



UNITED STATES CAPITOL POLICE
WASHINGTON, DC 20510-7218
October 9, 2014

Barbara Sapin, Esquire
Executive Director
Office of Compliance
110 Second Street, S.E. Room LA-200
Washington, D.C. 20540-1999

Re: Comments Regarding Proposed ADA Public Access Regulations to Implement Section 210 of the Congressional Accountability Act

Dear Ms. Sapin:

Please accept these comments on behalf of the United States Capitol Police regarding the Americans with Disabilities Act ("ADA") Public Access Regulations as proposed. As discussed below, we recommend that the ADA Public Access Regulations not be issued at this time. One primary concern is that the ADA Public Access Regulations do not appear to be coordinated with the statutory responsibilities of other Congressional entities, and could result in unnecessary conflicts with statutory responsibilities belonging to various entities within the legislative branch.

Additionally, the ADA Public Access Regulations do not appear to be tailored to the legislative branch or publicly accessible areas within the legislative branch. There are conflicts within the ADA Public Access Regulations that appear to exist because of the adoption by the Office of Compliance of both Title II and Title III of executive branch regulations. These conflicts should be clarified.

Finally, the methodology for identifying responsible entities is not clear. Because the determination of methodology is a statutory requirement under the Congressional Accountability Act ("CAA"), it is important that the identification of a responsible party be clearly articulated in the Regulations.

We have identified specific concerns with the ADA Public Access Regulations below. Although the itemization is not exhaustive, examples of concern are provided. We appreciate the time and effort spent on the ADA Public Access Regulations and look forward to working with the Office of Compliance on language that takes into consideration all statutory interests.

1) *The ADA Substantive Regulations Have Not Been Tailored To The Legislative Branch As Required By The CAA.*

2 U.S.C. § 1331(e)(2) requires that regulations be the same as substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement the statutory provisions referred to in subsection (b) except to the extent that the Board may

determine, for good cause shown and stated together with the regulation, that a modification of such regulation would be more effective for the implementation of the rights and protections under this section. However, there are several concerns with the regulations as written.

First, it is unclear which provisions have been promulgated under the ADA Public Access authority. The explanation provided by the Office of Compliance is that “all regulations promulgated after a notice and comment by the DOJ and/or the DOT to implement the provisions of Title II and Title III of the ADA applied by section 210(b) of the CAA are ‘substantive regulations’ within the meaning of section 210(e).” (Notice of Proposed Rulemaking, 160 CONG. REC. S5437 (daily ed. Sept. 9, 2014.)) Based on its finding, the Board of the Office of Compliance included Parts 35 and 36 of Title 28 of the Code of Federal Regulations (“C.F.R.”), Parts 37 and 38 of Title 49 of the C.F.R.

However, in reviewing the proposed regulations, the Board included, without explanation, a specific provision of 36 C.F.R. Part 1190, specifically section 1190.34. (160 CONG. REC. at S54460.) There are three problems. First, the substantive rule identifies section 1190.3, however, the referenced section is 1190.34. Thus, the adopted provision (1190.3) and the regulation cited (1190.34) are different. Second, section 1190.34 addresses “Accessible buildings and facilities: Leased” and there is no explanation why any other provision of this regulatory section was not adopted. Third, the cited regulation governing the Architectural and Transportation Barriers Compliance Board, an entity not made applicable by the CAA. Fourth, section 1190.34 adopts other provisions into the regulation, including sections 1190.31, 1190.33, 1190.50, 1190.150, 1190.60, 1190.160, 1190.80, 1190.210, 1190.220, 1190.250, 1190.240, and recommended standards of the American National Standards Institute (“ANSI”) A117.01. The Board of Directors has not explained how several other un-adopted regulations and ANSI standards can be included into the substantive regulations.

Second, the regulations themselves have not been tailored to the legislative branch. For example, Section 36.207 identifies “Places of public accommodations located in private residences.” (160 CONG. REC. S5445.) The Board did not identify any private residences located in the legislative branch and have not explained why this specific provision is adopted as a substantive regulation. Section 37.107 requires “acquisition of [passenger rail cars] by private entities primarily engaged in the business of transporting people.” (*Id.* S5442.) The Board does not identify any private entities engaged in transporting people. Sections 37.135 and 37.137 requires the development and submission of a “paratransit plan” operating a fixed route of transportation service. The Board has not explained where such service is provided and how what authority it has to review such plans. Moreover, Section 37.139 identifies what is expected of the “plan contents,” including development of inventory, policies, documents, certification from the Metropolitan Planning Organization, and a plan developed under the Federal Transit/Federal Highway Administration joint planning regulation under 49 C.F.R. § 613 and 23 C.F.R. pt. 450. There is no explanation as to how executive branch entities can have jurisdiction

over legislative branch entities and raises questions related to separation of powers under the United States Constitution.

Third, the regulations have not provided helpful language to understand what the Board means by its regulations. Under Sections 35.103(b) and 36.103(c), the substantive regulations bootstrap remedies, rights, and procedures of other “State or local laws (including State common law) that provide greater or equal protection.” The Board does not explain how it intends to implement state or local laws to the legislative branch in accordance with sections 35.103(b) and 36.103(c) as those laws are not identified by the Board or adopted under the CAA.

Under Section 36.303 requires for public accommodation that offers people the opportunity to make “outgoing telephone call” to provide “public accommodation’s equipment on more than an incidental convenience basis” and shall make available accessible public telephones, TTYs, or other telecommunications products and systems for use by an individual who is deaf, or hard of hearing, or has a speech impairment.” However, the Board has not identified what it believes constitutes “more than an incidental convenience basis” to provide guidance to the regulation.

The Board proposes not to adopt regulatory provisions of the regulations “that have no conceivable applicability to operations of entities within the Legislative branch or are unlikely to be invoked.” (160 CONG. REC. S7634.) Yet, the Board does not explain its rationale for not adopting provisions. For example, the Board has not adopted Section 38.91 dealing with commuter rail cars, but does not explain why that section is not adopted.

However, the Board does not identify those regulations nor do they identify the entity to which those regulations apply. Several examples are found in the substantive regulations. For example, Section 37.5 (nondiscrimination) is already incorporated into the CAA and the Board cannot add an additional avenue of relief through its regulations. Accordingly, the regulations have not been modified as required by the CAA to those where “good cause” is shown.

2) *The Substantive Regulations Do Not Take Into Account Safety Or Security Considerations Belonging To The Capitol Police Board Or The Security Requirements Of The United States Capitol Police.*

There exist a number of Legislative branch entities that have specific statutory or regulatory authority that may intersect with the ADA public accessibility substantive regulations. For example, the Capitol Police Board has statutory authority to regulate traffic around Capitol Buildings and Grounds. 2 U.S.C. § 1969. That statute authorizes the Capitol Police Board to “have exclusive charge and control of the regulation and movement of all vehicular and other traffic, including the parting and impounding of vehicles and limiting the speed thereof, within the United States Capitol Grounds.” *Id.* That statute also authorizes the Capitol Police Board “to make and enforce all necessary regulations therefor and to prescribe penalties for violation of such regulations.” *Id.* There is no language in the substantive regulations as to how the Office

of Compliance will coordinate issues that may affect the Capitol Police Board's statutory authority.

Additionally, the Capitol Police Board has statutory responsibility to determine release of security information under 2 U.S.C. § 1979. Among other things, that statute authorizes the Capitol Police Board, "[n]otwithstanding any other provision of law," to determine "in consultation with other appropriate law enforcement officials, experts in security preparedness and appropriate committees of Congress . . . the release of the security information [that] will not compromise the security and safety of the Capitol buildings and grounds or any individual whose protection and safety is under the jurisdiction of the Capitol Police." *Id.* § 1979(b).

The ADA Public Access regulations, on the other hand, do not consider the Capitol Police Board's statutory authority or its responsibilities. Instead, the substantive regulations provide the Office of Compliance General Counsel with unfettered discretion to investigate a charge, "requiring the parties to provide . . . ready access to: all physical areas subject to an inspection or investigation, individuals with relevant knowledge concerning the inspection or investigation who can be interviewed or questioned, and documents pertinent to the investigation." Section 2.103(a). The regulations (§3.103) provide the General Counsel of the Office of Compliance unfettered discretion to enter facilities and conduct inspections without regard to the security of the facility. Similarly, the regulations (§3.103(b)) permit the General Counsel to review "any and all information or documents deemed by the General Counsel to be relevant to a determination of whether the covered entity is in compliance with Section 210 of the CAA" without regard to the security information of the documents or the opportunity for the employing office to challenge the release of such documents. 160 CONG. REC. S7372.

Thus, the ADA public access regulations have not considered the Capitol Police Board's statutory to determine the release of security information nor do the regulations provide any process or protocol for coordination with the Capitol Police Board.

There are also a number of secure sites and confidential documents that belong to legislative branch entities. The ADA Public Access regulations do not address the proper protocols necessary to enter into secure sites or obtain release of confidential information that may intersect with their investigation. Nor has the Board offered regulations as to how intends to safeguard personally identifiable information and health information privacy rights that may exist in the documents sought. Thus, the Capitol Police cannot provide documentation that is not properly safeguarded or access to secure sites without proper authorization and clearance to enter such sites and/or facilities.

Moreover, the regulations seek to incorporate on employing offices a "duty to cooperate with investigations" under section 2.103(b). The regulations are not clear what is meant to "cooperate" as our experience has been that raising statutory defenses or providing legal arguments for not disclosing information has been considered as being uncooperative with an investigation. The duty to cooperate does not offer

- 3) *The Substantive Regulations Have Not Identified A Method For Identifying Responsible Entity.*

Section 1.104 does not identify a “method” for identifying the entity responsible. A “method” is a logical or systematic way of identifying the entity responsible. The Board did not comply with the statute in identifying a method for identifying a responsible entity. Rather, they simply state in a conclusory fashion, that it is the “covered entity” responsible. Moreover under Section 1.04(c) as defined by the Board, the entity responsible could be an entity not covered by the CAA if that entity is responsible for the design, maintenance, or construction. The regulation is not tailored to the statutory requirement.

4) *The ADA Substantive Regulations Regarding Remedies Is Inconsistent With Law.*

Section 2.107 is inconsistent with law. First, the language in 2.107(a) is not the full text of the statute as Section 210 provides additional language, “except that, with respect to any claim of employment discrimination asserted by any covered employee, the exclusive remedy shall be under section 201 of this title.” Thus, a charging individual, if an employee, is limited to the remedy proscribed in Section 210(c) of the CAA. Additionally, language permitting attorney fees, costs, and compensatory damages to a charging individual is not consistent with section 210(c) of the CAA, nor has the Office of Compliance cited to the specific statutory provision which allegedly permits payment.

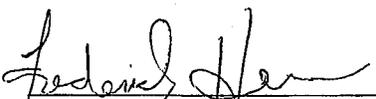
Moreover, there is no statutory authority to permit the Office of Compliance to determine that “fees, expenses, and costs” be paid from the covered entities’ “appropriated funds.” Rather, Section 1415 of the CAA provides that funds “to correct violations” may be used from funds appropriated for such correction. There is no statutory language to permit payment of funds “for compensatory damages” which is an Award and Settlement in accordance with Section 415(a) of the CAA paid out of the appropriated account of the Office in the Treasury of the United States. Similarly, Section 2.107(b) should be deleted because the language is inconsistent with Section 1415(c) of the CAA. Funds must be appropriated first to correct the violation. Thus, a substantive regulation cannot govern the timing of an appropriation of funds.

Finally, Section 2.108 is unnecessary to place in the procedural rules as that language is taken directly from Section 210(d)(4) of the CAA.

Given the issues raised above, it is recommended that the ADA public access regulations not be issued at this time.

Respectfully submitted,


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