

significant impact on the economy, the Department will prepare a formal regulatory analysis.

**Question 12.** What data source do you recommend to assist the Department in estimating the number of public accommodations (i.e., entities whose operations affect commerce and that fall within at least one of the 12 categories of public accommodations listed above) and State and local governments to be covered by any Web site accessibility regulations adopted by the Department under the ADA? Please include any data or information regarding entities the Department might consider limiting coverage of, as discussed in the "coverage limitations" section above.

**Question 13.** What are the annual costs generally associated with creating, maintaining, operating, and updating a Web site? What additional costs are associated with creating and maintaining an accessible Web site? Please include estimates of specific compliance and maintenance costs (software, hardware, contracting, employee time, etc.). What, if any, unquantifiable costs can be anticipated from amendments to the ADA regulations regarding Web site access?

**Question 14.** What are the benefits that can be anticipated from action by the Department to amend the ADA regulations to address Web site accessibility? Please include anticipated benefits for individuals with disabilities, businesses, and other affected parties, including benefits that cannot be fully monetized or otherwise quantified.

**Question 15.** What, if any, are the likely or potential unintended consequences (positive or negative) of Web site accessibility requirements? For example, would the costs of a requirement to provide captioning to videos cause covered entities to provide fewer videos on their Web sites?

**Question 16.** Are there any other effective and reasonably feasible alternatives to making the Web sites of public accommodations accessible that the Department should consider? If so, please provide as much detail about these alternatives, including information regarding their costs and effectiveness in your answer.

#### F. Impact on Small Entities

Consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. See 5 U.S.C. 603–04 (2006); E.O. 13272, 67 FR 53461 (Aug.

13, 2002). The Department will make an initial determination as to whether any rule it proposes is likely to have a significant economic impact on a substantial number of small entities, and if so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small entities and regulatory alternatives that reduce the regulatory burden on small entities while achieving the goals of the regulation. In response to this ANPRM, the Department encourages small entities to provide cost data on the potential economic impact of adopting a specific requirement for Web site accessibility and recommendations on less burdensome alternatives, with cost information.

**Question 17.** The Department seeks input regarding the impact the measures being contemplated by the Department with regard to Web accessibility will have on small entities if adopted by the Department. The Department encourages you to include any cost data on the potential economic impact on small entities with your response. Please provide information on capital costs for equipment, such as hardware and software needed to meet the regulatory requirements; costs of modifying existing processes and procedures; any affects to sales and profits, including increases in business due to tapping markets not previously reached; changes in market competition as a result of the rule; and cost for hiring web professionals for to assistance in making existing Web sites accessible.

**Question 18.** Are there alternatives that the Department can adopt, which were not previously discussed in response to *Questions 11* or *16*, that will alleviate the burden on small entities? Should there be different compliance requirements or timetables for small entities that take into account the resources available to small entities or should the Department adopt an exemption for certain or all small entities from coverage of the rule, in whole or in part. Please provide as much detail as possible in your response.

#### G. Other Issues

**Question 19.** The Department is interested in gathering other information or data relating to the Department's objective to provide requirements for Web accessibility under titles II and III of the ADA.

Are there additional issues or information not addressed by the Department's questions that are important for the Department to

consider? Please provide as much detail as possible in your response.

Dated: July 21, 2010.

**Thomas E. Perez,**

*Assistant Attorney General, Civil Rights Division.*

[FR Doc. 2010–18334 Filed 7–22–10; 4:15 pm]

**BILLING CODE 4410–13–P**

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## DEPARTMENT OF JUSTICE

### 28 CFR Part 36

[CRT Docket No. 112]

RIN 1190–AA63

#### **Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description**

**AGENCY:** Civil Rights Division, Justice.

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** The Department of Justice (Department) is considering revising its regulation implementing title III of the Americans with Disabilities Act (ADA) in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by movie theater owners or operators at movie theaters accessible to individuals who are deaf or hard of hearing or who are blind or have low vision by screening movies with closed captioning or video description. The Department is issuing this Advance Notice of Proposed Rulemaking (ANPRM) in order to solicit public comment on various issues relating to the potential application of such requirements and to obtain background information for the regulatory assessment the Department may need to prepare in adopting any such requirements.

**DATES:** The Department invites written comments from members of the public. Written comments must be postmarked and electronic comments must be submitted on or before January 24, 2011.

**ADDRESSES:** You may submit comments, identified by RIN 1190–AA63 (or Docket ID No. 112), by any one of the following methods:

- *Federal eRulemaking Web site:* [www.regulations.gov](http://www.regulations.gov). Follow the Web site's instructions for submitting comments. The Regulations.gov Docket ID is DOJ–CRT–0112.

- *Regular U.S. mail:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031–0885.

- *Overnight, courier, or hand delivery:* Disability Rights Section, Civil Rights Division, U.S. Department of

Justice, 1425 New York Avenue, N.W., Suite 4039, Washington, DC 20005.

**FOR FURTHER INFORMATION CONTACT:**

Kathleen Devine, Attorney, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY). This is not a toll free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

You may obtain copies of this ANPRM in large print or Braille or on audiotape or computer disk by calling the ADA Information Line at (800) 514-0301 (voice) and (800) 514-0383 (TTY). This ANPRM is also available on the ADA Home Page at <http://www.ada.gov>.

**SUPPLEMENTARY INFORMATION:**

**I. Electronic Submission of Comments and Posting of Public Comments**

You may submit electronic comments to [www.regulations.gov](http://www.regulations.gov). When submitting comments electronically, you must include DOJ-CRT 2010-0112 in the search field, and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and made available for public inspection online at [www.regulations.gov](http://www.regulations.gov). Submission postings will include any personal identifying information (such as your name, address, etc.) included in the text of your comment. If you include personal identifying information (such as your name, address, etc.) in the text of your comment but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also include all the personal identifying information you want redacted along with this phrase. Similarly, if you submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on [www.regulations.gov](http://www.regulations.gov).

Comments on this ANPRM will also be made available for public viewing by

appointment at the Disability Rights Section, located at 1425 New York Avenue, N.W., Suite 4039, Washington, DC 20005, during normal business hours. To arrange an appointment to review the comments, please contact the ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

The reason that the Civil Rights Division is requesting electronic comments before Midnight Eastern Time on the day the comment period closes is because the inter-agency Regulations.gov/Federal Docket Management System (FDMS) which receives electronic comments terminates the public's ability to submit comments at Midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov/FDMS system do not apply to U.S. postal comments, which will be considered as timely filed if they are postmarked before Midnight on the day the comment period closes.

**II. Public Hearing**

The Department will hold at least one public hearing to solicit comments on the issues presented in this notice. The Department plans to hold the public hearing during the 180-day public comment period. The date, time, and location of the public hearing will be announced to the public in the **Federal Register** and on the Department's ADA Home Page, <http://www.ada.gov/>.

**III. Background**

*A. Statutory and Rulemaking History Up to the 2008 NPRM*

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability. The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires, in pertinent part, newly designed and constructed or altered public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Section 306(b) of title III directs the Attorney General to promulgate regulations to carry out the provisions of title III, other than certain provisions dealing specifically with transportation. 42 U.S.C. 12186(b).

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation (private entities whose operations affect commerce and that fall into one of twelve categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreational facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181-89.

On July 26, 1991, the Department issued its final rule implementing title III, which is codified at 28 CFR part 36. Appendix A of the title III regulation, at 28 CFR part 36, contains the ADA Standards for Accessible Design. On September, 30, 2004, the Department published an advance notice of proposed rulemaking (2004 ANPRM) to begin the process of updating the 1991 regulation to adopt revised ADA Standards based on the relevant parts of the 2004 ADA/ABA Guidelines. 69 FR 58768. On June 17, 2008, the Department issued a Notice of Proposed Rulemaking (NPRM) to adopt the revised ADA Standards and, in pertinent part, revise the title III regulations. 73 FR 34466. The NPRM addressed the issues raised in the public's comments to the ANPRM and sought additional comment.

In that NPRM, the Department stated that it was considering options under which it might require that movie theater owners or operators exhibit movies that are captioned for patrons who are deaf or hard of hearing and movies that provide video (narrative) description<sup>1</sup> for patrons who are blind or have low vision.<sup>2</sup> The Department

<sup>1</sup> In the June 17, 2008 NPRM, the Department used the term "narrative description" to define the process and experience whereby individuals who are blind or have low vision are provided with a spoken narrative of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. In response to comments received from this NPRM, the Department now refers to this process as video description.

<sup>2</sup> The Department's regulations already require that public accommodations provide effective communication to the public through the provision of auxiliary aids and services, including, where appropriate, captioning and audio or video description. *See generally*, 28 CFR 36.303; 28 CFR part 36, Appendix B. To that end, the Department has entered into settlement agreements with a major museum and various entertainment entities requiring such aids and services. *See e.g.*, Agreement Between the United States of America and the International Spy Museum, (June 3, 2006), available at <http://www.ada.gov/spymuseum.htm>; Agreement Between the United States of America and Walt Disney World Co. Under the Americans

noted, for example, that technical advances since the early 1990s have made open and closed captioning for movies more readily available and effective. The Department also stated that it understood that the movie industry was transitioning, in whole or in part, to movies in digital format and that movie theater owners and operators were beginning to purchase digital projectors. As noted in that NPRM, movie theater owners and operators with digital projectors may have available to them different options for providing captioning and video description than those without digital projectors. The Department sought comments regarding whether and how to require captioning and video description while the film industry made the transition to digital. Also, the Department stated its concern about the potential cost to exhibit captioned movies, noting that cost may vary depending upon whether open or closed captioning is used and whether or not digital projectors are used, and stated that the cost of captioning must stay within the parameters of the undue burden requirement in 28 CFR 36.303(a). The Department also expressed concerns about the cost of video description equipment but stated that it understood that the cost for video description was less than that for closed captioning. The Department then stated that it was considering the possibility of requiring public accommodations to exhibit all new movies in captioned format and with video description at every showing. The Department indicated that at that time, it anticipated that it would not specify which types of captioning to provide, leaving that to the discretion of the movie theater owners and operators.

The Department received numerous comments urging the Department to issue captioning and video description regulations under the ADA. These comments are discussed *infra*. Recently, the United States Court of Appeals for the Ninth Circuit held that the ADA required a chain of movie theatres to exhibit movies with closed captioning and video description unless the theaters could show that to do so would amount to a fundamental alteration or undue burden. *Arizona v. Harkins Amusement Enterprises, Inc.*,—F.3d. —, 2010 WL 1729606 (9th Cir., April 30, 2010). In light of the comments received pursuant to the NPRM, the Ninth Circuit decision, and the additional reasons

detailed below, the Department has decided to begin the process of soliciting additional comments and suggestions with respect to what an NPRM regarding captioning and video description should contain.

#### *B. Legal Foundation for Captioning and Video Description*

Creating regulations that would require movie theater owners and operators to exhibit closed captioned and video described movies falls squarely within the requirements of the ADA. Title III of the ADA includes movie theaters within its definition of places of public accommodation. 42 U.S.C. 12181(7). Title III makes it unlawful for places of public accommodation, such as movie theaters, to discriminate against an individual in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. 42 U.S.C. 12182(a). Moreover, title III prohibits places of public accommodation from affording an unequal or lesser service to individuals or classes of individuals with disabilities than is offered to other individuals. 42 U.S.C. 12182(b)(1)(A)(ii). Title III requires places of public accommodation 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 entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” 42 U.S.C. 12182(b)(2)(A)(iii). The statute defines auxiliary aids to include “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments” and “taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments.” 42 U.S.C. 12103(1)(A)–(B). The Department’s title III regulation specifically lists open and closed captioning and audio recordings and other effective methods of making visually delivered materials available to individuals with visual impairments as examples of auxiliary aids and services that should be provided by places of public accommodations, 28 CFR 36.303(b)(1)–(2), unless the public accommodation can demonstrate that providing such aids and services would fundamentally alter the nature of the good or service being offered or would

result in an undue burden. 28 CFR 36.303(a). In addition, the Department’s title III regulation mandates that if a provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods or services being offered 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 and services offered by the public accommodation. 28 CFR 36.303(f).

While the ADA itself contains no explicit language regarding captioning (or video description) in movie theaters, the legislative history of title III states that “[o]pen-captioning \* \* \* of feature films playing in movie theaters, is not required by this legislation. Filmmakers, are, however, encouraged to produce and distribute open-captioned versions of films, and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films.” H.R. Rep. No. 101–485 (II), at 108 (1990); S. Rep. No. 101–116 at 64 (1989). Congress was silent on the question of closed captioning in movie theaters, a technology not yet developed at that time for first-run movies, but it acknowledged that closed captions may be an effective auxiliary aid and service for making aurally delivered information available to individuals who are deaf or hard of hearing. See H.R. Rep. No. 101–485 (II), at 107.<sup>3</sup> In addition, the House Committee stated that “technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.” *Id.* at 108.<sup>4</sup> Similarly, in 1991, the Department stated that “[m]ovie theaters are not required \* \* \* to present open-captioned films,” but was silent as to closed captioning. 56 FR 35544,

<sup>3</sup> Congress also was silent regarding requiring video description of movies.

<sup>4</sup> As the district court in *Ball v. AMC Entertainment, Inc.*, 246 F. Supp. 2d 17, 22 (D.D.C. 2003) noted, “Congress explicitly anticipated the situation presented in this case [the development of technology to provide closed captioning of movies]. Therefore, the isolated statement that open captioning of films in movie theaters was not required in 1990 cannot be interpreted to mean that [movie theaters] cannot *now* be expected and required to provide closed captioning of films in their movie theaters.” (Emphasis in original).

35567 (July 26, 1991). The Department also noted, however, that “other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required to make such information accessible to persons who are deaf or hard of hearing. Captioning is one means to make the information accessible to individuals with disabilities.” *Id.*

It is the Department’s view that the legislative history of the ADA and the Department’s commentary in the preamble to the 1991 regulation make clear that Congress was not requiring open captioning of movies in 1990, but that it was leaving open the door for the Department to require captioning in the future as the technology developed. It is also the Department’s position that neither the ADA nor its legislative history precludes, in any way, issuing regulations regarding video description. To the contrary, given the present state of technology, we believe that requirements of captioning and video description fit comfortably within the statutory text.

In April of this year, the first federal appellate court to squarely address the question of whether captioning and video description are required under the ADA determined that the ADA required movie theatre owner and operator Harkins Amusement Enterprises, Inc., and its affiliates, to screen movies with closed captioning and descriptive narration (video description) unless such owners and operators could demonstrate that to do so would amount to a fundamental alteration or undue burden. *Arizona v. Harkins Amusement Enterprises, Inc.*,—F.3d. —, 2010 WL 1729606 (9th Cir., April 30, 2010).<sup>5</sup> The Ninth Circuit found that because closed captioning and video descriptions are correctly classified as “auxiliary aids and services” that a movie theater may be required to provide under the ADA, the lower court erred in finding that these services are foreclosed as a matter of law. *Id.*

### C. Movie Basics

The very first movies were silent films. “Talkies” added sound as a separate component. Although many technological advances have been made since the advent of the “talkie,” the practice of exhibiting the visual portion of the movie separate from the sound is still common. Today, the cinematography portion of many movies is exhibited in an analog (*i.e.* film)

format, and the aural portion is exhibited in a digital format. Five to six reels of film are used for a typical two-hour long movie. These reels must be physically delivered to each movie theater exhibiting the movie. Digital sound is captured on CD-ROMs or optically or digitally on the film itself. Digital sound is synchronized to the visual images on the screen by a mechanism, called a reader head, that reads a timecode track printed on the film.

Digital cinema, by contrast, captures images, data, and sound on data files as a digital “package” that is stored on a hard drive or a flash drive. Digital movies are physically delivered to movie theaters on high resolution DVDs or removable or external hard drives, or to movie theaters’ servers via Internet, fiberoptic, or satellite networks. The movie industry recently has begun transitioning to digital cinema and it is the Department’s understanding that, in the industry’s view, this transition is one of the most profound advances in motion picture production and technology of the last 100 years and will provide numerous advantages both for the industry and the audience.

### D. Captioning and Video Description Generally

Captioning makes movies shown in theaters accessible to individuals whose hearing is too limited to benefit from assistive listening devices, as well as to individuals with other hearing disabilities. Open captions are similar to subtitles in that the text of the dialog is visible to everyone in the theater. Unlike subtitles, open captions also describe other sounds and sound makers (*e.g.*, sound effects, music, and the character who is speaking) in an on-screen text format. Open movie captions are sometimes referred to as “burned in” or “hardcoded” captions. However, new open captioning technology enables studios to superimpose captions without making a burned in copy or having to deliver a separate version of the movie. Open-captioned films are most often exhibited in movie theaters at certain limited showings.

Closed captioning displays the written text of the dialog and other sounds or sound makers only to those individuals who request it. It is the Department’s understanding that, at the time comments were received in response to the 2008 NPRM, there were various types of closed captioning systems either in use or in development, including the Rear Window system, hand-held displays similar to a PDA (personal digital assistant), eyeglasses fitted with a prism over one lens, and

projected bitmap captions. It is also the Department’s understanding that, at present, the only system that has gained a foothold in the marketplace is the Rear Window system. Unlike open captions that are sometimes burned onto the film itself, Rear Window captions are generated via a technology that neither is physically attached to the film nor requires a separate copy of the film to be made. The Rear Window system works through a movie theater’s digital sound system. It uses a computer, a time code signal, and captioning software to project the captions, in reverse, on an LED display in the rear of the theater. A clear adjustable panel that is mounted on, or near an individual viewer’s seat reflects the captions correctly and superimposes them on that panel so that it appears to a Rear Window user that the captions are on or near the movie image. Because this technology enables a movie theater that has been equipped with a Rear Window system to exhibit any movie that a movie producer has captioned, at any showing, without displaying captions to every movie-goer in the theater, individuals who are deaf or hard of hearing may enjoy movies in the same theater as those who do not require captioning.

Video description is a technology that enables individuals who are blind or have low vision to enjoy movies by providing a spoken narration of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. Visual description fills in information about the visual content of a movie where there are no corresponding audio elements in the film. It requires the creation of a separate script written by specially trained writers who prepare a script for video description that is recorded on an audiotape or CD that is synchronized with the film as it is projected. The script is transmitted to the user through infra-red or FM transmission to wireless headsets.

### E. Increasing Numbers of Individuals With Hearing and Vision Impairments

The percentage of Americans approaching middle age and older is increasing. According to 2000 Census figures, Baby Boomers (*i.e.*, individuals born between 1946 and 1964 or who were between the ages of 36 and 54 in 2000), comprised nearly a third of all Americans. Just over a fifth of the American populous was age 55 or older. From 1990 to 2000, the two fastest growing age groups were those 45 to 49 and 50 to 54. The younger of the two groups increased by nearly 45 percent, and the older increased by more than half (54.9 percent). Together these

<sup>5</sup> This court was guided, in part, by the *amicus* brief filed by the United States in support of requiring closed captioning and video description.

groups comprised nearly 38 million people (37,677,952). When joined with other “seniors,” the 2000 Census figure for the over 45 age group increased to nearly 97 million people (96,944,389). Assuming the population has remained fairly constant, when the 2010 Census is completed and the results are released, Baby Boomers, who will then fall between the ages of 46 and 64, will make older Americans the largest segment of the U.S. population.

The aging of the population is significant because of the correlation between aging and hearing and vision impairment or loss. An October 21, 2008 Department of Health and Human Services’ Progress Review on Vision and Hearing in the United States noted that Richard Klein, Chief of the NCHS Health Promotion Statistics Branch, found that there are about 21 million adults in the United States that are visually impaired, and about 36 million (17 percent) have some degree of hearing loss.<sup>6</sup> The Progress Review also noted that “[a]s with vision problems, the number of U.S. adults with hearing loss is expected to increase significantly as the population ages, because hearing loss and aging are related to a high degree. Hearing loss is one of the three most prevalent chronic conditions in older Americans, ranking just after hypertension and arthritis.” Progress Review: Vision and Hearing, <http://www.healthypeople.gov/data/2010prog/focus28/>. Moreover, at least one hearing loss Web site reports that “[a]s baby boomers reach retirement age starting in 2010, th[e] number of [Americans with hearing loss] is expected to rapidly climb and nearly double by the year 2030.” Hearing Loss Association of America, Facts on Hearing Loss, <http://www.hearingloss.org/learn/factsheets.asp>.

<sup>6</sup> According to the National Institute on Deafness and Other Communication Disorders of the National Institutes of Health, in 2004 there were 28 million Americans who had some type of hearing loss, and 500,000 to 750,000 Americans who had severe to profound hearing loss or deafness. Healthy Hearing 2010: Where Are We Now?, <http://www.nidcd.nih.gov/health/inside/spr05/pg1.asp>. The National Eye Institute of the National Institutes of Health reported in 2004, “With the aging of the population, the number of Americans with major eye diseases is increasing, and vision loss is becoming a major health problem. By the year 2020, the number of people who are blind or have low vision is projected to increase substantially. \* \* \* Blindness or low vision affects 3.3 million Americans age 40 or over, or one in 28, \* \* \*. This figure is projected to reach 5.5 million by 2020. \* \* \* [L]ow vision and blindness increase significantly with age, particularly in people over age 65.” See <http://www.nei.nih.gov/news/pressreleases/041204.asp>.

#### *F. The Department’s Rulemaking History Regarding Captioning and Video Description*

When the Department issued its September 30, 2004 advance notice of proposed rulemaking (ANPRM), it did not raise movie captioning or video description as potential areas of regulation. Despite that fact, several ANPRM commenters requested that the Department consider regulating in these areas. The Department has determined that since the publication of the 1991 regulation, new “closed” technologies for movie captioning and video description have been developed. By 1997, these technologies were released into the marketplace.<sup>7</sup>

Given the availability of this new technology, mindful that the ADA’s legislative history made clear that the ADA ought not be interpreted so narrowly or rigidly that new technologies are excluded, and aware that assistive listening devices and systems in movie theaters cannot be used to effectively convey the audio content of films for individuals who are deaf or who have severe or profound hearing loss, the Department decided to broach the topic of requiring closed captioning and video description at movie theaters in the 2008 NPRM. The NPRM asked exploratory questions about, but proposed no regulatory text for, movie captioning and video descriptions. The Department received many comments from individuals with disabilities, organizations representing individuals with disabilities, non-profit organizations, state governmental entities, and representatives from movie studios and movie theater owners and operators on these two issues.

Rather than using these comments to formulate a final rule, however, the Department is issuing this supplemental ANPRM for three main reasons. First, the Department wishes to obtain more information regarding several issues raised by commenters that were not contemplated at the time the 2008 NPRM was published. Second, the Department seeks public comment on several technical questions that arose from the research the Department undertook to address some of the issues raised by commenters to the original NPRM. Finally, in the two years that have passed since issuance of the 2008 NPRM, the Department is aware that movie theater owners and operators,

particularly major movie theater owners and operators, either have entered into, or had plans to enter into, agreements to convert to digital cinema. However, during this same time period, the United States’ economy, and the profitability of many public accommodations, experienced significant setbacks. The Department wishes to learn more about the status of digital conversion, concrete projections regarding if and when movie theater owners and operators, both large and small, expect to exhibit movies using digital cinema, when such movie theater owners and operators expect to implement digital cinema, by percentages, in their theaters, and any relevant protocols, standards, and equipment that have been developed regarding captioning and video description for digital cinema. In addition, the Department would like to learn if, in the last two years, other technologies or areas of interest (*e.g.*, 3D) have developed or are in the process of development that either would replace or augment digital cinema or make any regulatory requirements for captioning and video description more difficult or expensive to implement.

#### *G. Response to 2008 NPRM Comments Concerning Movie Captioning and Video Description, Analysis and Discussion of Proposed Regulatory Approach*

Although the 2008 NPRM did not propose any specific regulatory language with regard to movie captioning or video description, the Department sought input from the public as to whether the Department’s regulation should require movie theater owners and operators to exhibit movies that have captioning for patrons who are deaf or hard of hearing and video description for individuals who are blind or have low vision. The Department asked whether, within a year of the revised regulation’s effective date, all new movies should be exhibited with captions and video description at every showing or whether it would be more appropriate to require captions and video description less frequently. The preamble made clear that the Department did not intend to specify which types of captioning to provide and stated that such decisions would be left to the discretion of the movie theater owners and operators.

Individuals with disabilities, advocacy groups, a representative from a non-profit organization, and representatives of state governments, including eleven State Attorneys General, overwhelmingly supported issuance of a regulation requiring movie

<sup>7</sup> The first feature film with closed captions and video description, *The Jackal*, was exhibited at a California movie theater in 1997. *The Jackal*’s release was followed by the release of *Titanic*—the first major studio direct-release of a movie with closed captioning and video description capabilities.

theater owners and operators to exhibit captioned and video described movies at all showings unless doing so would result in an undue burden or fundamental alteration. These groups noted that although the technology to exhibit movies with captions and video description has been in existence for about ten years, most movie theaters still were not exhibiting movies with captioning and video description. As a result, these groups indicated that they believed regulatory action should not be delayed until the conversion to digital cinema had been completed. One commenter in this group said that because federal law requires movie studios to caption movies prior to their release to cable and television media, *see, e.g.*, 47 CFR 79.1, it made good business sense for studios to caption movies prior to their being released to movie theater owners and operators. Several commenters requested that any regulation include factors describing what constitutes effective captioning and video description, including that captioning be within the same line of sight to the screen as the movie so that individuals who are deaf or hard of hearing can watch the movie and read the captions at the same time, that the captioning be accessible from each seat, that the captions be of sufficient size and contrast to the background so as to be easily readable, and that the recommendations from the Telecommunications and Electronics and Information Technology Advisory Committee (TEITAC) Report to the Access Board that captions be “timely, accurate, complete, and efficient” be included.<sup>8</sup> The Department has carefully considered these requests and believes that more information is required before making a decision as to how many movies should be screened with captioning and video description available and whether factors that describe what constitutes effective captioning and video description would be helpful to movie theater owners and operators and individuals with disabilities.

The State Attorneys General supported the Department’s statement in the 2008 NPRM that the Department did not anticipate specifying which type of captioning to provide or what type of technology to use to provide video description, but would instead leave that to the discretion of the movie theater owners and operators. These

State Attorneys General said that such discretion in the selection of the type of technology was consistent with the statutory and regulatory scheme of the ADA and would permit any new regulation to keep pace with future advancements in captioning and video description technology. These same commenters stated that such discretion may result in a mixed use of both closed captioning and open captioning, affording more choices both for the movie theater owners and operators and for individuals who are deaf or hard of hearing. The Department has considered these points and has decided that this ANPRM should request additional comments regarding whether the Department should specifically require closed captioning or permit motion picture owners and operators to choose which type of captioning to provide in order to satisfy any regulatory requirements the Department might impose.

Representatives from the movie theater industry strongly urged the Department not to issue a regulation requiring captioning (but were silent as to requiring video description) at movie theaters. Some industry commenters also opposed any regulation by the Department in this area claiming that since the Access Board has not issued a regulation to require the exhibition of captioned and video described movies in public accommodations, the Department is precluded from so doing. These commenters misunderstood the allocation of regulatory authority under the ADA. The ADA authorizes the Access Board to issue design guidelines for accessible buildings and facilities and requires that the design standards for buildings and facilities included in regulations issued by the Department be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board. *See* 42 U.S.C. 12186(c). It is beyond the scope of the Access Board’s authority to establish regulations governing aspects of ADA implementation unrelated to design and construction issues. The Department, by contrast, has broad regulatory authority to implement additional provisions of the ADA, including those requiring covered entities to ensure effective communication with their clients and customers.

Industry commenters also said that the cost of obtaining the equipment necessary to display closed captioned and video described movies would constitute an undue burden. One industry commenter stated that the cost of equipment to display both closed

captions and video description per screen can approach \$11,000, plus additional installation expenses. The Department is aware that there are costs associated with providing closed captioning and video description technology and that for some movie theater owners and operators, particularly independent or very small movie theater companies, obtaining captioning and video description equipment may indeed constitute an undue burden. However, after carefully considering the concerns raised about the costs of implementing captioning and video description technology, the Department needs additional, more specific, and more recent information on the issue of undue burden.

In addition, in an effort to spread out any implementation costs so that costs could be absorbed over time and would lessen any financial impact on theater owners and operators, the Department is considering a provision that would phase in compliance requirements. It is the Department’s intention that such a provision, along with normal swings in supply and demand (*e.g.*, commenters noted that as more theaters purchase closed captioning and video description technologies, their costs will drop), could insulate many movie theater owners and operators from an undue burden.

Some industry commenters argued also that because the industry has made progress in making cinema more accessible without mandates to caption or describe movies, the Department should wait until the movie industry has completed its conversion to digital cinema to regulate. According to a commenter representing major movie producers and distributors, the number of motion pictures produced with closed captioning by its member studios had grown to 88 percent of total releases by the end of 2007, early 2008; the number of motion pictures produced with open captioning by its member studios had grown to 78 percent of total releases by the end of 2007, early 2008; and the number of motion pictures provided with video description has consistently ranged between 50 and 60 percent of total releases. This commenter explained that movie producers and distributors, not movie theater owners and operators, determine whether to caption, what to caption and describe, the type of captioning to use, and the content of the captions and video description script. In addition, the movie studios, not the movie theater owners and operators, assume the costs of captioning and describing movies. This commenter also said that movie theater owners and operators must only

<sup>8</sup> *See* Report to the Access Board: Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology (April 2008), <http://www.access-board.gov/sec508/refresh/report/>.

purchase the equipment to display the captions and play the video description in their auditoriums. That said, several commenters stated that movie theater owners and operators rarely exhibit the movies with captions or descriptions. They estimated that less than 1 percent of all movies being exhibited in theaters are actually shown with captions.

The Department has carefully considered this information and acknowledges that significant strides have been made by movie producers in terms of furnishing movies that have the potential to make movies more accessible for individuals with disabilities. Despite these strides, however, the percentage of captioned and video described movies actually exhibited or made available in movie theaters appears to be disproportionately low by comparison. The Department is concerned about what appears to be a significant disconnect between the production of movies that have captioning and video description capabilities and the actual exhibition or availability of such movies to individuals with sensory disabilities. The Department also is concerned that even when captioned and video described movies are exhibited, their showings appear to be relegated to the middle of the week or midday showings. Commenters lamented that individuals with disabilities generally do not have the option of attending movies on days and times (e.g., weekends or evenings) when most other moviegoers see movies because movie theaters usually only show captioned or video described movies during the week at off-peak hours. The Department has not been persuaded that movie theaters have made such significant strides in making the current captioning and video description technology available to moviegoers with disabilities that regulatory action in this area would be unnecessary.

Industry commenters have requested that any regulation regarding captioning and video description be timed to occur after the conversion to digital cinema is complete. The Department is aware that in 2005, the movie industry began transitioning away from the exclusive use of analog films to exhibit movies to a digital mode of movie delivery. However, the completion date of that conversion has remained elusive. One industry commenter said while there has been progress in making the conversion, only approximately 5,000 screens, out of 38,794, have been converted, and the cost to make the remaining conversions involves an investment of several billion dollars. Some commenters have suggested that

completion of digital conversion may be 10 or more years in the future. The Department also is concerned that because of the high cost of converting to digital cinema (an industry commenter estimated that the conversion to digital costs between \$70,000 and \$100,000 per screen and that maintenance costs for digital projectors are estimated to run between \$5,000 and \$10,000 a year, approximately five times as expensive as the maintenance costs for film projectors) and current economic conditions, a complete conversion to digital cinema may be postponed or may not happen at all. For example, National Public Radio reported that “[f]or more than seven years, film studios and theaters have been hyping digital projectors and the crisp, clear picture quality they’ll bring to movie screens. But the vast majority of the nation’s cinemas are still using old analog projectors. \* \* \* Despite the clear economic advantages of digital projection of the nation’s more than 38,000 movie screens, only 2,200 have digital projectors.” All Things Considered, *Digital Projection in Theaters Slowed Down by Dispute* (Mar. 21, 2007), available at <http://news.wvpubcast.org/templates/transcript/transcript.php?storyId=9047637>.

Whether a complete conversion to digital cinema will occur in a time certain, or not at all, is unknown. Even if the conversion of digital proceeds, until there is a complete digital conversion, at least some theaters will employ analog cinematography (i.e., 35 mm film) to exhibit movies. It is the Department’s understanding that currently the vast majority of movie theaters in the United States exhibit film-based movies. Many, however, use a digital sound system (e.g., Digital Theater Systems, Dolby Digital, Sony Dynamic Digital Sound, etc.). Digital sound systems operate independently from analog projectors that deliver the visual portion of a movie. It is also the Department’s understanding that the closed captioning and video description technology that is currently available requires a movie theater to have a digital sound system but that digital cinema is not necessary for the captioning and video description technology. Thus, because the Department has not been presented with any substantive information indicating that a complete conversion to digital cinema is necessary to provide individuals with disabilities the opportunity to attend a closed captioned or video described movie, and the date for any complete conversion to digital cinema is unclear,

at best, the Department believes that it may be unnecessary and inappropriate to wait to establish rules pertaining to closed captioning and video description for movies.

It appears that existing captioning and video description equipment can be used with digital cinema. Commenters appeared to agree that when theaters move to digital technology, both the caption data and video descriptions can be embedded into the digital signal that is projected. A few commenters said that the systems currently used to provide captioning and video description will not become obsolete once a theater has converted to digital cinema because their major components are compatible with, and can be used by, digital cinema systems. These commenters said that the only difference for a movie theater owner or operator using digital cinema is the way the data are delivered to the captioning and video description equipment in place in an auditorium. In other words, because closed captioning and video description equipment operates through the digital sound systems most theaters have, the fact that those sound systems may be integrated with the digital cinema system will not necessitate changing the captioning and description equipment, only the manner in which the data they project are delivered to the digital cinema system. The Department seeks additional and updated information on this point.

Finally, the Department is considering proposing that 50% of movie screens would offer captioning and video description 5 years after the effective date of the regulation. The Department originally requested guidance on any such figure in its 2008 NPRM. Individuals with disabilities, advocacy groups who represented individuals with disabilities, and eleven State Attorneys General advocated that the Department should require captioning and video description 100% of the time. Representatives from the movie industry did not want any regulation regarding captioning or video description. A representative of a non-profit organization recommended that the Department adopt a requirement that 50% of movies being exhibited be available with captioning and video description. The Department seeks further comment on this issue and is asking several questions regarding how such a requirement should be framed.

#### IV. Requests for Comments

While the Department has been persuaded by comments from individuals, advocacy groups, governmental entities, and at least some

representatives of the movie industry that the time may be right to issue regulations on captioning and video description at movie theaters, the Department has a series of questions concerning the details of how best to frame and implement any such requirements. The Department believes that input from interested parties and the public would prove to be very useful. Specifically, the Department is seeking additional comment in response to the following questions:

#### A. Coverage Issues

*Question 1.* The Department is considering proposing a regulation that contains a sliding compliance schedule whereby the percentage of movie screens offering closed captioning and video description increases on a yearly basis, beginning with 10 percent in the first year any such rule becomes effective, until the 50 percent mark is reached in the fifth year. Please indicate whether this approach achieves the proper balance between providing accessibility for individuals with sensory disabilities and giving movie theaters and owners sufficient time to acquire the technology and equipment necessary to exhibit movies with closed captioning and video descriptions. Also, if you believe that a different compliance schedule should be implemented, please provide a detailed response explaining how this should be accomplished and the reasons in support. Should a different compliance schedule be implemented for small businesses? If so, why? What should that schedule require?

*Question 2.* The Department is considering proposing regulatory language requiring movie theater owners and operators to exhibit movies with closed captions and movies with video description so that, after any sliding compliance scale has been achieved by the final year (e.g., at year 5), all showings of at least one-half of the movie screens at the theater will offer captioning and video description. We seek comment on the most appropriate basis for calculating the number of movies that will be captioned and video described: Should this be the number of screens located in a particular theater facility, the number of screens owned by a particular movie theater company, the number of different movies being screened in a particular theater facility, or some combination thereof? Should a different basis be used for small business owners? If so, why? What basis should be used? Please include an explanation of the advantages and disadvantages of each

option and the reasons a particular option is preferred over another.

*Question 3.* If the number of screens located in a particular theater facility is the preferred option, please explain whether the fact that some theaters show the same movie on multiple screens poses any concerns with regard to the number of movies being screened with captions and video descriptions, and if so, what they are and whether there are any ways to address those concerns. Does this option pose particular concerns to small businesses? If so, what are they? Please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

*Question 4.* If the number of screens owned by a particular movie theater company is the preferred option, please explain whether there are any concerns about the geographic distribution of movies being screened with captions and video descriptions, and if so, what they are and whether there are any ways to address those concerns. Does this option pose particular concerns to small businesses? If so, what are they? Please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage of movies is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

*Question 5.* If the number of movies being screened in a particular movie theater facility is the preferred option, please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage of movies is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies. Does this option pose particular concerns to small businesses? If so, what are they?

*Question 6.* If some combination of these three methods is the preferred option, please explain that option and how it would be implemented. Should a different combination or percentage be used for small business owners? If so, why? What combination or percentage should be used for small business owners? Please indicate whether the

Department should include specific language in the regulation that states that the basis for calculating the number or percentage is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

*Question 7.* Should any such regulation require that the same number or percentage of movies with video description be exhibited as required for movies with captioning or should a different number or percentage be imposed? If the latter, what would be the justification for distinguishing between these forms of access? Should small businesses use a different ratio or percentage of video described movies or should they also be required to exhibit the same number or percentage of video described and captioned movies as other entities?

*Question 8.* Should the Department adopt a requirement that movie theater owners and operators exhibit captioned and video described movies beginning on the day of their release? If not, why not (e.g., could such a requirement impose additional burdens and if so, what are they)? Should a different requirement be imposed on small business owners? If so, why? What should that requirement be?

*Question 9.* While the Department is not considering requiring the use of open captioning, should movie theater owners and operators be given the discretion to exhibit movies with open captioning, should they so desire, as an alternate method of achieving compliance with the captioning requirements of any Department regulation? If theaters opt to use open captioning, should they be required to exhibit movies with such captioning at peak times so that people with disabilities can have the option of going to the movies on days and times when other moviegoers see movies?

#### B. Digital Cinema

*Question 10.* How many movie theater owners or operators have converted, in whole or in part, to digital cinema? How many have concrete plans to convert 25 percent of their theaters in the next five years? Next ten years? How many have concrete plans to convert 50 percent of their theaters in the next five years? Next ten years? How many have concrete plans to convert 75 percent of their theaters in the next five years? Next ten years? What are the estimates for the cost for a movie theater to convert a movie auditorium to digital cinema? Are these costs different for small businesses? Have small businesses

entered into any cost-sharing agreements or other financing arrangements to assist in such a conversion?

*Question 11.* Have specific protocols or standards been developed for captioning and video description for digital cinema and, if so, what are they?

### C. Equipment and Technology Questions

*Question 12.* Do the closed captioning and video description technologies currently available require the use of a digital sound system or digital cinema? Have technologies been developed that do not require the use of either a digital sound system or digital cinema in order to display open or closed captions and offer video description? If any new technologies have been developed, please explain how they work and what, if any, additional costs are associated with the purchase or use of such technologies? Are there technologies in development that will not require the use of a digital sound system or digital cinema in order to display captions or video description? If so, what are they and when are they expected to be available for use by movie theater owners and operators? Please explain what, if any, additional costs are associated with the purchase or use of such technologies.

*Question 13.* Is the existing closed captioning and video description equipment in use for digital sound systems compatible, or able to be integrated, with digital cinema systems? If not, why not? Are there additional costs associated with using this equipment with digital cinema systems? If so, please provide details. Are the costs different for small businesses? If so, why? What are they?

*Question 14.* With regard to closed captioning systems, is the ability to read the captions equally good throughout the movie theater or are there certain seats in the theater that provide an enhanced level of readability or line of sight both to the screen and the adjustable panel affixed at or near the patron's seat? If certain seats enable individuals who are deaf or hard of hearing to view movies more effectively, which seats are they and why are they better (e.g., the image is better, there are fewer obstructions, there is less need to continually adjust the panel, etc.)? Should movie theater owners and operators be required to hold such seats for individuals with disabilities who wish to use the theater's closed captioning system? Since movie theater seating is usually first-come, first-serve, is there an effective system that movie theaters would be able to implement to

hold back releasing such seats? Should movie theater owners and operators be allowed to release such seats if they are not requested within a certain amount of time before the start of the movie? Should movie theater owners and operators be allowed to release such seats to the general movie going audience once all of the other seats in the theater have been sold out? Are there alternatives for seating that minimize the cost but still provide patrons who are deaf or hard of hearing with effective and efficient readability of the captions and lines of sight to the screen?

*Question 15.* Are there other factors that the Department should include with regard to the display of captions or the use of video description? What is the cost of purchasing/incorporating video description equipment per screen/theater? Are the costs different for small businesses? If so, why? What are they?

*Question 16.* Has any specific equipment been developed or is there equipment in development for use with digital cinema that would be necessary to exhibit closed captioned movies or movies with video description? If so, is that equipment included in the general cost of the conversion to digital cinema or is an additional fee imposed? If an additional fee is imposed, please provide details. Are the costs different for small businesses? If so, why? What are they?

*Question 17.* Are there any other technical requirements that the Department should consider for inclusion in any regulation? If so, please provide details.

### D. Notice Requirements

*Question 18.* Should the Department include a requirement that movie theater owners and operators establish a system for notifying individuals with disabilities in advance of movie screenings as to which movies and shows at its theaters provide captioning and video description? If so, how should such a requirement be structured? For example, should the Department require movie theater owners and operators to include, in their usual movie postings in the newspaper, on telephone recordings, and on the Internet, a notation or some other information that a movie is captioned, the type of captioning provided, or that the movie has video description? Should the Department require movie theater owners and operators to establish a procedure or method for directing individuals with sensory disabilities to where in each movie theater they should go to obtain any necessary captioning and video

description equipment? Should movie theater owners and operators have the discretion to determine what notification procedure or method is most appropriate or should the Department specify how and where individuals with disabilities can obtain such equipment at each theater? What are the costs for these types of notifications? Are there any alternative types of notifications possible? Are these costs different for small businesses? If so, why? What are they?

### E. Training

*Question 19.* Should the Department consider including a training requirement for movie theater personnel? Should the Department require that movie theater owners and operators ensure that at least one individual working any shift at which a captioned or video described movie is being screened be trained on how any captioning and video description equipment operates and how to convey that information quickly and effectively to an individual with a disability who seeks help in using that equipment? What are the costs and burdens to implementing such a training requirement? Are these costs different for small businesses? If so, why? What are they? Would written and recorded explanations of how the equipment works be a better alternative?

### F. Cost and Benefits of Movie Captioning and Video Description Regulations

Because this is an ANPRM, the Department is not required, at this time, to conduct certain economic analyses or written assessments that otherwise may be required for other more formal types of agency regulatory actions (e.g., notices of proposed rulemaking or final rules) that, for example, are deemed to be economically significant regulatory actions with an annual economic impact exceeding \$100 million annually or that are expected to have a significant economic effect on a substantial number of small entities or non-federal governmental jurisdictions (such as State, local, or tribal governments). See, e.g., Regulatory Flexibility Act of 1980, 5 U.S.C. 603-04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002); E.O. 12866, 58 FR 51735 (Sept. 30, 1993), as amended by E.O. 13497, 74 Fed. Reg. 6113 (Jan. 30, 2009); OMB Budget Circular A-4, <http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf> (last visited June 5, 2010). Nonetheless, one of the purposes of this ANPRM is to seek public comment on various topics relating to captioning and video description, including

perspectives from stakeholders concerning the benefits and costs of revising the Department's title III regulation to ensure the accessibility of movies (from both a quantitative and qualitative perspective), particularly from members of the disability community, industry, and governmental entities. The Department thus asks for information so that the Department can determine whether such a proposed rule (1) should be deemed an economically "significant regulatory action" as defined in section 3(f) of E.O. 12866; or (2) would have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act and, if so, consider suggested alternative regulatory approaches to minimize any such impact.

Consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including, in pertinent part, small businesses and small nonprofit organizations. See 5 U.S.C. 603-04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002). The Department will make an initial determination as to whether any rule it proposes is likely to have a significant economic impact on a substantial number of small entities, and if so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small entities and regulatory alternatives that reduce the regulatory burden on small entities while achieving the goals of the regulation. In response to this ANPRM, the Department encourages small entities to provide cost data on the numbers of small entities that may be impacted by this rule, the potential economic impact of adopting a specific requirement for captioning and video description and recommendations on less burdensome alternatives, with cost information.

**Question 20.** The Small Business Administration size standard for small movie theatres is \$7 million dollars in annual gross revenues. Does the public have estimates of the numbers of small entities that may be impacted by future regulation governed by this ANPRM? How many small entities presently provide movie captioning or video description? How many small entities already have, or have plans to convert to, digital cinema? How many small entities presently have, or plan to convert to, digital sound systems? How much would it cost each small entity to provide movie captioning and video description technology using digital sound? How much would it cost each small entity to provide movie

captioning or video description if the entity converted to digital cinema?

**Question 21.** Currently, what are the general costs per movie theater owner or operator to display movies with closed captioning? How many small entities offer this feature? What are the general costs to small entities to display movies with open or closed captioning? For all entities, is that figure per auditorium, per facility, or per company? Do these costs change for showing IMAX or 3D films with captions? Are there any cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators? Is most or all of this expense a one-time fee? If not, please explain.

**Question 22.** Currently, what are the general costs per movie theater owner or operator to display movies with video description? How many small entities offer this feature? What are the general costs to small entities to display movies with video description? For all entities, is that figure per auditorium, per facility, or per company? Are there any cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators? Is most or all of this expense a one-time fee? If not, please explain.

**Question 23.** Currently, what are the general costs to convert to digital cinema? Are the costs different for small entities? If so, why? What are the costs for small entities? Is that figure per auditorium, per facility, or per company? Are there cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators?

**Question 24.** What impact will the measures being contemplated by the Department requiring captioning and video description of movies have on small entities? Please provide information on: (a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures; (c) any effects to sales and profits, including increases in business due to tapping markets not previously reached; and (d) changes to market competition as a result of the proposed rule.

**Question 25.** Should any category or type of movie theater be exempted from any regulation requiring captioning or video description? For example, the Department now considers it likely that drive-in theaters will not be subject to this rule because the Department is not aware of any currently available technology that would enable closed captioning or video description of movies shown in drive-in theaters. Are

there other types of movie facilities that should be exempted and why?

**Question 26.** If an exemption is provided, how should such an exemption be structured? Should it be based on the size of the company? To determine size, should the Department consider (a) using the Small Business Size Standard of \$7 million dollars in annual gross revenue so that movie theater owners who fall within those parameters should be exempt?; (b) using factors such as whether the movie theater owner is an independent movie house (not owned, leased, or operated by, a movie theater chain), or small art film house in order to be exempt?; or (c) using some other formula or factors to determine if a movie theater owner should be exempt? Should the Department consider the establishment of different compliance requirements or timetables for compliance for small entities, independent movie houses, or small art film houses to take into account the resources available to small entities? What are other alternatives for small businesses, independent movie houses, or small art film houses that would minimize the cost of future regulations?

Dated: July 21, 2010.

**Thomas E. Perez,**

*Assistant Attorney General, Civil Rights Division.*

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 926

[SATS No. MT-030-FOR; Docket ID No. OSM-2009-0007]

#### Montana Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Proposed rule; reopening and extension of public comment period on proposed amendment.

**SUMMARY:** We are announcing receipt of revisions pertaining to a previously proposed statutory amendment to the Montana regulatory program (hereinafter, the "Montana program") under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). Montana revised its original amendment proposal to remain consistent with SMCRA and Office of Surface Mining Reclamation and Enforcement ("OSM") policy. The