The Honorable Keith Oakley  
Chair, Committee on Public Safety  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Dear Representative Oakley:

You ask whether the Texas Department of Licensing and Regulation ("TDLR") must defer enforcing general reach-range requirements against gasoline pump credit-card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers. We conclude that the TDLR has the discretion to defer enforcement.

The State of Texas has adopted a policy to eliminate, as far as possible, "unnecessary barriers" that needlessly restrict a disabled individual's ability to achieve "maximum personal independence." To this end, the Commissioner of Licensing and Regulation ("commissioner") is authorized to adopt standards regulating "a privately funded building or facility" that the Americans with Disabilities Act ("ADA") defines either as a public accommodation or as a commercial facility. A gasoline pump apparently may fit into either category: 42 U.S.C. § 12181(7)(F) defines "public accommodation" explicitly to include a gasoline station whose operations affect commerce; and 42 U.S.C. § 12181(2)(B) defines "commercial facility" to include a facility whose operations

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1See V.T.C.S. art. 9102, § 1.


3See 42 U.S.C. § 12181(7)(F) (defining "public accommodation").

4See id. § 12181(2) (defining "commercial facility"); V.T.C.S. art. 9102, § 2(a)(4), (5).

5See also 28 C.F.R. § 36.104 (defining "public accommodation").
affect commerce. A facility includes “all or any portion of ... equipment, ... or other real or personal property ...”

Under the TDLR’s maximum high reach requirements, if an individual in a wheelchair may approach controls or operating mechanisms that are generally required to be accessible only from the front, the “high forward reach” may be no higher than forty-eight inches. Similarly, if an individual in a wheelchair may approach an object only from the side, the “maximum high side reach” is fifty-four inches. The TDLR’s reach-range requirements appear to be consistent with federal law.

You question only whether the department must defer enforcing its reach-range standard against gasoline pump credit-card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers. We believe it has the discretion to defer enforcement, so long as the TDLR does not selectively enforce its regulations in violation of due-process standards. An agency with enforcement authority is free to determine when it will enforce the law, balancing numerous factors that are peculiarly within the agency’s expertise.

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6See also id. (defining “commercial facilities”). “Commerce” includes interstate travel, trade, traffic, or transportation. See id.

7Id. (defining “facility”); Texas Accessibility Standards rule 3.5.31.

8See Texas Accessibility Standards rules 4.2.5, 4.27.3.

9See Texas Accessibility Standards rules 4.2.6, 4.27.3. We express no opinion here as to whether the maximum high forward reach or maximum high side reach allowance applies to a gasoline pump credit-card reader, access to which may be limited when a car is parked beside it.

10Cf. 28 C.F.R. ch. 36 app. A, §§ 4.2.5, 4.2.6, 4.27.3 & figs. 5(a), (b).


12Cf. Meisner v. State, 907 S.W.2d 664, 668 (Tex. App.--Waco 1995, no writ) (stating that law-enforcement officers’ discretion limited by certain recognizable boundaries to ensure due process for all individuals).

**SUMMARY**

The Texas Department of Licensing and Regulation has the discretion to defer enforcement of general reach-range requirements against gasoline pump credit-card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers.

Yours very truly,

Kymberly K. Oltrogge  
Assistant Attorney General  
Opinion Committee