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**PUBLIC
INTEREST
COMMENT**

NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS-MOVIE THEATERS; MOVIE CAPTIONING AND AUDIO DESCRIPTION

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Christopher Koopman
Research Fellow, Mercatus Center at George Mason University

Scott Eastman
MA Fellow, Mercatus Center at George Mason University

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INTRODUCTION

The Regulatory Studies Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts careful and independent analyses that employ contemporary economic scholarship to assess rulemaking proposals and their effects on the economic opportunities and social well-being available to all members of American society.

This comment addresses, from an economic point of view, the efficiency and efficacy of the Department of Justice's (DOJ) proposed amendments to Title III of the Americans with Disabilities Act of 1990 (ADA). Specifically, it examines how the relevant rule may be improved by more closely examining the societal goals the rule intends to achieve and whether this reconsideration will successfully achieve those goals. In many instances, regulations can be substantially improved by choosing more effective regulatory options or more carefully assessing the actual societal problem.

For more information, contact:
Robin Bowen, (703) 993-8582, rbowen@mercatus.gmu.edu
Mercatus Center at George Mason University
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

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BACKGROUND

With this Notice of Proposed Rule Making (NPRM) the DOJ proposes amendments to Title III of the ADA concerning captioning and audio description services at movie theaters.¹ Title III of the ADA applies to places of “public accommodation,” such as movie theaters, restaurants, schools, and doctors’ offices.² These covered entities are prohibited from discriminating against any individual “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”³

In particular, Title III of the ADA prohibits public accommodations, such as movie theaters, from affording unequal or lesser service to individuals with disabilities.⁴ As a result, these entities must “ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently . . . because of the absence of auxiliary aids and services.”⁵ In this context, “auxiliary aids and services” is defined to include:

[E]ffective methods of making aurally delivered materials available to individuals with hearing impairments . . . effective methods of making visually delivered materials available to individuals with visual impairments . . . acquisition or modification of equipment or devices, and other similar services and actions.⁶

As a result, the DOJ is proposing amendments that would require movie theaters to:

1. exhibit movies with closed captioning and audio description at all times and for all showings whenever movies are produced, distributed, or otherwise made available with captioning and audio description, unless to do so would result in an undue burden or fundamental alteration;⁷ and
2. maintain a certain number of individual captioning and audio description devices.⁸

1. US Department of Justice (DOJ), Civil Rights Division, *Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description; Notice of Proposed Rulemaking*, 28 CFR Part 36, CRT Docket No. 126; AG Order No. 3449-2014, RIN 1190-AA63(Aug. 1, 2014): 44976. [Hereafter cited as NPRM].

2. 42 U.S.C. 12181(7) (2014).

3. 42 U.S.C. 12182(a)(2014).

4. 42 U.S.C.12182(b)(1)(A)(ii) (2014).

5. 42 U.S.C. 12182(b)(2)(A)(iii) (2014).

6. 42 U.S.C. 12103(1)(A)-(B) (2014).

7. NPRM, 44977.

8. NPRM, 44977.

Consistent with the Title III, these requirements contain an exemption if compliance would cause an “undue burden”⁹ or “fundamental alteration.”¹⁰ However, covered entities would still be required to provide an alternative auxiliary aid or service, if available.¹¹

In addition, the DOJ seeks public comment regarding whether the proposed amendments should apply to analog screens in movie theaters.¹² The DOJ provides two potential options. Under both, digital theaters would be required to provide captioning and audio description services. However, under option one, analog theaters would have four years to comply.¹³ Under option two, analog theaters would be exempted from this rule altogether, and the DOJ would revisit the possibility of analog regulation at a later date.¹⁴

Finally, the proposed amendments would require movie theaters to notify disabled patrons which movies have closed captioning and audio description services, perhaps through “signage, instruction guides, and exchange of written notes.”¹⁵

SUMMARY OF COMMENT AND PROPOSALS

While the goal of enhancing and expanding the movie theater experience to the visually and hearing impaired is laudable, the DOJ’s proposed regulations suffer from numerous deficiencies. These will each be discussed in detail in this comment. In particular:

1. The DOJ fails to identify a systemic or market failure that would justify this regulation. In particular, the DOJ has failed to measure the extent to which movie theaters are already providing, or failing to provide, captioning and audio description services. The DOJ has also failed to measure whether other forms of entertainment, such as video-on-demand and streaming services, are already providing captioning and audio description outside of the traditional movie theater experience.

9. To determine if compliance would cause an “undue burden” the DOJ has devised a five-factor test, which considers: (1) the nature and cost of an action; (2) the financial resources of a regulated entity; (3) the geographic separateness and relationship of a regulated entity to its parent corporation; (4) the financial resources of a regulated entity’s parent corporation; and (5) the type of operations of a parent corporation. See 28 CFR 36.104 (2014), NPRM, 44982.

10. The DOJ has defined “fundamental alteration” as a “modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.” US Department of Justice, *Americans with Disabilities Act ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities III-4.3600*.

11. “If provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration . . . or in an undue burden . . . the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.” 28 CFR 36.303(g) (2014), NPRM, 44982.

12. This refers to those theaters exhibiting movies in the traditional form of 35 mm film rather than those using the modern digital cinema technology.

13. NPRM, 44998.

14. NPRM, 44998.

15. NPRM, 44998.

2. While the DOJ refers to general qualitative values, it fails to define these values in the broader context of movie theaters and fails to provide evidence that these proposed rules will advance those values. Further, the proposed rule fails to measure or monetize any benefits. This makes it impossible to support the assertion that this rule's benefits outweigh the set of tangible costs that would be imposed on movie theaters.
3. The costs of this rule will disproportionately burden small movie theaters relative to larger movie theaters; moreover, depending on the option chosen by the DOJ, this rule would disproportionately affect analog theaters relative to digital theaters.
4. The design of this rule may actually cause a *reduction* in the number of entertainment options available to disabled individuals and discourage theaters from adopting and marketing business practices geared toward the visually and hearing impaired.

To help the DOJ ensure that the proposed rule will further the goal of enhancing and expanding the movie theater experience, we make several recommendations. If followed, these could (1) provide the information essential for making an evidence-based determination regarding whether this rule is necessary, and (2) provide flexibility in implementation that would reduce the cost of compliance while still promoting the laudable goals of the ADA. In particular:

1. The DOJ should conduct an industry-wide survey of movie theaters across the United States to determine the extent to which captioning and audio description is provided and when theaters adopted these technologies. This would provide an accurate picture of the adoption of these services over time, allowing the DOJ to assess the extent to which movie theaters currently provide disabled patrons with these technologies and whether there is a trend among theaters to provide these technologies absent regulation.
2. If, after conducting the survey, the DOJ still finds the proposed regulations necessary, it could maintain a general requirement of auxiliary devices but refrain from setting rigid quotas on the number of captioning and audio description devices each theater must acquire. This would promote the overall outcomes that are at the heart of the ADA without mandating some strict output requirements that may not be necessary for some theaters to be in compliance.

DISCUSSION

While we support the “full and equal enjoyment” of public accommodations by disabled individuals, we find that the proposed amendments to Title III of the ADA fail on several basic requirements for sufficient regulatory analysis.

A. The Department fails to identify a systemic or market failure.

In its discussion of the need for action, the DOJ provides a compelling story for the historical importance movies have played in America. In particular, the DOJ notes that “[g]oing to the movies is the quintessential American experience.”¹⁶ Indeed, as the DOJ argues, “Movies are part of our shared cultural experience, ‘water cooler’ talk, and subject of lunch-time conversation.”¹⁷ While this may be true, the proposed rule fails to identify how many theaters are currently providing captioning and audio description and how many moviegoers with disabilities are being denied these services and kept from enjoying a full movie theater experience.

The DOJ admits that it lacks the necessary information to determine whether the market is moving voluntarily toward increased captioning and audio description services, and the DOJ has not identified a demand from disabled individuals that has been systematically denied.¹⁸ In the absence of any data that would demonstrate a systemic failure on the part of movie theaters to provide captioning and audio description, the DOJ relies entirely on anecdotal evidence from a number of public comments to support its assertion that disabled individuals purchase fewer movie tickets due to a lack of closed captioning and audio description.¹⁹

Limiting regulation to instances of systemic or market failures is not simply a suggestion for better regulation. It is a basic requirement for all agencies set out in Executive Order 12866:

Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new regulatory action) as well as assess the significance of that problem.²⁰

The Office of Management and Budget (OMB) provides further guidance to agencies in figuring out when to regulate, noting that agencies “should try to explain whether the action is intended to address a significant market failure,” or else how it addresses “some other compelling need.” OMB emphasizes that agencies should show their regulation “is likely to do more good than harm,” as well as “provide a demonstration of compelling social purpose and the likelihood of effective action.”²¹

The analysis of this proposed rule fails to meet this requirement. However, this gap in information would be overcome if the DOJ were willing to issue an industry-wide survey concerning the use of captioning and description technologies, as we propose.

It is incumbent on the DOJ to make an effort to identify whether the industry is moving toward

16. NPRM, 44983.

17. NPRM, 44983.

18. “In addition, the Department does not know precisely how many movie theaters currently screen movies with closed captioning and audio description, or how many people with hearing or vision disabilities currently have consistent access to movie theaters that provide closed captioning and audio description.” NPRM, 45002.

19. NPRM, 45002.

20. Exec. Order 12866, 58 Fed. Reg. 190 (October 4, 1993) sec. 1(b)(1).

21. Office of Management and Budget, Circular A-4, “Regulatory Analysis” (September 17, 2003), 4.

adoption of this technology already and whether this trend alleviates the need for these regulatory efforts. Indeed, the DOJ's analysis acknowledges that a large portion of the industry is already providing captioning and audio description services. In particular, the DOJ includes in its cost estimates baselines for digital theaters, ranging from 13 percent to 42 percent to 53 percent.²² This highest estimate is also the number provided by National Association of Theater Owners (NATO) from a 2013 survey of 604 member theaters. The NATO survey found that over 18,000 digital movie screens, representing 53 percent of the total market, are already equipped with these technologies.²³

While the DOJ recognizes this survey, it does provide some reason why it is skeptical that these data demonstrate that the market is currently moving to provide these services.²⁴ In particular, the DOJ remains concerned that the 18,000 screens may not be (1) showing the movie disabled individuals want to see; (2) showing the desired movie at convenient days and times; (3) in a convenient location or may require travel compared to other, more convenient theaters; or (4) conveniently located in communities where disabled persons may choose to travel (for vacation, to visit relatives, for work, or other reasons).²⁵ While these are valid societal concerns, the mere possibility that they may occur is not the same as providing evidence of a market failure. Instead, this demonstrates the overall lack of information available to the DOJ. These concerns do not necessitate increased regulation, but instead require a more intensive attempt by the DOJ to gather the necessary industry-wide data to determine whether these concerns are warranted.

Further, in assessing whether a systemic or market failure exists, the DOJ should also consider the recent evolution of the relevant market, and the rise of alternative forms of entertainment that provide closed captioning and audio description. By restricting its focus solely to the traditional movie theater experience, the DOJ ignores recent developments in video-on-demand services. These services (e.g., Netflix, Amazon Instant Video, and Apple iTunes) provide disabled consumers an opportunity to enjoy services outside traditional movie theaters. Netflix, with more than 31 million subscribers in the United States at the end of 2013,²⁶ provides captioning for all of its products. Both Apple iTunes and Amazon Instant, which accounted for 63 percent of the US video-on-demand market in in 2013,²⁷ can be played with audio description. In addition, these services are becoming a more viable substitution for the traditional movie theater, with production companies bypassing the traditional theaters and choosing to release films through these on-demand platforms.²⁸

22. NPRM, 44999.

23. Testimony of John Fithian, President and CEO of the National Association of Theater Owners, Inc., *Before the US Senate Committee on Health, Education, Labor, and Pensions* (May 14, 2013), 5, <http://natoonline.org/wp-content/uploads/2013/08/Harkin-Hearing-Testimony-May-2013.pdf>.

24. NPRM, 45002.

25. NPRM, 45002.

26. Netflix, Inc., *Form 10-K, Annual Report Pursuant To Section 13 Or 15(d) Of The Securities Exchange Act of 1934: For the fiscal year ended December 31, 2013* (accessed November 19, 2014), 22.

27. NPD Group, "Apple iTunes Dominates Internet Video Market," April 23, 2013.

28. See Stephanie Merry, "Netflix Deals with Adam Sandler, 'Crouching Tiger': Why They Matter," the *Washington Post*, October 2, 2014. See also Ty Burr, "Video on Demand Surges as Theaters Reel," the *Boston Globe*, November 2, 2014.

The rise of alternative entertainment options has coincided with a decline in demand for traditional theaters as these in-home services compete for viewers. From 2012 to 2013, as services such as Netflix and Amazon Prime continued to grow, the total number of movie tickets sold by theaters had declined 1.5 percent.²⁹ This is part of a larger trend.³⁰ While movie theater revenues increased 17 percent from 2004 to 2013, total number of tickets sold fell 11 percent over this same period. While the DOJ states that 56 million adults may attend a movie in any given month to demonstrate the importance of movie theaters,³¹ this one statistic fails to recognize the overall trends and developments within the industry, as well as the prevalence of substitutes available to consumers.

This also calls into question the relevant baselines used by the DOJ in its analysis of costs and benefits. The DOJ is required to take this sort of relevant information, such as evolutions in the market, into account when determining its baseline.³² By failing to take these facts into account, it is impossible for the DOJ to determine how the market is likely to evolve in the absence of this regulation and whether the problem is likely to increase or diminish in the absence of regulation.

Finally, the availability of these substitutes may provide an alternative explanation for the perception that some geographic markets are “underserved” with regard to captioned and audio-described movies.³³ The DOJ bases this belief on a review of information provided by Captionfish, a nationwide search engine that monitors which theaters offer both closed and open captions and audio description.³⁴ However, in addition to providing data on the availability of caption and audio description services, Captionfish also provides an answer to the question, “Why aren’t there more captioned movie options in my area?” Its response: “A lot of it depends on demand.”³⁵

Ultimately, the DOJ fails to accurately and sufficiently determine whether, and the extent to which, a market failure actually exists. Are movie theaters already providing these services, and over what time frame have they implemented these technologies? Do movie theaters have plans to provide these accommodations? Even more important, have movie theaters without captioning and audio description technology experienced any sort of demand for these technologies among disabled patrons? The DOJ needs to determine a baseline for the level of services being provided by theaters today in order to sufficiently establish whether there is a systemic need for regulation.

In addition, we recommend that the DOJ broaden its description of the market beyond traditional movie theaters to include innovations that are currently serving those with disabilities

29. Motion Pictures Association of America, *Theatrical Market Statistics 2013*. A decline from or 1.36 billion to 1.34 billion.

30. Erich Schwartzel and Ben Fritz, “Fewer Americans Go to the Movies,” the *Wall Street Journal*, March 25, 2014.

31. NPRM, 44983.

32. OMB, *Circular A-4*, 4.

33. See NPRM, 44985.

34. NPRM, 44985, fn 17.

35. Captionfish, “Frequently Asked Questions,” accessed November 19, 2014, <http://www.captionfish.com/faq>.

and make some effort to determine if disabled individuals are turning to alternative products being offered rather than simply demanding captioning and audio description from traditional theaters.

If upon conducting an industry-wide survey the DOJ finds that fewer movie theaters are providing these services than their most generous baseline predicts (53 percent of movie theaters), the DOJ should consider regulating, although with a more quota-free, outcome-based approach that we will address later. If, however, the DOJ finds that the number of movie theaters voluntarily providing these services is larger than their baseline assumptions and that movie theaters in areas where disabled patrons demand these services plan on providing them, the DOJ should let this market process occur, unencumbered by regulation.

B. The DOJ fails to provide an adequate estimation of the benefits to be realized.

The proposed rule fails to provide any empirical measure of benefits that stem from captioning and audio description requirements. Although the DOJ notes that it “cannot confidently estimate the likely number of people who would directly benefit from this proposed rule,” there is no mention of whether the DOJ attempted such quantification.³⁶ In addition, the DOJ states that not only is the number of individuals that may benefit from the rule uncertain, but how and to what degree these individual benefits are realized will vary depending on each individual’s circumstances and preferences.³⁷

Instead, by relying on Executive Order 13593, the rule lists a series of hard-to-quantify benefits, such as “equity, human dignity, and fairness.”³⁸ However, the proposed rule fails to define these values.³⁹ Additionally, the rule would benefit by defining these values in the context of movie theaters. To improve its assessment of the proposed rule’s benefits, the DOJ should:

1. clearly state its theory of fairness, justice, or equity that underlies this regulation;
2. justify the ethical theory with relevant, evidence-based research; and
3. provide evidence that the proposed rule will advance those values.

Moreover, while the DOJ provides a list of other benefits that it believes would be realized by the proposed rule,⁴⁰ the DOJ should again provide some evidence that the proposed rules will

36. NPRM, 44979.

37. NPRM, 45002.

38. NPRM, 45003.

39. Sean Mulholland discusses several DOJ analyses that quantify benefits to a much greater extent than this regulation. The DOJ has been better able to measure benefits where they have relied on factors that are quantifiable, such as time savings that stem from regulating door clearances in water closets that make bathroom use easier for people in wheelchairs. Time savings are a much easier benefit to quantify than psychic benefits like movie theater enjoyment. Sean Mulholland. “Passenger Vessels Accessibility Guidelines.” Public Interest Comment. Mercatus Center at George Mason University. January 14, 2014.

40. These include (1) better access to the movie viewing experience enjoyed by others; (2) increased opportunity to attend and enjoy movies with their family members and acquaintances; and (3) the ability to participate in conversations about movies with family members and acquaintances. NPRM, 45003.

achieve these ends. Even if results are difficult to quantify, the DOJ ought to be able to provide some evidence that the regulation really will achieve the desired results. Without either a well-defined goal or an evidence-based theory connecting the proposed rule to the stated goal, the DOJ is unable to assess whether the proposed rule will achieve its intended purpose.

One way the DOJ might begin to assess the regulation's benefits would be to gather information about where disabled individuals are currently seeking these services, how many are currently receiving these services, ticket prices at movie theaters providing these services, and for the DOJ to determine specifically the other associated costs individuals are incurring to take advantage of these services. Such analysis would help improve the DOJ's understanding of how many disabled patrons demand these services but have no access to movie theaters with captioning and audio description, as well as how much these individuals are currently spending to purchase these services. This may give the DOJ some indication of the number of individuals seeking these services and their willingness to pay. However, given the DOJ's uncertainty regarding the number of disabled individuals that take advantage of these services, the DOJ cannot know this information without a broad nationwide survey of those with hearing or vision disabilities. The DOJ could then assess with greater detail the number of individuals currently seeking these services and their willingness to pay. This could give the DOJ some baseline to begin estimating the potential benefits of this rule.

C. This rule would disproportionately burden small movie theaters, and the DOJ fails to fully estimate the total cost for small businesses.

As proposed, this rule would impose costs that disproportionately burden lower-revenue movie theaters. The current size standard to qualify as a small business in the movie theater industry is \$35.5 million in annual revenue. According to the DOJ, 98 percent of movie theaters met this qualification and comprised approximately 53 percent of the movie theater market in 2007.⁴¹ While \$35.5 million is the threshold established by the Small Business Administration, the DOJ's analysis shows that most qualifying theaters generated revenues far below this threshold.⁴² Of the 2,004 firms that qualified in 2007, 1,849 firms (or 92 percent of small theaters) generated revenues below \$5 million.⁴³ Even within this subset of firms, 1,036 (or 56 percent of small theaters) generated revenues below \$500,000 annually.⁴⁴

The size of theaters can also be broken down into the number of theaters each firm operates, from single screen theaters through "megaplex" theaters.⁴⁵ The DOJ uses these designations to both project the makeup of the movie theater market in 2015 and estimate the capital cost to firms within each.

41. 2007 is the last year detailed information on annual revenue for the movie theater industry is available. NPRM, 44979.

42. NPRM, 45005.

43. NPRM, 45005.

44. NPRM, 45005.

45. In their analysis, the DOJ also defines Megaplex as having 16 or more screens, Multiplexes as having 8 to 15 screens, and Miniplexes as having 2 to 7 screens. NPRM, 44981.

It is worth noting that the DOJ's estimates assume that nearly half of the theater market (approximately 49 percent) will be made up of small businesses, and the costs of this rule—as a percentage of revenue—will be most expensive for these businesses. The estimated average costs to purchase this equipment for firms operating digital theaters and generating less than \$500,000 in revenue is projected to be between \$3,198 and \$3,996, and these costs are projected to be between 1.6 percent and 2.1 percent of revenues. For firms with \$5 million to \$35.5 million in revenues, the initial cost of this equipment will take up .7 percent to 1.1 percent of receipts. The costs as a percentage of revenue are more than doubled for firms of the same size that provide analog films. For firms showing analog films that have revenues of less than \$500,000, average costs per firm will run from \$8,172 to \$10,638, or between 4.1 percent and 5.7 percent of receipts. For firms generating \$5 million to \$35.5 million in revenues, initial costs are projected to range from 2 percent to 3.4 percent of revenues.

For movie theaters in the smallest revenue category, or those generating less than \$100,000 in revenue, providing equipment for digital theaters is projected to take up 6.1 percent of receipts, while the same-sized theaters providing analog films will on average see 15.6 percent of revenues taken up by these initial costs.⁴⁶

While these initial compliance costs are quite substantial for small business in the movie theater industry, they are not the only ones that must be incurred under the proposed rule. The DOJ notes that movie theaters will incur additional costs in the form of maintenance, replacement, storage costs, and any additional costs associated with the procurement of closed captioning and audio description technology. However, the DOJ has failed to estimate how these costs will affect small businesses, instead calculating these costs across the entire industry.⁴⁷

The DOJ's analysis shows that the burden of these initial costs will disproportionately fall on the small theaters that account for a vast majority of firms within the movie theater industry; however, these estimations fall short by failing to determine the longer-term costs of continued compliance. As a result, the true costs that will be borne by small businesses most likely exceeds the DOJ's initial estimation. If these costs are fixed, then they will be a higher percentage of

46. All of these estimates use industry revenue estimates from 2007, which the DOJ gathered from the Small Business Administration. The DOJ's citation is: "Number of firms and number of establishments from Small Business Administration, Statistics of U.S. Businesses, Business Dynamics Statistics, Business Employment Dynamics, and Non-employer Statistics. <http://www.sba.gov/advocacy/849/12162> (last visited July 14, 2014). Downloaded from SBA Web site December 2013." NPRM, 45008.

47. If analog theaters are required to comply after four years from the publishing of the rule, costs for theaters will range from \$177.8 million to \$225.9 million at a 7 percent discount rate, and \$219 million to \$275.5 million at a 3 percent discount rate, while annual costs per theater will range from \$19.5 million to \$24.8 million using a 7 percent discount rate and from \$18.3 million to \$23.1 million at a 3 percent discount rate. If analog theaters are not regulated, costs over 15 years will range from \$138.1 million to \$186.2 million at 7 percent, and between \$169.3 million and \$226 million at 3 percent, while annual costs will range from \$15.2 million to \$20.4 million at 7 percent and \$14.2 million and \$18.9 million at 3 percent. NPRM, 44999.

revenues for very small theaters than for larger theaters. This cost could ultimately limit the supply of movie theaters by inducing movie theater closures and other market exits.⁴⁸

The failure by the DOJ to consider the distributional effects on small theaters relative to larger theaters is important because the rule will ultimately put small theaters at a competitive disadvantage. While the fixed cost of compliance is the same across the industry, these compliance costs have a greater impact on smaller-revenue theaters than larger-revenue theaters. As noted above, this rule could have anticompetitive consequences and ultimately force smaller theaters out of the market.

Moreover, a solution to this situation may not be as simple as carving out an exemption for analog theaters, as the DOJ proposes. An exemption for analog theaters might slow the transition to digitalization by incentivizing analog theaters to avoid the digital transition in order to remain exempted from the regulatory burdens placed on digital theaters. Additionally, a more broad exemption based on theater size could serve as an unintended tax on growth, whereby certain theaters would remain small to avoid the regulation imposed on larger theaters.

One way that the DOJ can lessen the costs imposed on all theaters is to replace the rule's strict quotas—requiring theaters to acquire a certain number of captioning and audio description devices—and instead allow movie theaters to find less expensive ways of serving disabled patrons. To achieve this, we propose that theaters be allowed to meet the requirements for public accommodations without requiring how these ends are achieved. For example, the DOJ could continue to require theaters to address the outcomes of the ADA, such as ensuring disabled patrons are not excluded from the movie theater experience; however, how these outcomes are achieved does not have to come in the form of specific output targets that may impose unnecessary costs on movie theaters.⁴⁹ As proposed, the rule's strict quota would require all members of the industry to purchase the equipment, even absent demand.⁵⁰ However, as the DOJ noted, most comments received from theaters stated that many theaters are equipped with captioning devices, but they have received few requests from disabled patrons to use this equipment.⁵¹ In these cases, where demand for these services is low, a more flexible approach would allow theaters to purchase the equipment necessary to meet consumer demands.

48. NATO also emphasizes “the adverse consequences that will fall on those theaters that do not switch to digital cinema” or analog theaters, noting many of these theaters “will be small theaters in rural communities” that are struggling to remain in business. NATO's point is that these theaters will not receive first-run films that are equipped with closed captioning and audio description, but these theaters may still have to incur the cost of equipping. Even if these analog theaters are exempted, other issues will remain. See “Statement of Position,” National Association of Theater Owners, January 24, 2011.

49. “The ADA requires public accommodations to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently because of the absence of auxiliary aids and services unless the public accommodation can demonstrate that taking such steps would result in a fundamental alteration or undue burden.” NPRM, 44996.

50. In some instances, it would even require theaters to purchase the equipment when there is a high likelihood it will never be used. For example, This rule's blanket output target would also require independent theaters—where many of the films being screened do not have captioning and audio description available—to purchase captioning and audio description technologies.

51. NPRM, 44995.

D. This rule risks creating unintended consequences and limiting the availability of captioning and audio description to those most in need of these services.

While providing captioning and audio description services would certainly enhance the viewing experience for disabled individuals, it is important to ask whether this rule might actually decrease the amount of services being provided to those in need. As mentioned in the previous section, there is a potential that this rule could ultimately limit the supply of theaters, lowering possible benefits for disabled individuals and harming the general moviegoing population.

CONCLUSION

The DOJ fails to provide sufficient justification in its regulatory impact analysis of this rule to support regulation. Specifically, the DOJ:

1. does not demonstrate a systemic or market failure, largely because the DOJ cannot measure the extent to which movie theaters already provide captioning and audio description services, and does not consider that other forms of entertainment (such as video-on-demand) provide a substitute for disabled patrons to enjoy the benefits attributed to movie theaters absent regulation;
2. fails to define the qualitative values in the broader context of movie theaters, fails to demonstrate how this rule would advance those values, and fails to measure or monetize any benefits, making the DOJ's assertion that this rule's benefits outweigh the set of tangible costs imposed on theaters suspect;
3. ignores the disproportionate compliance burden this regulation will place on small movie theaters relative to larger movie theaters and, depending on the option chosen by the DOJ, the disproportionate compliance burden this regulation will place on analog theaters relative to digital theaters;
4. does not consider that this rule may actually cause a *reduction* in the number of entertainment options available to disabled individuals and discourage theaters from adopting and marketing business practices geared toward the visually and hearing impaired.

If the DOJ regulates without gathering further information on whether movie theaters are currently providing an amount of closed captioning and audio description technology that satisfies the demands of disabled patrons, the DOJ risks imposing a costly yet unnecessary burden on theaters, particularly small theaters. To make sure regulation is the best route, the DOJ should:

1. Conduct an industry-wide survey of movie theaters across the United States to determine the extent to which captioning and audio description is provided and when theaters adopted these technologies.

This would provide an accurate picture of the adoption of these services over time, allowing the DOJ to assess the extent to which movie theaters currently provide disabled patrons with these technologies and whether movie theaters are trending toward providing these services absent regulation.

If, after completing this survey, the DOJ still determines that regulation is necessary, we propose that the DOJ:

2. Require movie theaters to attain an outcome of providing more “effective communication” and avoid setting strict output goals in terms of hardware and devices theaters must acquire.

Focusing on outcomes, rather than outputs, would give theaters more freedom to adjust the amount of devices they need to purchase based on the number of disabled patrons they actually serve. Theaters in areas with higher numbers of disabled patrons would provide more, while theaters in areas with disabled patrons that do not demand this technology would be able to adjust accordingly. In this way, the rule could achieve the goals of the ADA without creating a costly blanket mandate on all theaters that would put the smallest theaters at a competitive disadvantage and potentially reduce the options available to all moviegoing consumers.