evidence that portable or fixed lifts are unsafe. Moreover, the Access Board, in issuing the Guidelines for recreation facilities on which the pool access requirements in the 2010 Standards are based, found “[p]ool lifts have been commercially available for over 20 years. While the Board recognizes that inappropriate use of pool lifts may result in accident or injury, the Board is not aware of any incidents of injury or accidents involving pool lifts. The Board is also not aware of any evidence that shows that pool lifts are any less safe than other components of a pool facility, such as other means of pool entry, when they are used inappropriately. Manufacturers are also incorporating features which are intended to discourage inappropriate use, such as fold-up seats and covers.” *See* 67 Fed. Reg. 56352, 56379 (September 3, 2002). Notwithstanding the above, the ADA permits consideration of legitimate safety requirements in its assessment of whether barrier removal is readily achievable, “so long as the requirements are based on actual risks and are necessary for safe operation of the public accommodation.” 28 CFR pt. 36, App. C at 884 (2011). However, speculation or

⁴ The Department notes that the barrier removal standard is not new to the lodging industry. Under a grant from the Department, the AH&LA (then the American Hotel & Motel Association) developed an ADA compliance manual for use by the lodging industry, which details the application of the barrier removal standard. *See Accommodating All Guests: The Americans with Disabilities Act and the Lodging Industry* at pp. 22-29 (December 1992).

unsubstantiated generalizations about safety concerns or risks cannot form the basis of a legitimate safety requirement.

V. The Proposed Legislation Would Impair the Civil Rights of People with Disabilities

The ADA's readily achievable barrier removal framework balances the provision of equal access for persons with disabilities with legitimate financial and operational concerns of businesses. To this end, a pool owner is required to install a fixed lift in an existing pool only to the extent that it is readily achievable to do so (i.e., easily accomplished without much difficulty or expense). H.R. 4256 and H.R. 4200 would change the substance of the pool requirement and irreparably skew this carefully crafted balance for people with disabilities by legislating that people with disabilities have no right to equal and independent access to a hotel's pool even where the hotel could readily afford to install a fixed lift.

Many entities wish to use portable lifts so they can keep the lifts stored away and take them out only at the request of a person with a disability. While, at first glance, this approach may seem to pose only minor inconvenience, it puts people with disabilities at a disadvantage by unnecessarily imposing very different terms and conditions for access to amenities that are immediately available to other customers.

Lifts should be consistently mounted for safe and independent use in an accessible location that complies with the requirements in the 2010 Standards and that persons with disabilities will not experience discrimination on the basis of their disability. Prior to the pool requirements in the 2010 Standards, many older portable lifts were not independently operable and were difficult for the swimmer to use. For example, lifts with hand cranks were included among the early pool lifts and they were not independently operable and were particularly difficult to use in getting out of the pool, even with assistance.

The 2010 Standards provide specific requirements for the design, location, and operation of pool lifts. The use of non-fixed portable lifts that are made available only on the request of a person with a disability raises safety concerns because of the possibility that the lift will not be assembled and located properly in relationship to the pool for the safe and independent use by a person with a disability. For instance, providing a consistent mounting point for a pool lift helps to assure that the lift will be consistently mounted in a location that complies with the 2010 Standards. In contrast, portable lifts that are not fixed to the pool deck can be erratically placed in any location with respect to the pool and used in a way that does not comply with 2010 Standards. Allowing lifts to be provided only on request could also increase the probability that the lift will be placed in a location that fails to provide the necessary clear floor space as required by the 2010 Standards. This clear floor space is necessary to allow placement of a wheelchair or other mobility device next to the lift to facilitate an individual's safe transfer from the mobility device to and from the lift.

H.R. 4256 also would require revising the regulation to allow an entity to share a portable lift

among pools when that entity has more than one pool. Sharing portable pool lifts between or among multiple pools also can pose safety risks to swimmers with disabilities because if a lift has been moved to another pool, a person with a disability might be unable to get out of the pool when they would otherwise choose to do so. This is increasingly problematic if there are multiple pools spread out over a large area.

The use of non-fixed portable lifts only on request of a person with a disability significantly increases the likelihood that persons with disabilities will be denied the “equality of opportunity and full participation” that the ADA requires. Allowing portable lifts to be provided only upon request runs counter to the ADA’s core principles of inclusion, equal opportunity, and independence by forcing individuals with disabilities to rely upon others to provide access for them. It would require an individual with a disability to call special attention to herself and her disability, interrupt staff who may be engaged in meeting the needs of other guests, and delay her enjoyment of the pool.

A complicating factor in the use of portable lifts is the fact that many portable lifts use batteries, which require attention to ensure they are fully charged so the lift is operational when needed. When lifts are stored away and not regularly recharged, the battery will die. Thus, even if a hotel employee is readily available and able to quickly and properly set up a portable lift upon request, a dead battery renders the lift unusable.

Consistent with the Department’s experiences regarding portable accessible elements, persons with disabilities have relayed their experiences of unsuccessful attempts to use portable non-fixed lifts. For example, an individual who commented on the Department’s recent NPRM regarding the four-month extension of the compliance date for existing pools offered the following observations:

“Portable lifts will mean that individuals [with disabilities] need to approach personnel, and have trained personnel available to use these lifts. In my experience, being forced to rely on additional personnel will limit safe access in practice. Hotels in particular frequently rely on low paid and apparently temporary workers who will not know how to access portable lifts or how to safely set them up. In practice when I have to receive assistance from personnel as opposed to being able to use accessible features independently, I find innumerable obstacles and waits that deny safe and equivalent enjoyment of facilities and services.”

Witnesses with disabilities at the April 24, 2012 hearing also emphasized the difficulties with portable accessible pool lifts. Ann Cody, Director, Policy and Global Outreach, BlazeSports America, testified:

“In my experience, the best way to ensure access to swimming pools is a fixed or permanent lift. A fixed lift is there and ready whenever a person with a disability wants to swim. The person doesn't have to find a staff person who knows where the lift is, where the keys are, how to set it up, and operate it. Often the keys to these lifts reside with a staff person who has to be paged over the radio. If the person with the key is in the middle of a job or on a break they are not able

to respond quickly leaving the person with a disability wondering if they'll be able to use the pool at all."

In its comments to the Department's 2004 Advanced Notice of Proposed Rulemaking, the National Center on Accessibility (NCA) advised the Department that it had collected anecdotal information over several years indicating that pool lifts installed on a temporary basis are not readily available for use by people with disabilities. The NCA noted a lack of staff on any given day with the training and expertise to install the pool lift, which would render the pool unavailable for use by people with disabilities. In addition to staffing concerns, individuals with disabilities have reported that there are often missing parts when portable lift assembly is attempted so that the lift is inoperable (or not safely operable). The NCA also questioned the feasibility of using one pool lift for multiple settings. Shared portable lifts compromise equal access and independence, by again relying on staff for pool access. Sharing lifts also poses a potential safety risk for a swimmer with a disability who may be in the pool and unable to exit because the lift has been moved to another location. This comment by the NCA is particularly notable because NCA conducted the Access Board's pool lift study.

The Department recognizes that under the current ADA regulatory framework, portable lifts may sometimes be used in situations where it is not readily achievable to provide fixed lifts. However, revising the regulation to allow portable lifts in all circumstances—as H.R. 4256 does—undermines the statute and regulation by removing the individualized barrier removal assessment and determining de facto what is readily achievable for all entities, irrespective of an entity's ability to provide a fixed lift.

VI. Conclusion

The Department stands by the existing regulatory framework governing the accessibility of pools for people with disabilities, and opposes the adoption of legislation that would undermine the six-year, thorough and transparent rulemaking process that offered multiple opportunities for stakeholders to comment and address any concerns with the Department's proposals. When the ADA was signed into law in 1990, Congress charged the Department with enforcing this critical civil rights statute and promulgating regulations to implement it. The Department has always taken these responsibilities very seriously and is committed to vigorous stewardship of the ADA to meet the legitimate needs and interests of both people with disabilities and covered entities.