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U.S. DISTRICT COURT
DISTRICT OF MASS.
COMMONWEALTH OF MASSACHUSETTS
C.A. No.: 03 11206-MEL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

.....
COMMONWEALTH OF MASSACHUSETTS, et al.

Plaintiffs,

v.

E*TRADE ACCESS, INC., et al.

Defendants.
.....

**COMMONWEALTH'S RESPONSE TO DEFENDANTS'
SUBMISSION OF SUPPLEMENTAL EVIDENCE IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

The Commonwealth submits this Response to briefly address Defendants' misguided attempt to rely on the Commonwealth's recent interrogatory responses that note the availability and wide use of voice guidance technology to provide ATM access for blind people as a basis for judgment against Plaintiffs.¹

In their Submission, Defendants correctly point out that the Commonwealth cites in its interrogatory responses voice guidance technology as one means by which Defendants could translate visual instructions and information for use at its ATMs into a non-visual format so that the ATMs would be accessible to, and independently useable by, blind people. Defendants also correctly point out that the Commonwealth cites voice guidance technology as the chosen method of providing access to blind consumers used at well over 1,600 ATMs owned and/or operated in Massachusetts by such major financial institutions as Bank of America, Sovereign

¹ Defendants filed their Submission of Supplemental Evidence in Support of Defendants' Cross-Motion for Summary Judgment ("Submission") in contravention of the Local Rule requiring parties to seek leave of court before filing papers additional to a reply brief, *see* Local Rule 7.1(B)(3), and the Local Rule requiring parties to confer with counsel before submitting such a motion. *See* Local Rule 7.1(A)(2).

Bank, Citizens Bank, and TD BankNorth. *See, e.g.*, Defendants Submission, Exhibit A, Response to Interrogatory Number 16. Defendants then leap to an unwarranted conclusion that the Commonwealth's recognition of the availability and wide use of voice guidance technology proves that they are entitled to summary judgment. Although Defendants repeatedly remind the Court that "[it] has already ruled [that voice guidance] is not a permissible remedy,"² Submission at 2, the Court's dictum does not prevent Defendants from undertaking *voluntary* steps to use voice guidance to afford access, as the Commonwealth suggested in its interrogatory responses.

The Court's expressed view of its latitude in fashioning an order of relief would not preclude Defendants from, or somehow place Defendants in jeopardy of violating the law by, undertaking voluntary implementation of voice guidance technology to afford blind consumers access. This is so as a matter of common sense, and it is so under ADAAG 2.2, the "equivalent facilitation" provision:

2.2 Equivalent Facilitation. Departures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies will provide substantially equivalent or greater access to and usability of the facility.

² While the Court stated in dictum in its February 22, 2005, decision on Defendants' Rule 12(c) motion that it could not impose voice guidance technology on Defendants under ADAAG 4.34.5, the Court can, in fact, order voice guidance as a remedy for Defendants' failure to comply with ADAAG 4.34.5. That provision sets forth a flexible, performance-based standard of "access" and "independent usability." No legislation or case law limits the remedial power of the court to order a remedy, such as voice guidance, when an entity violates ADAAG and the remedy will bring the entity into compliance. Defendants have relied on case law that says, correctly, that if a public accommodation has complied with ADAAG, nothing further may be required of the public accommodation under the ADA's general prohibition against discrimination by a public accommodation. That case law has no bearing on the remedies available to the court when an entity has violated ADAAG. The Court also seems to have relied on language in the Access Board comments to the ADAAG to the effect that the Access Board would not, at that time, require headphone jacks *per se*. *See* Memorandum and Order dated February 22, 2005, at 3. However, Defendants presented this comment to the Court shorn of its context: the Access Board was addressing security and privacy concerns at ATMs that affected all consumers alike and were unrelated to access issues specifically. *See* 56 Fed. Reg. 35441-42 (attached as Exhibit 3 to the November 9, 2004, Memorandum in Support of Defendants' Rule 12(c) Motion for Judgment on the Pleadings). Moreover, by foreclosing headphone jacks as a means of addressing privacy and security concerns, the Access Board did not rule out other means of supplying audio capability that were then more common (*e.g.*, voice guidance through a telephone headset), although, again, it declined to mandate any specific means and instead adopted a flexible, performance-based approach.

Thus, even if voice guidance technology were somehow beyond the scope of ADAAG 4.34.5's flexible, performance-based "access" and "independent use" requirements, Defendants could still undertake to make their ATM services accessible to blind consumers through the use of voice guidance technology under Section 2.2, since that technology would provide "substantially equivalent or greater access to and usability of the facility."

The proliferation of voice guidance technology since 1991, when the current ADAAG standard was promulgated, brings it squarely within the equivalent facilitation doctrine. The Access Board explained in its comments to this provision that it intended to facilitate new technologies and specifically noted "audible signage for individuals with vision impairments" as an example of appropriate "equivalent facilitation." See 56 Fed. Reg. 35408, 35413 (attached as Exhibit A). Even under Defendants' reading of ADAAG 4.34.5, therefore, they are not foreclosed from *voluntarily* taking advantage of the same technology implemented at thousands of other ATMs in Massachusetts and across the country that allows blind consumers the same or equivalent access and independent use afforded sighted consumers.³

Instead, the evidence here shows that Defendants have done virtually nothing – either under ADAAG 4.34.5 or under ADAAG 2.2 – to afford blind people access to and independent use of their ATMs. The evidence Plaintiffs submitted in support of their partial summary judgment motion shows that in the case of *some* ATMs, there is *some* Braille on the keypads. However, that Braille offers only a negligible fraction of the universe of the ATMs' instructions and information for use. Rather, the great majority of the information and instructions required to use the ATMs is now presented only through visually-discerned screen prompts. While

³ If Defendants were to use voice guidance technology at any of their ATMs, those ATMs would also comply with the type of order the Plaintiffs have requested in connection with their motion for partial summary judgment, namely, that the Court order Defendants to make their ATMs accessible to and independently useable by blind people.

defense counsel stated at the October 6, 2005, hearing on the cross-motions for summary judgment that “we [Defendants] believe our ATMs are accessible,” no admissible evidence supports that belief. The evidence shows the contrary: the Defendants’ ATMs present the myriad screen prompts a consumer must navigate in only a visual format, which consumers without sight cannot use.

Defendants assert that the proposed revised ADAAG will require talking ATMs, and assert that they should not have to implement voice guidance technology before this revised ADAAG takes effect and other institutions must also implement that technology. As the Commonwealth’s interrogatory responses indicate, other financial institutions have read ADAAG’s flexible, performance-based standard of 4.34.5 and *already* implemented voice guidance technology as their chosen method of complying with that flexible standard. Contrary to Defendants’ suggestion, Plaintiffs do not ask the Court to order Defendants to make their ATMs accessible *in advance* of a legal rule that they do so; rather, Plaintiffs ask the Court to order Defendants to finally do what other institutions have already done and afford blind consumers access and independent use. Those other institutions have adopted widely available voice guidance technology for a variety of compelling business reasons. However, the order Plaintiffs have requested – that would require Defendants’ ATMs to offer instructions and all information for use in a manner that is accessible to and independently useable by the blind – would leave it up to Defendants to decide how best to make their ATMs accessible and would not require Defendants to follow the well-trodden path chosen by other financial institutions.

In light of the undisputed evidence illustrating Defendants’ refusal to make *any* good-faith effort to afford blind people access to their ATMs’ services, the Commonwealth asks the

Court to enter judgment on Count V of the Third Amended Complaint and issue Plaintiffs' proposed order of relief.

Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS,
By its Attorneys,

THOMAS F. REILLY
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A handwritten signature in dark ink, appearing to read 'Patricia Correa', is written over a horizontal line.

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Dated: January 5, 2006

CERTIFICATE OF SERVICE

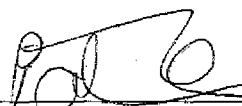
I, Patricia Correa, hereby certify that on this 5th day of January, 2006, I served the within document via first-class mail, postage prepaid (with attachments) and via e-mail (without attachments) on the following counsel of record:

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federal register

Friday
July 26, 1991

35407

Part II

Architectural and Transportation Barriers Compliance Board

36 CFR Part 1191

**Americans With Disabilities Act (ADA)
Accessibility Guidelines for Buildings and
Facilities; Final Guidelines**

35408

Federal Register / Vol. 56, No. 144 / Friday, July 26, 1991 / Rules and Regulations

**ARCHITECTURAL AND
TRANSPORTATION BARRIERS
COMPLIANCE BOARD**

36 CFR Part 1191

[Docket No. 90-2]

RIN 3014-AA09

**Americans With Disabilities Act (ADA)
Accessibility Guidelines for Buildings
and Facilities****AGENCY:** Architectural and
Transportation Barriers Compliance
Board.**ACTION:** Final guidelines.

SUMMARY: The Architectural and Transportation Barriers Compliance Board is issuing final guidelines to assist the Department of Justice to establish accessibility standards for new construction and alterations in places of public accommodation and commercial facilities, as required by title III of the Americans with Disabilities Act (ADA) of 1990. The guidelines will ensure that newly constructed and altered portions of buildings and facilities covered by title III of the ADA are readily accessible to and usable by individuals with disabilities in terms of architecture and design, and communication. The Department of Justice has proposed to adopt the guidelines as the accessibility standards for new construction and alterations in places of public accommodation and commercial facilities for purposes of title III of the ADA.

EFFECTIVE DATE: July 26, 1991.

FOR FURTHER INFORMATION CONTACT: James Raggio, Office of the General Counsel, Architectural and Transportation Barriers Compliance Board, 1111-18th Street, NW., Suite 501, Washington, DC 20036. Telephone (202) 653-7834 (Voice/TDD). This is not a toll-free number. This document is available in accessible formats (cassette tape, braille, large print, or computer disc) upon request.

SUPPLEMENTARY INFORMATION:**Statutory Background**

The Americans with Disabilities Act (ADA) of 1990 extends to individuals with disabilities comprehensive civil rights protections similar to those provided to persons on the basis of race, sex, national origin, and religion under the Civil Rights Act of 1964. Title III of the ADA, which becomes effective on January 26, 1992, prohibits discrimination on the basis of disability in places of public accommodation by any person who owns, leases or leases to, or operates a place of public

accommodation. As discussed below, title III establishes accessibility requirements for new construction and alterations in places of public accommodation and commercial facilities.

"Public accommodation" is defined by section 301(7) of the ADA as including the following twelve categories of private entities if their operations affect commerce:

- (1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (2) A restaurant, bar, or other establishment serving food or drink;
- (3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (4) An auditorium, convention center, lecture hall, or other place of public gathering;
- (5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (7) A terminal, depot, or other station used for specified public transportation;
- (8) A museum, library, gallery, or other place of public display or collection;
- (9) A park, zoo, amusement park, or other place of recreation;
- (10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (12) A gymnasium health spa, bowling alley, golf course, or other place of exercise or recreation.

The legislative history states that these twelve categories "should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities." H. Rept. 101-485, pt. 2, at 100.

"Commercial facilities" are defined by section 301(1) of the ADA as facilities that are intended for nonresidential use and whose operations will affect commerce. The legislative history states that the term is to be interpreted broadly to cover commercial establishments that are not included within the specific definition of "public accommodation" such as office buildings, factories, and

other places in which employment will occur. H. Rept. 101-485, pt. 2, at 116-17.

Section 303 of the ADA establishes accessibility requirements for new construction and alterations in places of public accommodation and commercial facilities. With respect to new construction, section 303(a)(1) requires that places of public accommodation and commercial facilities designed or constructed for first occupancy after January 26, 1993, must be readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable. When alterations are made that affect or could affect usability of or access to a place of public accommodation or commercial facility, section 303(a)(2) requires that the alterations be made in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities. In addition, where alterations affect or could affect usability of or access to an area of the facility containing a primary function, section 303(a)(2) requires that the alterations be made in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities unless it is disproportionate to the overall alterations in terms of cost and scope, as determined under criteria established by the Attorney General.

Section 303(b) of the ADA contains an exception which specifies that the installation of an elevator is not required for newly constructed or altered facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, shopping mall, the professional office of a health care provider, or another type of facility determined by the Attorney General to require the installation of an elevator based on the usage of the facility.

According to the legislative history, the term "readily accessible to and usable by" is intended to provide "a high degree of convenient accessibility" and "enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter and use a facility." H. Rept. 101-485, pt. 2, at 117-18. The term includes "accessibility of parking areas, accessible routes to and from the facility, accessible entrances, usable bathrooms and water fountains, accessibility of public and common use areas, and access to the goods, services,

Board's response to those comments, and any changes made to the guidelines.

1. Purpose

The purpose section has been clarified to state that the guidelines are to be applied during the design, construction, and alteration of places of public accommodation and commercial facilities to the extent required by regulations issued by Federal agencies, including the Department of Justice, under the ADA. The Department of Justice's final regulations will address the extent to which the guidelines are applicable to places of public accommodation and commercial facilities under new construction and alteration sections, including alterations to an area containing a primary function and cost disproportionality. The Department of Justice's final regulations will also address whether the guidelines are applicable to the removal of architectural barriers, and communications barriers that are structural in nature, in existing buildings and facilities where such removal is readily achievable. The Equal Employment Opportunity Commission's final regulations will address whether the guidelines are applicable for purposes of reasonable accommodation under title I of the ADA.

2. General

2.1 Provisions for Adults

There were no comments on this section. As discussed under the general issues, the Board will develop guidelines for children's environments.

2.2 Equivalent Facilitation

Comment. Commenters generally supported the equivalent facilitation provision which permits departures from the guidelines where substantially equivalent or greater access to or usability of a building or facility is provided. Some commenters requested that the guidelines include examples of alternatives that would provide equivalent facilitation. Other commenters expressed concerns about enforcement and a few recommended that a process be established for reviewing whether equivalent facilitation is provided.

Response. The equivalent facilitation provision has been clarified by substituting the words "designs and technologies" for "methods." The purpose of the provision is to allow for flexibility to design for unique and special circumstances and to facilitate the application of new technologies. The accessibility and usability of design solutions developed for unique and

special circumstances must be evaluated on a case by case basis. In the case of new technologies which provide equivalent facilitation, as those technologies become more common, the Board will consider incorporating them in the guidelines.

The final guidelines in corporate specific provisions for equivalent facilitation in five sections. In 4.1.6(3)(c), in the case of alterations to an existing facility the guidelines permit an elevator car to have different dimensions when usability can be demonstrated and all other elements required to be accessible comply with the applicable provisions of 4.10 (e.g., a 49 inch by 69 inch elevator car with a door opening on the narrow dimension could accommodate the standard wheelchair clearances shown in figure 4). In 4.31.9, the guidelines permit the use of a portable text telephone if it is readily available for use with a nearby public pay telephone that is equipped with a shelf; an electrical outlet within, or adjacent to, the telephone enclosure; and a long enough telephone handset cord to allow connection of the text telephone and the telephone receiver if an acoustic coupler is used. In 7.2, the guidelines provide for equivalent facilitation at counters that may not have a cash register but at which goods or services are distributed (e.g., teller stations in banks, registration counters in hotels and motels) by permitting use of a folding shelf attached to the main counter on which an individual with a disability can write, and use of the space on the side of the counter or at the concierge desk for handling materials back and forth. In 9.1.4, the guidelines deem it equivalent facilitation if the operator of a hotel or similar place of transient lodging elects to limit construction of accessible rooms to those intended for multiple occupancy provided that such rooms are made available to an individual with a disability who requests a single-occupancy room. In 9.2.2(b)(d), hotels and other similar places of transient lodging are permitted to utilize a higher door threshold or a change in level at patios, terraces and balconies where necessary to protect the integrity of the unit from wind and water damage but equivalent facilitation is required where it results in patios, terraces, or balconies that are not on an accessible level (e.g., raised decking or a ramp must be provided to permit access to the patio, terrace or balcony).

Equivalent facilitation is appropriate and applies to the entire guidelines and not only those sections mentioned above. For example, other areas where equivalent facilitation may be appropriate include the use of automatic

door openers for double leaf doors, and provision of audible signage for individuals with vision impairments. The use of a portable ramp, however, is not considered equivalent facilitation.

The ADA does not require any process to be established for reviewing whether equivalent facilitation is provided.

3. Miscellaneous Instructions and Definitions

3.1 Graphic Conventions

3.2 Dimensional Tolerances

3.3 Notes

3.4 General Terminology

Few comments were received on these sections and they did not warrant any changes.

3.5 Definitions

Comment. Several commenters recommended that the term "individual with a disability" should be defined the same as in the ADA.

Response. The definition of the term "individual with a disability" has been deleted from the guidelines as unnecessary since the guidelines will be incorporated in the Department of Justice's regulations implementing title III of the ADA which will include a definition of the term. The NPRM defined "accessible" in terms of being used "by individuals with disabilities, including those affecting mobility, sensory, or cognitive functions." The definition of the term "accessible" has been revised in the final guidelines to mean a site, building, facility, or portion thereof that complies with the guidelines. In other words, buildings and facilities that meet the requirements of the guidelines are by definition accessible to individuals with disabilities.

Comment. Commenters made several recommendations for changes in the definition of the term "technically infeasible."

Response. The Definition of the term "technically infeasible" has been revised and moved to the scoping provisions for alterations at 4.1.6(1)(j). Changes to that definition are discussed under that section. A new term "structural frame" has been added to 3.5 in connection with the revised definition of "technically infeasible" which is also discussed under the scoping provision for alterations.

Comment. A commenter requested that the term "text telephone" be used in place of "telecommunication display device or telecommunication device for the deaf (TDD)."