Americans with Disabilities Act Title II Regulations

Nondiscrimination on the Basis of Disability in State and Local Government Services

Department of Justice
September 15, 2010

Contents

Title II Regulations

Supplementary Information

Department of Justice

DEPARTMENT OF JUSTICE

28 CFR Part 35

[CRT Docket No. 105; AG Order No. 3180–2010]

RIN 1190–AA46
Nondiscrimination on the Basis of Disability in State and Local Government Services

AGENCY: Department of Justice, Civil Rights Division.
ACTION: Final rule.

SUMMARY: This final rule revises the regulation of the Department of Justice (Department) that implements title II of the Americans with Disabilities Act (ADA), relating to nondiscrimination on the basis of disability in State and local government services. The Department is issuing this final rule in order to adopt enforceable accessibility standards under the ADA that are consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (Access Board), and to update or amend certain provisions of the title II regulation so that they comport with the Department's legal and practical experiences in enforcing the ADA since 1991. Concurrently with the publication of this final rule for title II, the Department is publishing a final rule amending its ADA title III regulation, which covers nondiscrimination on the basis of disability by public accommodations and in commercial facilities.
DATES: *Effective Date:* March 15, 2011.
FOR FURTHER INFORMATION CONTACT:
Janet L. Blizard, Deputy Chief, or Barbara J. Elkin, Attorney Advisor, 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).

This rule is also available in an accessible format on the ADA Home Page at *http://www.ada.gov*. You may obtain copies of this rule in large print or on computer disk by calling the ADA Information Line listed above.

SUPPLEMENTARY INFORMATION:

The Roles of the Access Board and the Department of Justice

The Access Board was established by section 502 of the Rehabilitation Act of 1973. 29 U.S.C. 792. The Board consists of 13 members appointed by the President from among the general public, the majority of whom must be individuals with disabilities, and the heads of 12 Federal departments and agencies specified by statute, including the heads of the Department of Justice and the Department of Transportation (DOT). Originally, the Access Board was established to develop and maintain accessibility guidelines for facilities designed, constructed, altered, or leased with Federal dollars under the Architectural Barriers Act of 1968 (ABA). 42 U.S.C. 4151 *et seq*. The passage of the ADA expanded the Access Board's responsibilities.

The ADA requires the Access Board to ''issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter * * * to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.'' 42 U.S.C. 12204. The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the ''minimum guidelines'' issued by the Access Board, 42 U.S.C.

12134(c); 42 U.S.C. 12186(c), but vests in the Attorney General sole responsibility for the promulgation of those standards that fall within the Department's jurisdiction and for enforcement of the regulations.

The ADA also requires the Department to develop regulations with respect to existing facilities subject to title II (subtitle A) and title III. How and to what extent the Access Board's guidelines are used with respect to the barrier removal requirement applicable to existing facilities under title III of the ADA and to the provision of program accessibility under title II of the ADA are solely within the discretion of the Department.

Enactment of the ADA and Issuance of the 1991 Regulations

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.[1] 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 newly designed and constructed or altered State and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities.

[1] On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Amendments Act of 2008 (ADA Amendments Act), Public Law 110-325. The ADA Amendments Act amended the ADA definition of disability to clarify its coverage of persons with disabilities and to provide guidance on the application of the definition. This final rule does not contain regulatory language implementing the ADA Amendments Act. The Department intends to publish a supplemental rule to amend the regulatory definition of "disability" to implement the changes mandated by that law.

42 U.S.C. 12101 *et seq*. Section 204(a) of the ADA directs the Attorney General to issue regulations implementing part A of title II but exempts matters within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244. *See* 42 U.S.C. 12134. Section 229(a) and section 244 of the ADA direct the Secretary of Transportation to issue regulations implementing part B of title II, except for section 223. *See* 42 U.S.C 12149; 42 U.S.C. 12164. Title II, which this rule addresses, applies to State and local government entities, and, in subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments regardless of whether these entities receive Federal financial assistance. 42 U.S.C. 12131B65.

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation (businesses that are generally open to the public 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 like factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181B89.

On July 26, 1991, the Department issued rules implementing title II and title III, which are codified at 28 CFR part 35 (title II) and part 36 (title III). Appendix A of the 1991 title III regulation, which is republished as Appendix D to 28 CFR part 36, contains the ADA Standards for Accessible Design (1991 Standards), which were based upon the version of the Americans with Disabilities Act Accessibility Guidelines (1991

ADAAG) published by the Access Board on the same date. Under the Department's 1991 title III regulation, places of public accommodation and commercial facilities currently are required to comply with the 1991 Standards with respect to newly constructed or altered facilities. The Department's 1991 title II regulation gives public entities the option of complying with the Uniform Federal Accessibility Standards (UFAS) or the 1991 Standards with respect to newly constructed or altered facilities.

The Access Board's publication of the 2004 ADA/ABA Guidelines was the culmination of a long-term effort to facilitate ADA compliance by eliminating, to the extent possible, inconsistencies among Federal accessibility requirements and between Federal accessibility requirements and State and local building codes. In support of this effort, the Department is amending its regulation implementing title II and is adopting standards consistent with ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines, naming them the 2010 ADA Standards for Accessible Design. The Department is also amending its title III regulation, which prohibits discrimination on the basis of disability by public accommodations and in commercial facilities, concurrently with the publication of this rule in this issue of the **Federal Register**.

Development of the 2004 ADA/ABA Guidelines

In 1994, the Access Board began the process of updating the 1991 ADAAG by establishing an advisory committee composed of members of the design and construction industry, the building code community, and State and local government entities, as well as individuals with disabilities. In 1998, the Access Board added specific guidelines on State and local government facilities, 63 FR 2000 (Jan. 13, 1998), and building elements designed for use by children, 63 FR 2060 (Jan. 13, 1998). In 1999, based largely on the report and recommendations of the advisory committee, the Access Board issued a Notice of Proposed Rulemaking (NPRM) to update and revise its ADA and ABA Accessibility Guidelines. *See* 64 FR 62248 (Nov. 16, 1999). In 2000, the Access Board added specific guidelines on play areas. *See* 65 FR 62498 (Oct. 18, 2000). The Access Board released an interim draft of its guidelines to the public on April 2, 2002, 67 FR 15509, in order to provide an opportunity for entities with model codes to consider amendments that would promote further harmonization. In September of 2002, the Access Board set forth specific guidelines on recreational facilities. 67 FR 56352 (Sept. 3, 2002).

By the date of its final publication on July 23, 2004, the 2004 ADA/ABA Guidelines had been the subject of extraordinary review and public participation. The Access Board received more than 2,500 comments from individuals with disabilities, affected industries, State and local governments, and others. The Access Board provided further opportunity for participation by holding public hearings.

The Department was involved extensively in the development of the 2004 ADA/ABA Guidelines. As a Federal member of the Access Board, the Attorney General's representative voted to approve the revised guidelines. ADA Chapter 1 and ADA Chapter 2 of the 2004 ADA/ABA Guidelines provided scoping requirements for facilities subject to the ADA; ''scoping'' is a term used in the 2004 ADA/ABA Guidelines to describe requirements that prescribe which elements and spaces— and, in some cases, how many—must comply with the technical specifications. ABA Chapter 1 and ABA Chapter 2 provide scoping requirements for facilities subject to the ABA (*i.e.*, facilities designed, built, altered, or leased with Federal funds). Chapters 3 through 10 provide uniform technical specifications for facilities subject to either the ADA or ABA. This revised format is designed to eliminate unintended conflicts between the two sets of Federal accessibility standards and to minimize conflicts between the Federal regulations and the model

codes that form the basis of many State and local building codes. For the purposes of this final rule, the Department will refer to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as the 2004 ADAAG.

These amendments to the 1991 ADAAG have not been adopted previously by the Department as ADA Standards. Through this rule, the Department is adopting revised ADA Standards consistent with the 2004 ADAAG, including all of the amendments to the 1991 ADAAG since 1998. For the purposes of title II, the Department's revised standards are entitled ''The 2010 Standards for Accessible Design'' and consist of the 2004 ADAAG and the requirements in § 35.151. Because the Department has adopted the 2004 ADAAG as part of its title II and title III regulations, once the Department's final rules become effective, the 2004 ADAAG will have legal effect with respect to the Department's title II and title III regulations and will cease to be mere guidance for those areas regulated by the Department. In 2006, the (DOT) adopted the 2004 ADAAG. With respect to those areas regulated by DOT, these guidelines, as adopted by DOT have had legal effect since 2006.

The Department's Rulemaking History

The Department published an advance notice of proposed rulemaking (ANPRM) on September 30, 2004, 69 FR 58768, for two reasons: (1) To begin the process of adopting the 2004 ADAAG by soliciting public input on issues relating to the potential application of the Access Board's revisions once the Department adopts them as revised standards; and (2) to request background information that would assist the Department in preparing a regulatory analysis under the guidance provided in Office of Management and Budget (OMB) Circular AB4, sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs) (Sept. 17, 2003), available at *http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf* (last visited June 24, 2010). While underscoring that the Department, as a member of the Access Board, already had reviewed comments provided to the Access Board during its development of the 2004 ADAAG, the Department specifically requested public comment on the potential application of the 2004 ADAAG to existing facilities. The extent to which the 2004 ADAAG is used with respect to the program access requirement in title II (as well as with respect to the barrier removal requirement applicable to existing facilities under title III) is within the sole discretion of the Department. The ANPRM dealt with the Department's responsibilities under both title II and title III.

The public response to the ANPRM was substantial. The Department extended the comment deadline by four months at the public's request. 70 FR 2992 (Jan. 19, 2005). By the end of the extended comment period, the Department had received more than 900 comments covering a broad range of issues. Many of the commenters responded to questions posed specifically by the Department, including questions regarding the Department's application of the 2004 ADAAG once adopted by the Department and the Department's regulatory assessment of the costs and benefits of particular elements. Many other commenters addressed areas of desired regulation or of particular concern.

To enhance accessibility strides made since the enactment of the ADA, commenters asked the Department to focus on previously unregulated areas such as ticketing in assembly areas; reservations for hotel rooms, rental cars, and boat slips; and captioning. They also asked for clarification on some issues in the 1991 regulations, such as the requirements regarding service animals. Other commenters dealt with specific requirements in the 2004 ADAAG or responded to questions regarding elements scoped for the first time in the 2004 ADAAG, including recreation facilities and play areas. Commenters also provided some information on how to assess the cost of elements in small facilities, office

buildings, hotels and motels, assembly areas, hospitals and long-term care facilities, residential units, recreation facilities, and play areas. Still other commenters addressed the effective date of the proposed standards, the triggering event by which the effective date is calculated for new construction, and variations on a safe harbor that would excuse elements built in compliance with the 1991 Standards from compliance with the proposed standards.

After careful consideration of the public comments in response to the ANPRM, on June 17, 2008, the Department published an NPRM covering title II (73 FR 34466). The Department also published an NPRM on that day covering title III (73 FR 34508). The NPRMs addressed the issues raised in the public's comments to the ANPRM and sought additional comment, generally and in specific areas, such as the Department's adoption of the 2004 ADAAG, the Department's regulatory assessment of the costs and benefits of the rule, its updates and amendments of certain provisions of the existing title II and III regulations, and areas that were in need of additional clarification or specificity.

A public hearing was held on July 15, 2008, in Washington, D.C. Forty-five individuals testified in person or by phone. The hearing was streamed live over the Internet. By the end of the 60- day comment period, the Department had received 4,435 comments addressing a broad range of issues many of which were common to the title II and title III NPRMs, from representatives of businesses and industries, State and local government agencies, disability advocacy organizations, and private individuals, many of which addressed issues common to both NPRMs.

The Department notes that this rulemaking was unusual in that much of the proposed regulatory text and many of the questions asked across titles II and III were the same. Consequently, many of the commenters did not provide separate sets of documents for the proposed title II and title III rules, and in many instances, the commenters did not specify which title was being commented upon. As a result, where comments could be read to apply to both titles II and III, the Department included them in the comments and responses for each final rule.

Most of the commenters responded to questions posed specifically by the Department, including what were the most appropriate definitions for terms such as ''wheelchair,'' ''mobility device,'' and ''service animal''; how to quantify various benefits that are difficult to monetize; what requirements to adopt for ticketing and assembly areas; whether to adopt safe harbors for small businesses; and how best to regulate captioning. Some comments addressed specific requirements in the 2004 ADAAG or responded to questions regarding elements scoped for the first time in the 2004 ADAAG, including recreation facilities and play areas. Other comments responded to questions posed by the Department concerning certain specific requirements in the 2004 ADAAG.

Relationship to Other Laws

The Department of Justice regulation implementing title II, 28 CFR 35.103, provides the following:

(a) *Rule of interpretation.* Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.

(b) *Other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any other Federal, State, or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

These provisions remain unchanged by the final rule. The Department recognizes that public entities subject to title II of the ADA may also be subject to title I of the ADA, which prohibits discrimination on the basis of disability in

employment; section 504 of the Rehabilitation Act of 1973 and other Federal statutes that prohibit discrimination on the basis of disability in the programs and activities of recipients of Federal financial assistance; and other Federal statutes such as the Air Carrier Access Act (ACAA), 49 U.S.C. 41705 *et seq*., and the Fair Housing Act (FHAct), 42 U.S.C. 3601 *et seq*. Compliance with the Department's title II and title III regulations does not necessarily ensure compliance with other Federal statutes.

Public entities that are subject to the ADA as well as other Federal disability discrimination laws must be aware of the requirements of all applicable laws and must comply with these laws and their implementing regulations. Although in many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity or because of distinctions between the statutes. For example, emotional support animals that do not qualify as service animals under the Department's title II regulation may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct and the ACAA. *See*, *e.g., Overlook Mutual Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850 (S.D. Ohio 2009). Public entities that operate housing facilities must ensure that they apply the reasonable accommodation requirements of the FHAct in determining whether to allow a particular animal needed by a person with a disability into housing and may not use the ADA definition as a justification for reducing their FHAct obligations. In addition, nothing in the ADA prevents a covered entity subject to one statute from modifying its policies and providing greater access in order to assist individuals with disabilities in achieving access to entities subject to other Federal statutes. For example, a public airport is a title II facility that houses air carriers subject to the ACAA. The public airport operator is required to comply with the title II requirements, but is not covered by the ACAA. Conversely, the air carrier is required to comply with the ACAA, but is not covered by title II of the ADA. If a particular animal is a service animal for purposes of the ACAA and is thus allowed on an airplane, but is not a service animal for purposes of the ADA, nothing in the ADA prohibits an airport from allowing a ticketed passenger with a disability who is traveling with a service animal that meets the ACAA's definition of a service animal to bring that animal into the facility even though under the ADA's definition of service animal the animal could be lawfully excluded.

In addition, public entities (including AMTRAK) that provide public transportation services that are subject to subtitle B of title II should be reminded that the Department's regulation, at 28 CFR 35.102, provides: ''(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities. (b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, 42 U.S.C. 12141 *et seq*., they are not subject to the requirements of this part.'' The ADA regulations of DOT at 49 CFR 37.21(c) state that entities subject to DOT's ADA regulations may also be subject to the ADA regulations of the Department of Justice. As stated in the preamble to § 37.21(c) in DOT's 1991 regulation, ''[t]he DOT rules apply only to the entity's transportation facilities, vehicles, or services; the DOJ rules may cover the entity's activities more broadly.'' 56 FR 45584, 45736 (Sept. 6, 1991). Nothing in this final rule alters these provisions.

The Department recognizes that DOT has its own independent regulatory responsibilities under subtitle B of title II of the ADA. To the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are subject to the DOT regulations at 49 CFR parts 37 and

39. Matters covered by subtitle A are covered by this rule. However, this rule should not be read to prohibit DOT from elaborating on the provisions of this rule in its own ADA rules in the specific regulatory contexts for which it is responsible, after appropriate consultation with the Department. For example, DOT may issue such specific provisions with respect to the use of non-traditional mobility devices, *e.g.,* Segways®, on any transportation vehicle subject to subtitle B. While DOT may establish transportation-specific requirements that are more stringent or expansive than those set forth in this rule, any such requirements cannot reduce the protections and requirements set forth in this rule.

In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 of the Rehabilitation Act for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of Federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Airports operated by public entities are not subject to DOT's ADA regulation, but they are subject to subpart A of title II and to this rule. The Department of Justice regulation implementing title II generally, and the DOT regulations specifically implementing subtitle B of title II, may overlap. If there is overlap in areas covered by subtitle B which DOT regulates, these provisions shall be harmonized in accordance with the DOT regulation at 49 CFR 37.21(c).

Organization of This Rule

Throughout this rule, the original ADA Standards, which are republished as Appendix D to 28 CFR part 36, will be referred to as the ''1991 Standards.'' The original title II regulation, 28 CFR part 35, will be referred to as the ''1991 title II regulation.'' ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines, codified at 36 CFR part 1191, app. B and D (2009) will be referred to as the ''2004 ADAAG.'' The Department's Notice of Proposed Rulemaking, 73 FR 34466 (June 17, 2008), will be referred to as the ''NPRM.'' As noted above, the 2004 ADAAG, taken together with the requirements contained in § 35.151 (New Construction and Alterations) of the final rule, will be referred to as the ''2010 Standards.'' The amendments made to the 1991 title II regulation and the adoption of the 2004 ADAAG, taken together, will be referred to as the ''final rule.''

In performing the required periodic review of its existing regulation, the Department has reviewed the title II regulation section by section, and, as a result, has made several clarifications and amendments in this rule. Appendix A of the final rule, ''Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services,'' codified as Appendix A to 28 CFR part 35, provides the Department's response to comments and its explanations of the changes to the regulation. The section entitled ''Section-by-Section Analysis and Response to Comments'' in Appendix A provides a detailed discussion of the changes to the title II regulation. The Section-by-Section Analysis follows the order of the 1991 title II regulation, except that regulatory sections that remain unchanged are not referenced. The discussion within each section explains the changes and the reasoning behind them, as well as the Department's response to related public comments. Subject areas that deal with more than one section of the regulation include references to the related sections, where appropriate. The Section-by-Section Analysis also discusses many of the questions asked by the Department for specific public response. The section of Appendix A entitled ''Other Issues'' discusses public comments on several issues of concern to the Department that were the subject of questions that are not specifically addressed in the Section-by-Section Analysis.

The Department's description of the 2010 Standards, as well as a discussion of the public comments on specific sections of the 2004 ADAAG, is found in Appendix B of the final title III rule, ''Analysis and Commentary on the 2010 ADA Standards for Accessible Design,'' and codified as Appendix B to 28 CFR part 36.

The provisions of this rule generally take effect six months from its publication in the **Federal Register**. The Department has determined, however, that compliance with the 2010 Standards shall not be required until 18 months from the publication date of this rule. This exception is set forth in § 35.151(c) and is discussed in greater detail in Appendix A. *See* Appendix A discussion entitled ''Section 35.151(c) New construction and alterations.''

This final rule only addresses issues that were identified in the NPRM as subjects the Department intended to regulate through this rulemaking proceeding. Because the Department indicated in the NPRM that it did not intend to regulate certain areas, including equipment and furniture, accessible golf cars, and movie captioning and video description, as part of this rulemaking proceeding, the Department believes it would be appropriate to solicit more public comment about these areas prior to making them the subject of a rulemaking. The Department intends to engage in additional rulemaking in the near future addressing accessibility in these areas and others, including next generation 9–1–1 and accessibility of Web sites operated by covered public entities and public accommodations.

Additional Information

Regulatory Process Matters (SBREFA, Regulatory Flexibility Act, and Executive Orders)

The Department must provide two types of assessments as part of its final rule: an analysis of the costs and benefits of adopting the changes contained in this rule, and a periodic review of its existing regulations to consider their impact on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. *See* E.O. 12866, 58 FR 51735, 3 CFR, 1994 Comp., p. 638, as amended; Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 610(a); OMB Circular A–4, available at *http://www.whitehouse.gov/ OMB/ circulars/a004/a-4.pdf* (last visited June 24, 2010); E.O. 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247.

In the NPRM, the Department kept open the possibility that, if warranted by public comments received on an issue raised by the 2004 ADAAG, or by the results of the Department's Initial Regulatory Impact Analysis (available at *ada.gov/NPRM2008/ria.htm*) showing that the likely costs of making a particular feature or facility accessible were disproportionate to the benefits (including both monetized and nonmonetized benefits) to persons with disabilities, the Attorney General, as a member of the Access Board, could return the issue to the Access Board for further consideration. After careful consideration, the Department has determined that it is unnecessary to return any issues to the Access Board for additional consideration.

Executive Order 12866

This rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Department has evaluated its existing regulations for title II and title III section by section, and many of the provisions in the final rule for both titles reflect its efforts to mitigate any negative effects on small entities. A Final Regulatory Impact Analysis (Final RIA or RIA) was prepared by the Department's contractor, HDR|HLB Decision Economics, Inc. (HDR). In accordance with Executive Order 12866, as amended, and OMB Circular A–4, the Department has reviewed and considered the Final RIA and has accepted the results of this analysis as its

assessment of the benefits and costs of the final rules.

Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to ''distributive impacts'' and ''equity,'' *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. The ADA states, ''[i]t is the purpose of this [Act] (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]'' 42 U.S.C. 12101(b). Many of the benefits of this rule stem from the provision of such standards, which will promote inclusion, reduce stigma and potential embarrassment, and combat isolation, segregation, and second-class citizenship of individuals with disabilities. Some of these benefits are, in the words of Executive Order 12866, ''difficult to quantify, but nevertheless essential to consider.'' E.O. 12866, section 1(a). The Department has considered such benefits here.

Final Regulatory Impact Analysis

The Final RIA embodies a comprehensive benefit-cost analysis of the final rules for both title II and title III and assesses the incremental benefits and costs of the 2010 Standards relative to a primary baseline scenario (1991 Standards). In addition, the Department conducted additional research and analyses for requirements having the highest negative net present values under the primary baseline scenario. This approach was taken because, while the 1991 Standards are the only uniform set of accessibility standards that apply to public accommodations, commercial facilities, and State and local government facilities nationwide, it is also understood that many State and local jurisdictions have already adopted IBC/ANSI model code provisions that mirror those in the 2004 ADAAG. The assessments based on this approach assume that covered entities currently implementing codes that mirror the 2004 ADAAG will not need to modify their code requirements once the rules are finalized. They also assume that, even without the final rules, the current level of compliance would be unchanged. The Final RIA contains specific information, including data in chart form, detailing which States have already adopted the accessibility standards for this subset of six requirements. The Department believes that the estimates resulting from this approach represent a reasonable upper and lower measure of the likely effects these requirements will have that the Department was able to quantify and monetize.

The Final RIA estimates the benefits and costs for all new (referred to as ''supplemental'') requirements and revised requirements across all types of newly constructed and existing facilities. The Final RIA also incorporates a sophisticated risk analysis process that quantifies the inherent uncertainties in estimating costs and benefits and then assesses (through computer simulations) the relative impact of these factors when varied simultaneously. A copy of the Final RIA will be made available online for public review on the Department's ADA Home Page (*http://www.ada.gov*).

From an economic perspective (as specified in OMB Circular A–4), the results of the Final RIA demonstrate that the Department's final rules increase social resources and thus represent a public good because monetized benefits exceed monetized costs—that is, the regulations have a positive net present value (NPV). Indeed, under every scenario assessed in the Final RIA, the final rules have a positive NPV. The Final RIA's first scenario examines the incremental impact of the final rules using the ''main'' set of assumptions (*i.e.*, assuming a primary baseline (1991 Standards), that the safe harbor applies, and that for title III entities barrier removal is readily

achievable for 50 percent of elements subject to supplemental requirements).

Under this set of assumptions, the final rules have an expected NPV of $9.3 billion (7 percent discount rate) and $40.4 billion (3 percent discount rate). *See* Final RIA, table ES–1 & figure ES– 2.

Expected Impact of the Rules[2] (in billions)

Discount rate	Expected NPV	Total Expected PV (Benefits)	Total Expected PV (Costs)
3%	$40.4	$66.2	$25.8
7%	$9.3	$22.0	$12.8

Water Closet Clearances

The Department gave careful consideration to the costs and benefits of its adoption of the standards relating to water closet clearances in single-user toilet rooms. The primary effect of the Department's proposed final rules governing water closet clearances in single-user toilet rooms with in-swinging and out-swinging doors is to allow sufficient room for ''side'' or ''parallel'' methods of transferring from a wheelchair to a toilet. Under the current 1991 Standards, the requisite clearance space in single-user toilet rooms between and around the toilet and the lavatory does not permit these methods of transfer. Side or parallel transfers are used by large numbers of persons who use wheelchairs and are regularly taught in rehabilitation and occupational therapy. Currently, persons who use side or parallel transfer methods from their wheelchairs are faced with a stark choice at establishments with single-user toilet rooms—*i.e.*, patronize the establishment but run the risk of needing assistance when using the restroom, travel with someone who would be able to provide assistance in toileting, or forgo the visit entirely. The revised water closet clearance regulations would make single-user toilet rooms accessible to all persons who use wheelchairs, not just those with the physical strength, balance, and dexterity and the training to use a front-transfer method. Single-user toilet rooms are located in a wide variety of public and private facilities, including restaurants, fast-food establishments, schools, retail stores, parks, sports stadiums, and hospitals. Final promulgation of these requirements might thus, for example, enable a person who uses a side or parallel transfer method to use the restroom (or use the restroom independently) at his or her local coffee shop for the first time.

Because of the complex nature of its cost-benefit analysis, the Department is providing ''plain language'' descriptions of the benefits calculations for the two revised requirements with the highest estimated total costs: Water closet clearance in single-user toilet rooms with out-swinging doors (RIA Req. # 28) (section 604.3 of the 2010 Standards) and water closet clearance in single-user toilet rooms with in-swinging doors (RIA Req. # 32) (sections 604.3 and 603.2.3 Exception 2 of the 2010 Standards). Since many of the concepts and calculations in the Final RIA are highly technical, it is hoped that, by providing ''lay'' descriptions of how benefits are monetized for an illustrative set of requirements, the Final RIA will be more transparent and afford readers a more complete understanding of the benefits model generally. Because of the widespread adoption of the water closet clearance standards in existing State and local building codes, the following calculations use the IBC/ANSI baseline.

[2] The analysis assumes these regulations will be in force for 15 years. Incremental costs and benefits are calculated for all construction, alterations, and barrier removal that is expected to occur during these 15 years. The analysis also assumes that any new or revised ADA rules enacted 15 years from now will include a safe harbor provision. Thus, any facilities constructed in year 14 of the final rules are assumed to continue to generate benefits to users, and to incur any operating or replacement costs for the life of these buildings, which is assumed to be 40 years.

General description of monetized benefits for water closet clearance in single-user toilet rooms—out-swinging doors (Req. # 28). In order to assess monetized benefits for the requirement covering water closet clearances in single-user toilet rooms with out-swinging doors, a determination needed to be made concerning the population of users with disabilities who would likely benefit from this revised standard. Based on input received from a panel of experts jointly convened by HDR and the Department to discuss benefits related estimates and assumptions used in the RIA model, it was assumed that accessibility changes brought about by this requirement would benefit persons with any type of ambulatory (*i.e.*, mobility-related) disability, such as persons who use wheelchairs, walkers, or braces. Recent census figures estimate that about 11.9 percent of Americans ages 15 and older have an ambulatory disability, or about 35 million people. This expert panel also estimated that single-user toilet rooms with out-swinging doors would be used slightly less than once every other visit to a facility with such toilet rooms covered by the final rules (or, viewed another way, about once every two hours spent at a covered facility assumed to have one or more single-user toilet rooms with out-swinging doors) by an individual with an ambulatory disability. The expert panel further estimated that, for such individuals, the revised requirement would result in an average time savings of about five and a half minutes when using the restroom. This time savings is due to the revised water closet clearance standard, which permits, among other things, greater flexibility in terms of access to the toilet by parallel or side transfer, thereby perhaps reducing the wait for another person to assist with toileting and the need to twist or struggle to access the toilet independently. Based on average hourly wage rates compiled by the U.S. Department of Labor, the time savings for Req. # 28 is valued at just under $10 per hour.

For public and private facilities covered by the final rules, it is estimated that there are currently about 11 million single-user toilet rooms with out-swinging doors. The majority of these types of single-user toilet rooms, nearly 7 million, are assumed to be located at ''Indoor Service Establishments,'' a broad facility group that encompasses various types of indoor retail stores such as bakeries, grocery stores, clothing stores, and hardware stores. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with out-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. # 28, it is further understood that about half of all existing facilities assumed to have single-user toilet rooms with out-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

With respect to new construction, it is assumed that each single-user toilet room with an out-swinging door will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the building (*i.e.*, a period of time between 1 and 39 years).

Summing up monetized benefits to users with disabilities across all types of public and private facilities covered by the final rules, and assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ ANSI model code provisions, it is expected that the revised requirement for water closet clearance in single-user toilet rooms with out-swinging doors will

result in net benefits of approximately $900 million over the life of these regulations.

General description of monetized benefits for water closet clearance in single-user toilet rooms—in-swinging doors (Req. # 32). For the water closet clearance in single-user toilet rooms with the in-swinging door requirement (Req. #32), the expert panel determined that the primary beneficiaries would be persons who use wheelchairs. As compared to single-user toilet rooms with out-swinging doors, those with in-swinging doors tend to be larger terms of square footage) in order to accommodate clearance for the in-swinging door and, thus, are already likely to have adequate clear floor space for persons with disabilities who use other types of mobility aids such as walkers and crutches.

The expert benefits panel estimated that single-user toilet rooms with in-swinging doors are used less frequently on average—about once every 20 visits to a facility with such a toilet room by a person who uses a wheelchair—than their counterpart toilet rooms with out-swinging doors. This panel also determined that, on average, each user would realize a time savings of about 9 minutes as a result of the enhanced clearances required by this revised standard.

The RIA estimates that there are about 4 million single-user toilet rooms with in-swinging doors in existing facilities. About half of the single-user toilet rooms with in-swinging doors are assumed to be located in single-level stores, and about a quarter of them are assumed to be located in restaurants. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with in-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. #32, it is further understood that slightly more than 70 percent of all existing facilities assumed to have single-user toilet rooms with in-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

Similar to the assumptions for Req. #28, it is assumed that newly constructed single-user toilet rooms with in-swinging doors will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the building (*i.e.*, a period of time between 1 and 39 years). Over this time period, the total estimated value of benefits to users of water closets with in-swinging doors from the time they will save and decreased discomfort they will experience is nearly $12 million.

Additional benefits of water closet clearance standards. The standards requiring sufficient space in single-user toilet rooms for a wheelchair user to effect a side or parallel transfer are among the most costly (in monetary terms) of the new provisions in the Access Board's guidelines that the Department adopts in this rule—but also, the Department believes, one of the most beneficial in non-monetary terms. Although the monetized costs of these requirements substantially exceed the monetized benefits, the additional benefits that persons with disabilities will derive from greater safety, enhanced independence, and the avoidance of stigma and humiliation— benefits that the Department's economic model could not put in monetary terms—are, in the Department's experience and considered judgment, likely to be quite high. Wheelchair users, including veterans returning from our Nation's wars with disabilities, are taught to transfer onto toilets from the side. Side transfers are the safest, most efficient, and most independence-promoting way for wheelchair users to get onto the toilet. The opportunity

to effect a side transfer will often obviate the need for a wheelchair user or individual with another type of mobility impairment to obtain the assistance of another person to engage in what is, for most people, among the most private of activities. Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to ''distributive impacts'' and ''equity,'' *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. These water closet clearance provisions will have non-monetized benefits that promote equal access and equal opportunity for individuals with disabilities, and will further the ADA's purpose of providing ''a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'' 42 U.S.C. 12101(b)(1).

The Department's calculations indicated that, in fact, people with the relevant disabilities would have to place only a very small monetary value on these quite substantial benefits for the costs and benefits of these water closet clearance standards to break even. To make these calculations, the Department separated out toilet rooms with out-swinging doors from those with in-swinging doors, because the costs and benefits of the respective water closet clearance requirements are significantly different. The Department estimates that, assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, the costs of the requirement as applied to toilet rooms with out-swinging doors will exceed the monetized benefits by $454 million, an annualized net cost of approximately $32.6 million. But a large number of people with disabilities will realize benefits of independence, safety, and avoided stigma and humiliation as a result of the requirement's application in this context. Based on the estimates of its expert panel and its own experience, the Department believes that both wheelchair users and people with a variety of other mobility disabilities will benefit. The Department estimates that people with the relevant disabilities will use a newly accessible single-user toilet room with an out-swinging door approximately 677 million times per year. Dividing the $32.6 million annual cost by the 677 million annual uses, the Department concludes that for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at just under 5 cents per visit. The Department believes, based on its experience and informed judgment, that 5 cents substantially understates the value people with the relevant disabilities would place on these benefits in this context.

There are substantially fewer single-user toilet rooms with in-swinging doors, and substantially fewer people with disabilities will benefit from making those rooms accessible. While both wheelchair users and individuals with other ambulatory disabilities will benefit from the additional space in a room with an out-swinging door, the Department believes, based on the estimates of its expert panel and its own experience, that wheelchair users likely will be the primary beneficiaries of the in-swinging door requirement. The Department estimates that people with the relevant disabilities will use a newly accessible single-user toilet room with an in-swinging door approximately 8.7 million times per year. Moreover, the alteration costs to make a single-user toilet room with an in-swinging door accessible are substantially higher (because of the space taken up by the door) than the equivalent costs of making a room with an out-swinging door accessible. Thus, the Department calculates that, assuming 72 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, the costs of applying the toilet room accessibility standard to rooms with in-swinging doors will exceed the monetized benefits of doing so by $266.3 million over the

life of the regulations, or approximately $19.14 million per year. Dividing the $19.14 million annual cost by the 8.7 million annual uses, the Department concludes that for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at approximately $2.20 per visit. The Department believes, based on its experience and informed judgment, that this figure approximates, and probably understates, the value wheelchair users place on safety, independence, and the avoidance of stigma and humiliation in this context.

Alternate Scenarios

Another scenario in the Final RIA explores the incremental impact of varying the assumptions concerning the percentage of existing elements subject to supplemental requirements for which barrier removal would be readily achievable. Readily achievable barrier removal rates are modeled at 0 percent, 50 percent, and 100 percent levels. The results of this scenario show that the expected NPV is positive for each readily achievable barrier removal rate and that varying this assumed rate has little impact on expected NPV. *See* Final RIA, figure ES–3.

A third set of analyses in the Final RIA demonstrates the impact of using alternate baselines based on model codes instead of the primary baseline. The IBC model codes, which have been widely adopted by State and local jurisdictions around the country, are significant because many of the requirements in the final rules mirror accessibility provisions in the IBC model codes (or standards incorporated therein by reference, such as ANSI A117.1). The actual economic impact of the Department's final rules is, therefore, tempered by the fact that many jurisdictions nationwide have already adopted and are enforcing portions of the final rules—indeed, this was one of the goals underlying the Access Board's efforts to harmonize the 2004 ADAAG Standards with the model codes. However, capturing the economic impact of this reality poses a difficult modeling challenge due to the variety of methods by which States and localities have adopted the IBC/ANSI model codes (*e.g.*, in whole, in part, and with or without amendments), as well as the lack of a national ''facility census'' establishing the location, type, and age of existing ADA-covered facilities.

As a result, in the first set of alternate IBC baseline analyses, the Final RIA assumes that all of the three IBC model codes—IBC 2000, IBC 2003, and IBC 2006—have been fully adopted by all jurisdictions and apply to all facilities nationwide. As with the primary baseline scenarios examined in the Final RIA, use of these three alternate IBC baselines results in positive expected NPVs in all cases. *See* Final RIA, figure ES–4. These results also indicate that IBC 2000 and IBC 2006 respectively have the highest and lowest expected NPVs. These results are due to changes in the make-up of the set of requirements that is included in each alternative baseline.

Additionally, a second, more limited alternate baseline analysis in the Final RIA uses a State-specific and requirement-specific alternate IBC/ANSI baseline in order to demonstrate the likely actual incremental impact of an illustrative subset of 20 requirements under current conditions nationwide. For this analysis, research was conducted on a subset of 20 requirements in the final rules that have negative net present values under the primary baseline and readily identifiable IBC/ANSI counterparts to determine the extent to which they each respectively have been adopted at the State or local level. With respect to facilities, the population of adopting jurisdictions was used as a proxy for facility location. In other words, it was assumed that the number of ADA-covered facilities respectively compliant with these 20 requirements was equal to the percentage of the United States population (based on statistics from the Census Bureau) currently residing in those States or local jurisdictions that have adopted the

IBC/ANSI counterparts to these requirements. The results of this more limited analysis, using State-specific and requirement-specific alternate IBC/ANSI baselines for these 20 requirements, demonstrate that the widespread adoption of IBC model codes by States and localities significantly lessens the financial impact of these specific requirements. Indeed, the Final RIA estimates that, if the NPVs for these 20 requirements resulting from the requirement-specific alternate IBC/ANSI baseline are substituted for their respective results under the primary baseline, the overall NPV for the final rules increases from $9.2 billion to $12.0 billion. *See* Final RIA, section 6.2.2 & table 10.

Benefits Not Monetized in the Formal Analysis

Finally, the RIA recognizes that additional benefits are likely to result from the new standards. Many of these benefits are more difficult to quantify. Among the potential benefits that have been discussed by researchers and advocates are reduced administrative costs due to harmonized guidelines, increased business opportunities, increased social development, and improved health benefits. For example, the final rules will substantially increase accessibility at newly scoped facilities such as recreation facilities and judicial facilities, which previously have been very difficult for persons with disabilities to access. Areas where the Department believes entities may incur benefits that are not monetized in the formal analysis include, but may not be limited to, the following:

Use benefits accruing to persons with disabilities. The final rules should improve the overall sense of well-being of persons with disabilities, who will know that public entities and places of public accommodation are generally accessible, and who will have improved individual experiences. Some of the most frequently cited qualitative benefits of increased access are the increase in one's personal sense of dignity that arises from increased access and the decrease in possibly humiliating incidents due to accessibility barriers. Struggling to join classmates on a stage, to use a bathroom with too little clearance, or to enter a swimming pool all negatively affect a person's sense of independence and can lead to humiliating accidents, derisive comments, or embarrassment. These humiliations, together with feelings of being stigmatized as different or inferior from being relegated to use other, less comfortable or pleasant elements of a facility (such as a bathroom instead of a kitchen sink for rinsing a coffee mug at work), all have a negative effect on persons with disabilities.

Use benefits accruing to persons without disabilities. Improved accessibility can affect more than just the rule's target population; persons without disabilities may also benefit from many of the requirements. Even though the requirements were not designed to benefit persons without disabilities, any time savings or easier access to a facility experienced by persons without disabilities are also benefits that should properly be attributed to that change in accessibility. Curb cuts in sidewalks make life easier for those using wheeled suitcases or pushing a baby stroller. For people with a lot of luggage or a need to change clothes, the larger bathroom stalls can be highly valued. A ramp into a pool can allow a child (or adult) with a fear of water to ease into that pool. All are examples of ''unintended'' benefits of the rule. And ideally, all should be part of the calculus of the benefits to society of the rule.

Social benefits. Evidence supports the notion that children with and without disabilities benefit in their social development from interaction with one another. Therefore, there will likely be social development benefits generated by an increase in accessible play areas. However, these benefits are nearly impossible to quantify for several reasons. First, there is no guarantee that accessibility will generate play opportunities between children with and without disabilities. Second, there may be substantial overlap between interactions at accessible play areas and interactions at other facilities, such as schools and religious

facilities. Third, it is not certain what the unit of measurement for social development should be.

Non-use benefits. There are additional, indirect benefits to society that arise from improved accessibility. For instance, resource savings may arise from reduced social service agency outlays when people are able to access centralized points of service delivery rather than receiving home-based care. Home-based and other social services may include home health care visits and welfare benefits. Third-party employment effects can arise when enhanced accessibility results in increasing rates of consumption by disabled and non-disabled populations, which in turn results in reduced unemployment.

Two additional forms of benefits are discussed less often, let alone quantified: Option value and existence value. Option value is the value that people with and without disabilities derive from the option of using accessible facilities at some point in the future. As with insurance, people derive benefit from the knowledge that the option to use the accessible facility exists, even if it ultimately goes unused. Simply because an individual is a nonuser of accessible elements today does not mean that he or she will remain so tomorrow. In any given year, there is some probability that an individual will develop a disability (either temporary or permanent) that will necessitate use of these features. For example, the 2000 Census found that 41.9 percent of adults 65 years and older identified themselves as having a disability. Census Bureau figures, moreover, project that the number of people 65 years and older will more than double between 2000 and 2030—from 35 million to 71.5 million. Therefore, even individuals who have no direct use for accessibility features today get a direct benefit from the knowledge of their existence should such individuals need them in the future.

Existence value is the benefit that individuals get from the plain existence of a good, service or resource—in this case, accessibility. It can also be described as the value that people both with and without disabilities derive from the guarantees of equal treatment and non-discrimination that are accorded through the provision of accessible facilities. In other words, people value living in a country that affords protections to individuals with disabilities, whether or not they themselves are directly or indirectly affected. Unlike use benefits and option value, existence value does not require an individual ever to use the resource or plan on using the resource in the future. There are numerous reasons why individuals might value accessibility even if they do not require it now and do not anticipate needing it in the future.

Costs Not Monetized in the Formal Analysis

The Department also recognizes that in addition to benefits that cannot reasonably be quantified or monetized, there may be negative consequences and costs that fall into this category as well. The absence of a quantitative assessment of such costs in the formal regulatory analysis is not meant to minimize their importance to affected entities; rather, it reflects the inherent difficulty in estimating those costs. Areas where the Department believes entities may incur costs that are not monetized in the formal analysis include, but may not be limited to, the following:

Costs from deferring or forgoing alterations. Entities covered by the final rules may choose to delay otherwise desired alterations to their facilities due to the increased incremental costs imposed by compliance with the new requirements. This may lead to facility deterioration and decrease in the value of such facilities. In extreme cases, the costs of complying with the new requirements may lead some entities to opt to not build certain facilities at all. For example, the Department estimates that the incremental costs of building a new wading pool associated with the final rules will increase by about $142,500 on average. Some facilities may opt to not build such pools to avoid incurring this increased cost.

Loss of productive space while modifying an existing facility. During complex alterations, such as where moving walls or plumbing systems will be necessary to comply with the final rules, productive space may be unavailable until the alterations are complete. For example, a hotel altering its bathrooms to comply with the final rules will be unable to allow guests to occupy these rooms while construction activities are underway, and thus the hotel may forgo revenue from these rooms during this time. While the amount of time necessary to perform alterations varies significantly, the costs associated with unproductive space could be high in certain cases, especially if space is already limited or if an entity or facility is located in an area where real estate values are particularly high (*e.g.*, New York or San Francisco).

Expert fees. Another type of cost to entities that is not monetized in the formal analysis is legal fees to determine what, if anything, a facility needs to do in order to comply with the new rules or to respond to lawsuits. Several commenters indicated that entities will incur increased legal costs because the requirements are changing for the first time since 1991. Since litigation risk could increase, entities could spend more on legal fees than in the past. Likewise, covered entities may face incremental costs when undertaking alterations because their engineers, architects, or other consultants may also need to consider what modifications are necessary to comply with the new requirements. The Department has not quantified the incremental costs of the services of these kinds of experts.

Reduction in facility value and losses to individuals without disabilities due to the new accessibility requirements. It is possible that some changes made by entities to their facilities in order to comply with the new requirements may result in fewer individuals without disabilities using such facilities (because of decreased enjoyment) and may create a disadvantage for individuals without disabilities, even though the change might increase accessibility for individuals with disabilities. For example, the new requirements for wading pools might decrease the value of the pool to the entity that owns it due to fewer individuals using it (because the new requirements for a sloped entry might make the pool too shallow). Similarly, several commenters from the miniature golf industry expressed concern that it would be difficult to comply with the regulations for accessible holes without significantly degrading the experience for other users. Finally, with respect to costs to individuals who do not have disabilities, a very tall person, for example, may be inconvenienced by having to reach further for a lowered light switch.

Section 610 Review

The Department is also required to conduct a periodic regulatory review pursuant to section 610 of the RFA. The review requires agencies to consider five factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. *See* 5 U.S.C. 610(b). Based on these factors, the agency is required to determine whether to continue the rule without change or to amend or rescind the rule, to minimize any significant economic impact of the rule on a substantial number of small entities. *See id.* 610(a).

In developing the 2010 Standards, the Department reviewed the 1991 Standards section by section and, as a result, has made several clarifications and amendments in both the title II and title III implementing regulations. The changes reflect the Department's analysis and review of complaints or comments from the

public, as well as changes in technology. Many of the amendments aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, one significant goal of the development of the 2004 ADAAG was to eliminate duplication or overlap in Federal accessibility guidelines, as well as to harmonize the Federal guidelines with model codes. The Department has also worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

The Department has consulted with the Small Business Administration's Office of Advocacy about this process. The Office of Advocacy has advised that although the process followed by the Department was ancillary to the proposed adoption of revised ADA Standards, the steps taken to solicit public input and to respond to public concerns are functionally equivalent to the process required to complete a section 610 review. Therefore, this rulemaking fulfills the Department's obligations under section 610 of the RFA.

Final Regulatory Flexibility Analysis

The final rule also has been reviewed by the Small Business Administration's Office of Advocacy (Advocacy) in accordance with Executive Order 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247. Chapter Seven of the Final RIA demonstrates that the final rule will not have a significant economic impact on a substantial number of small governmental jurisdictions or facilities. The Department has also conducted a final regulatory flexibility analysis (FRFA) as a component of this rulemaking. Collectively, the ANPRM, NPRM, Initial RIA, Final RIA, and 2010 Standards, include all of the elements of a FRFA required by the Regulatory Flexibility Act (RFA). *See* 5 U.S.C. 604(a)(1)–(5).

Section 604(a) lists the specific requirements for a FRFA. The Department has addressed these RFA requirements throughout the ANPRM, NPRM, the 2010 Standards, and the RIA. In summary, the Department has satisfied its FRFA obligations under section 604(a) by providing the following:

1. *Succinct summaries of the need for, and objectives of, the final rules.* The Department is issuing this final rule in order to comply with its obligations under both the ADA and the SBREFA. The Department is also updating or amending certain provisions of the existing title II regulations so that they are consistent with the title III regulations and accord with the Department's legal and practical experiences in enforcing the ADA.

The ADA requires the Department to adopt enforceable accessibility standards under the ADA that are consistent with the Access Board's minimum accessibility guidelines and requirements. Accordingly, this rule adopts ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as part of the 2010 Standards, which will give the guidelines legal effect with respect to the Department's title II and title III regulations.

Under the SBREFA, the Department is required to perform a periodic review of its 1991 rule because the rule may have a significant economic impact on a substantial number of small entities. The SBREFA also requires the Department to make a regulatory assessment of the costs and benefits of any significant regulatory action. *See* preamble sections of the final rules for titles II and III entitled, ''Summary'' and ''The Department's Rulemaking History''; Department of Justice ANPRM, 69 FR 58768, 58768–70 (Sept. 30, 2004) (outlining the regulatory history, goals, and rationale underlying DOJ's proposal to revise its regulations implementing titles II and III of the ADA); Department of Justice NPRM, 73 FR 34508, 34508– 14 (June 17, 2008) (outlining the regulatory history and rationale underlying DOJ's

proposal to revise its regulations implementing titles II and III of the ADA).

2. *Summaries of significant issues raised by public comments in response to the Department's initial regulatory flexibility analysis (IRFA) and discussions of regulatory revisions made as a result of such comments.* The Department received no comments addressing specific substantive issues regarding the IRFA for the title II NPRM. However, the Office of Advocacy (Advocacy) of the U.S. Small Business Administration did provide specific comments on the title III NPRM, which may be relevant to the title II IRFA. Accordingly, the Department has included those comments here.

Advocacy acknowledged how the Department took into account the comments and concerns of small entities. However, Advocacy remained concerned about certain items in the Department's NPRM and requested clarification or additional guidance on certain items.

General Safe Harbor. Advocacy expressed support for the Department's proposal to allow an element-by-element safe harbor for elements that now comply with the 1991 ADA Standards and encouraged the Department to include specific technical assistance in the Small Business Compliance Guide that the Department is required to publish pursuant to section 212 of the SBREFA. Advocacy requested that technical assistance outlining which standards are subject to the safe harbor be included in the Department's guidance. The Department has provided a list of the new requirements in the 2010 Standards that are not eligible for the safe harbor in § 35.150(b)(2)(ii)(A) through § 35.150(b)(2)(ii)(L) of the final rule and plans to include additional information about the application of the safe harbor in the Department's Small Business Compliance Guide. Advocacy also requested that guidance regarding the two effective dates for regulations also be provided and the Department plans to include such guidance in its Small Business Compliance Guide.

Indirect Costs. Advocacy expressed concern that small entities would incur substantial indirect costs under the final rules for accessibility consultants, legal counsel, training, and the development of new policies and procedures. The Department believes that such ''indirect costs,'' even assuming they would occur as described by Advocacy, are not properly attributed to the Department's final rules implementing the ADA.

The vast majority of the new requirements are incremental changes subject to a safe harbor. All small entities currently in compliance with the 1991 Standards will neither need to undertake further retrofits nor require the services of a consultant to tell them so. If, on the other hand, elements at an existing facility are not currently in compliance with the 1991 Standards, then the cost of making such a determination and bringing these elements into compliance are not properly attributed to the final rules, but to lack of compliance with the 1991 Standards.

For the limited number of requirements in the final rule that are supplemental (*i.e.*, relating to accessibility at courthouses, play areas, and recreation facilities), the Department believes that covered entities simply need to determine whether they have an element covered by a supplemental requirement (*e.g.*, a swimming pool) and then conduct any work necessary to provide program access either in-house or by contacting a local contractor. Determining whether such an element exists is expected to take only a minimal amount of staff time. Nevertheless, Chapter 5.3 of the Final RIA has a high-end estimate of the additional management costs of such evaluation (from 1 to 8 hours of staff time).

The Department also anticipates that small entities will incur minimal costs for accessibility consultants to ensure compliance with the new requirements for New Construction and Alterations in the final rules. Both the 2004 ADAAG and the proposed requirements have been made public for some time and are already being incorporated into design plans by architects

and builders. Further, in adopting the final rules, the Department has sought to harmonize, to the greatest extent possible, the ADA Standards with model codes that have been adopted on a widespread basis by State and local jurisdictions across the country. Accordingly, many of the requirements in the final rules are already incorporated into building codes nationwide. Additionally, it is assumed to be part of the regular course of business—and thereby incorporated into standard professional services or construction contracts—for architects and contractors to keep abreast of changes in applicable Federal, State, and local laws and building codes. Given these considerations, the Department has determined that the additional costs, if any, for architectural or contractor services that arise out of the final rules are expected to be minimal.

Some business commenters stated that the final rules would require them to develop new policies or manuals to retrain employees on the revised ADA standards. However, it is the Department's view that because the revised and supplemental requirements address architectural issues and features, the final rules would require minimal, if any, changes to the overall policies and procedures of covered entities.

Finally, commenters representing business interests expressed the view that the final rules would cause businesses to incur significant legal costs in order to defend ADA lawsuits. However, regulatory impact analyses are not an appropriate forum for assessing the cost covered entities may bear, or the repercussions they may face, for failing to comply (or allegedly failing to comply) with current law. *See* Final RIA, Ch. 3, section 3.1.4, *id.*, at Ch. 5, *id.* at table 15.

3. *Estimates of the number and type of small entities to which the final rules will apply.* The Department estimates that the final rules will apply to approximately 89,000 facilities operated by small governmental jurisdictions covered by title II. *See* Final RIA, Ch. 7, ''Small Business Impact Analysis,'' table 17, and app. 5, ''Small Business Data of the RIA'' (available for review at *http:// www.ada.gov*); *see also* 73 FR 36964 (June 30, 2008), app. B: Initial Regulatory Assessment, sections entitled, ''Regulatory Alternatives,'' ''Regulatory Proposals with Cost Implications,'' and ''Measurement of Incremental Benefits'' (estimating the number of small entities the Department believes may be impacted by the NPRM and calculating the likely incremental economic impact of these rules on small facilities or entities versus ''typical'' (*i.e.*, average-sized) facilities or entities).

4. *A description of the projected reporting, record-keeping, and other compliance requirements of the final rules, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* The final rules impose no new recordkeeping or reporting requirements. *See* preamble sections of the final rule for titles II and III entitled, ''Paperwork Reduction Act.'' Small entities may incur costs as a result of complying with the final rules. These costs are detailed in the Final RIA, Chapter 7, ''Small Business Impact Analysis'' and accompanying Appendix 5, ''Small Business Data'' (available for review at *http://www.ada.gov*).

5. *Descriptions of the steps taken by the Department to minimize any significant economic impact on small entities consistent with the stated objectives of the ADA, including the reasons for selecting the alternatives adopted in the final rules and for rejecting other significant alternatives.* From the outset of this rulemaking, the Department has been mindful of small entities and has taken numerous steps to minimize the impact of the final rule on small governmental jurisdictions. Several of these steps are summarized below.

As an initial matter, the Department— as a voting member of the Access Board—was extensively involved in the development of the 2004 ADAAG. These guidelines, which are

incorporated into the 2010 Standards, reflect a conscious effort to mitigate any significant economic impact on small entities in several respects. First, one of the express goals of the 2004 ADAAG is harmonization of Federal accessibility guidelines with industry standards and model codes that often form the basis of State and local building codes, thereby minimizing the impact of these guidelines on all covered entities, but especially small entities. Second, the 2004 ADAAG is the product of a 10-year rulemaking effort in which a host of private and public entities, including groups representing government entities, worked cooperatively to develop accessibility guidelines that achieved an appropriate balance between accessibility and cost. For example, as originally recommended by the Access Board's Recreation Access Advisory Committee, all holes on a miniature golf course would be required to be accessible except for sloped surfaces where the ball could not come to rest. *See*, *e.g.,* ''ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities and Outdoor Developed Areas,'' Access Board Advance Notice of Proposed Rulemaking, 59 FR 48542 (Sept. 21, 1994). Miniature golf trade groups and facility operators, who are nearly all small businesses or small governmental jurisdictions, expressed significant concern that such requirements would be prohibitively expensive, require additional space, and might fundamentally alter the nature of their courses. *See*, *e.g.,* ''ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities,'' Access Board Notice of Proposed Rulemaking, 64 FR 37326 (July 9, 1999). In consideration of such concerns, and after holding informational meetings with miniature golf representatives and persons with disabilities, the Access Board significantly revised the final miniature golf guidelines. The final guidelines not only reduced significantly the number of holes required to be accessible to 50 percent of all holes (with one break in the sequence of consecutive holes permitted), but also added an exemption for carpets used on playing surfaces, modified ramp landing slope and size requirements, and reduced the space required for start of play areas. *See*, *e.g.,* ''ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities Final Rule,'' 67 FR 56352, 56375B76 (Sept. 3, 2002) (codified at 36 CFR parts 1190 and 1191).

The Department also published an ANPRM to solicit public input on the adoption of the 2004 ADAAG as the revised Federal accessibility standards implementing titles II and III of the ADA. Among other things, the ANPRM specifically invited comment from small entities regarding the proposed rules' potential economic impact and suggested regulatory alternatives to ameliorate any such impact. *See* ANPRM, 69 FR 58768, 58778-79 (Sept. 30, 2004). The Department received over 900 comments and small entities' interests figured prominently. *See* NPRM, 73 FR 34466, 34468, 34501 (June 17, 2008).

Subsequently, when the Department published its NPRM in June 2008, several regulatory proposals were included to address concerns raised by small businesses and small local governmental jurisdictions in ANPRM comments. First, to mitigate costs to existing facilities, the Department proposed an element-by-element safe harbor that would exempt elements in compliance with applicable technical and scoping requirements in the 1991 Standards from any program accessibility retrofit obligations under the revised title II rules. *Id.* at 34485. While this proposed safe harbor applied to title-II covered entities irrespective of size, it was small governmental jurisdictions that especially stood to benefit since, according to comments from small entities, such jurisdictions are more likely to operate in older buildings and facilities. Additionally, the NPRM sought public input on the inclusion of reduced scoping provisions for certain types of small existing recreational

facilities (*i.e.*, swimming pools, play areas, and saunas). *Id.* at 34485-88.

During the NPRM comment period, the Department engaged in considerable public outreach to small entities. A public hearing was held in Washington, D.C, during which nearly 50 persons testified in person or by phone, including several small business owners. *See Transcript of the Public Hearing on Notices of Proposed Rulemaking* (July 15, 2008), available at *http://www.ada.gov/NPRM2008/ public_ hearing_transcript.htm*. This hearing was also streamed live over the Internet. By the end of the 60-day comment period, the Department had also received nearly 4,500 public comments on the NPRMs, including a significant number of comments reflecting the perspectives of small governmental jurisdictions on a wide range of regulatory issues.

In addition to soliciting input from small entities through the formal process for public comment, the Department also targeted small entities with less formal regulatory discussions, including a Small Business Roundtable convened by the Office of Advocacy and held at the offices of the Small Business Administration in Washington, DC, and an informational question-and-answer session concerning the title II and III NPRMs at the Department of Justice in which business representatives attended in-person and by telephone. These outreach efforts provided the small business community with information on the NPRM proposals being considered by the Department and gave small entities the opportunity to ask questions of the Department and provide feedback.

As a result of the feedback provided by representatives of small business interests on the title II NPRM, the Department was able to assess the impact of various alternatives on small governmental jurisdictions before adopting its final rule and took steps to minimize any significant impact on small entities. Most notably, the final rule retains the element-by-element safe harbor, for which the community of small businesses and small governmental jurisdictions voiced strong support. *See* Appendix A discussion of safe harbor (§ 35.150(b)(2)). The Department believes that this element-by-element safe harbor provision will go a long way toward mitigating the economic impact of the final rule on existing facilities owned or operated by small governmental jurisdictions.

Additional regulatory measures mitigating the economic impact of the final rule on entities covered by title II (including small governmental jurisdictions) include deletion of the proposed requirement for captioning of safety and emergency information on scoreboards at sporting venues, retention of the proposed path of travel safe harbor, and extension of the compliance date of the 2010 Standards as applied to new construction and alterations from 6 months to 18 months after publication of the final rule. *See* Appendix A discussions of captioning at sporting venues (§ 35.160), path of travel safe harbor (§ 35.151(b)(4)(ii)(C)), and accessibility standards compliance dates for new construction and alterations (§ 35.151(c)).

One set of proposed alternative measures that would have potentially provided some cost savings to small public entities—the reduced scoping for certain existing recreational facilities— was not adopted by the Department in the final rule. While these proposals were not specific to small entities, they nonetheless might have mitigated the impact of the final rule for some small governmental jurisdictions that owned or operated existing facilities at which these recreational elements were located. *See* Appendix A discussion of existing facilities. The Department gave careful consideration to how best to insulate small entities from overly burdensome costs under the 2010 Standards for existing small play areas, swimming pools, and saunas, while still ensuring accessible and integrated recreational facilities that are of great importance to persons with disabilities. The Department concluded that the

existing program accessibility standard (coupled with the new general element-by-element safe harbor), rather than specific exemptions for these types of existing facilities, is the most efficacious method by which to protect small governmental jurisdictions.

Once the final rule is promulgated, small entities will also have a wealth of documents to assist them in complying with the 2010 Standards. For example, accompanying the title III final rule in the **Federal Register** is the Department's ''Analysis and Commentary on the 2010 ADA Standards for Accessible Design'' (codified as Appendix B to 28 CFR part 36), which provides a plain language description of the revised scoping and technical requirements in these Standards and provides illustrative figures. The Department also expects to publish guidance specifically tailored to small businesses in the form of a small business compliance guide, as well as to publish technical assistance materials of general interest to all covered entities following promulgation of the final rule. Additionally, the Access Board has published a number of guides that discuss and illustrate application of the 2010 Standards to play areas and various types of recreational facilities.

Executive Order 13132

Executive Order 13132, 64 FR 43255, 3 CFR, 2000 Comp., p. 206, requires executive branch agencies to consider whether a rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on State and local governments, a substantial direct effect on the relationship between the Federal Government and the States and localities, or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a rule is likely to have federalism implications, it must consult with State and local elected officials about how to minimize or eliminate the effects.

Title II of the ADA covers State and local government programs, services, and activities and, therefore, clearly has some federalism implications. State and local governments have been subject to the ADA since 1991, and the majority have also been required to comply with the requirements of section 504. Hence, the ADA and the title II regulation are not novel for State and local governments. In its adoption of the 2010 Standards, the Department was mindful of its obligation to meet the objectives of the ADA while also minimizing conflicts between State law and Federal interests.

The 2010 Standards address and minimize federalism concerns. As a member of the Access Board, the Department was privy to substantial feedback from State and local governments throughout the development of the Board's 2004 guidelines. Before those guidelines were finalized as the 2004 ADA/ABA Guidelines, they addressed and minimized federalism concerns expressed by State and local governments during the development process. Because the Department adopted ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as part of the 2010 Standards, the steps taken in the 2004 ADA/ABA Guidelines to address federalism concerns are reflected in the 2010 Standards.

The Department also solicited and received input from public entities in the September 2004 ANPRM and the June 2008 NPRM. Through the ANPRM and NPRM processes, the Department solicited comments from elected State and local officials and their representative national organizations about the potential federalism implications. The Department received comments addressing whether the ANPRM and NPRM directly affected State and local governments, the relationship between the Federal Government and the States, and the distribution of power and responsibilities among the various levels of government. This rule preempts State laws affecting entities subject to the ADA only to the extent that those laws conflict with the

requirements of the ADA, as set forth in the rule.

Title III of the ADA covers public accommodations and commercial facilities. These facilities are generally subject to regulation by different levels of government, including Federal, State, and local governments. The ADA and the Department's implementing regulations set minimum civil rights protections for individuals with disabilities that in turn may affect the implementation of State and local laws, particularly building codes. The Department's implementing regulations address federalism concerns and mitigate federalism implications, particularly the provisions that streamline the administrative process for State and local governments seeking ADA code certification under title III.

National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that as a general matter, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally non-profit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities. Public Law 104– 113, section 12(d) (1) (15 U.S.C. 272 note). In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources. *Id.* at section 12(d)(1). The Department, as a member of the Access Board, was an active participant in the lengthy process of developing the 2004 ADAAG, on which the 2010 Standards are based. As part of this update, the Board has made its guidelines more consistent with model building codes, such as the IBC, and industry standards. It coordinated extensively with model code groups and standard-setting bodies throughout the process so that differences could be reconciled. As a result, a historic level of harmonization has been achieved that has brought about improvements to the guidelines, as well as to counterpart provisions in the IBC and key industry standards, including those for accessible facilities issued through the American National Standards Institute.

Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800) 514–0301 (voice); (800) 514–0383 (TTY) that the public is welcome to call at any time to obtain assistance in understanding anything in this rule. If any commenter has suggestions for how the regulation could be written more clearly, please contact Janet L. Blizard, Deputy Chief or Barbara J. Elkin, Attorney Advisor, Disability Rights Section, whose contact information is provided in the introductory section of this rule, entitled, **"FOR FURTHER INFORMATION CONTACT."**

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (PRA) requires agencies to clear forms and record keeping requirements with OMB before they can be introduced. 44 U.S.C. 3501 *et seq*. This rule does not contain any paperwork or record keeping requirements and does not require clearance under the PRA.

Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that ''establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.'' Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Part 35

Administrative practice and procedure, Buildings and facilities, Civil rights, Communications, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments.

• By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 204 of the Americans with Disabilities Act of 1990, Pub. L. 101– 336, 42 U.S.C. 12134, and for the reasons set forth in Appendix A to 28 CFR part 35, chapter I of title 28 of the Code of Federal Regulations shall be amended as follows—

Title II Regulations

Revised Final Title II Regulation with Integrated Text

Department of Justice

This revised title II regulation integrates the Department's new regulatory provisions with the text of the existing title II regulation that was unchanged by the 2010 revisions.

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES
(as amended by the final rule published on September 15, 2010)

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

Subpart A—General

§ 35.101 Purpose.

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.

§ 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are not subject to the requirements of this part.

§ 35.103 Relationship to other laws.

(a) *Rule of interpretation.* Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to that title.

(b) *Other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

§ 35.104 Definitions.

For purposes of this part, the term—

1991 Standards means the requirements set forth in the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to 28 CFR part 36.

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in § 35.151.

Act means the Americans with Disabilities Act (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services includes—

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)

(i) The phrase *physical or mental impairment* means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase *physical or mental impairment* does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase *is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term *disability* does not include—

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Historic preservation programs means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law.

Housing at a place of education means housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This

definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

Public entity means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794), as amended.

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 35.160(d).

Wheelchair means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207 (c)(2).

§ 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

§ 35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 35.107 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

§§ 35.108—35.129 [Reserved]

Subpart B—General Requirements

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)

(1) A public entity, in providing any aid, benefit, or service, may not, directly or through

contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration—

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or

procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)

(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

§ 35.131 Illegal use of drugs.

(a) General.

(1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) *Health and drug rehabilitation services.*

(1) A public entity shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) *Drug testing*.

(1) This part does not prohibit a public entity from adopting or administering reasonable policies or procedures, including but not limited

to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

§ 35.132 Smoking.

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in transportation covered by this part.

§ 35.133 Maintenance of accessible features.

(a) A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

(c) If the 2010 Standards reduce the technical requirements or the number of required accessible elements below the number required by the 1991 Standards, the technical requirements or the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the 2010 Standards.

§ 35.134 Retaliation or coercion.

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

§ 35.135 Personal devices and services.

This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

§ 35.136 Service animals.

(a) *General*. Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(b) *Exceptions*. A public entity may ask an individual with a disability to remove a service animal from the premises if—

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

(c) *If an animal is properly excluded*. If a public entity properly excludes a service animal under § 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.

(d) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.*, voice control, signals, or other effective means).

(e) *Care or supervision*. A public entity is not responsible for the care or supervision of a service animal.

(f) *Inquiries*. A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.*, the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(g) *Access to areas of a public entity*. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.

(h) *Surcharges*. A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

(i) *Miniature horses*.

(1) *Reasonable modifications*. A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(2) *Assessment factors*. In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider—

(i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

(ii) Whether the handler has sufficient control of the miniature horse;

(iii) Whether the miniature horse is housebroken; and

(iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(3) *Other requirements*. Paragraphs 35.136 (c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.

§ 35.137 Mobility devices.

(a) *Use of wheelchairs and manually-powered mobility aids*. A public entity shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.

(b)

(1) *Use of other power-driven mobility devices.* A public entity shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public entity can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public entity has adopted pursuant to § 35.130(h).

(2) *Assessment factors*. In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public entity shall consider—

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics (*e.g.*, whether its service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.

(c)

(1) *Inquiry about disability*. A public entity shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) *Inquiry into use of other power-driven mobility device.* A public entity may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A public entity that permits the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation of a valid, State-issued, disability parking placard or card, or other State-issued proof of disability as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a public entity shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards.

§ 35.138 Ticketing.

(a)

(1) For the purposes of this section, "accessible seating" is defined as wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (d) of this section.

(2) *Ticket sales*. A public entity that sells tickets for a single event or series of events shall modify its policies, practices, or procedures to ensure that individuals with disabilities have an equal opportunity to purchase tickets for accessible seating—

(i) During the same hours;

(ii) During the same stages of ticket sales, including, but not limited to, pre-sales, promotions, lotteries, wait-lists, and general sales;

(iii) Through the same methods of distribution;

(iv) In the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons; and

(v) Under the same terms and conditions as other tickets sold for the same event or series of events.

(b) *Identification of available accessible seating*. A public entity that sells or distributes tickets for a single event or series of events shall, upon inquiry—

(1) Inform individuals with disabilities, their companions, and third parties purchasing tickets for accessible seating on behalf of individuals with disabilities of the locations of all unsold or otherwise available accessible seating for any ticketed event or events at the facility;

(2) Identify and describe the features of available accessible seating in enough detail to reasonably permit an individual with a disability to assess independently whether a given accessible seating location meets his or her accessibility needs; and

(3) Provide materials, such as seating maps, plans, brochures, pricing charts, or other information, that identify accessible seating and information relevant thereto with the same text or visual representations as other seats, if such materials are provided to the general public.

(c) *Ticket prices*. The price of tickets for accessible seating for a single event or series of events shall not be set higher than the price for other tickets in the same seating section for the same event or series of events. Tickets for accessible seating must be made available at all price levels for every event or series of events. If tickets for accessible seating at a particular price level are not available because of inaccessible features, then the percentage of tickets for accessible seating that should have been available at that price level (determined by the ratio of the total number of tickets at that price level to the total number of tickets in the assembly area) shall be offered for purchase, at that price level, in a nearby or similar accessible location.

(d) *Purchasing multiple tickets.*

(1) *General.* For each ticket for a wheelchair space purchased by an individual with a disability or a third-party purchasing such a ticket at his or her request, a public entity shall make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. A public entity is not required to provide more than three contiguous seats for each wheelchair space. Such seats may include wheelchair spaces.

(2) *Insufficient additional contiguous seats available*. If patrons are allowed to purchase at least four tickets, and there are fewer than three such additional contiguous seat tickets available for purchase, a public entity shall offer the next highest number of such seat tickets available for purchase and shall make up the difference by offering tickets for sale for seats that are as close as possible to the accessible seats.

(3) *Sales limited to less than four tickets.* If a public entity limits sales of tickets to fewer than four seats per patron, then the public entity is only obligated to offer as many seats to patrons with disabilities, including the ticket for the wheelchair space, as it would offer to patrons without disabilities.

(4) *Maximum number of tickets patrons may purchase exceeds four*. If patrons are allowed to purchase more than four tickets, a public entity shall allow patrons with disabilities to purchase up to the same number of tickets, including the ticket for the wheelchair space.

(5) *Group sales*. If a group includes one or more individuals who need to use accessible seating because of a mobility disability or because their disability requires the use of the accessible features that are provided in accessible seating, the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group

who use wheelchairs are not isolated from their group.

(e) *Hold-and-release of tickets for accessible seating*.

(1) *Tickets for accessible seating may be released for sale in certain limited circumstances*. A public entity may release unsold tickets for accessible seating for sale to individuals without disabilities for their own use for a single event or series of events only under the following circumstances—

(i) When all non-accessible tickets (excluding luxury boxes, club boxes, or suites) have been sold;

(ii) When all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area; or

(iii) When all non-accessible tickets in a designated price category have been sold and the tickets for accessible seating are being released within the same designated price category.

(2) *No requirement to release accessible tickets*. Nothing in this paragraph requires a facility to release tickets for accessible seating to individuals without disabilities for their own use.

(3) *Release of series-of-events tickets on a series-of-events basis.*

(i) Series-of-events tickets sell-out when no ownership rights are attached. When series-of-events tickets are sold out and a public entity releases and sells accessible seating to individuals without disabilities for a series of events, the public entity shall establish a process that prevents the automatic reassignment of the accessible seating to such ticket holders for future seasons, future years, or future series so that individuals with disabilities who require the features of accessible seating and who become newly eligible to purchase tickets when these series-of-events tickets are available for purchase have an opportunity to do so.

(ii) *Series-of-events tickets when ownership rights are attached.* When series-of-events tickets with an ownership right in accessible seating areas are forfeited or otherwise returned to a public entity, the public entity shall make reasonable modifications in its policies, practices, or procedures to afford individuals with mobility disabilities or individuals with disabilities that require the features of accessible seating an opportunity to purchase such tickets in accessible seating areas.

(f) *Ticket transfer.* Individuals with disabilities who hold tickets for accessible seating shall be permitted to transfer tickets to third parties under the same terms and conditions and to the same extent as other spectators holding the same type of tickets, whether they are for a single event or series of events.

(g) *Secondary ticket market.*

(1) A public entity shall modify its policies, practices, or procedures to ensure that an individual with a disability may use a ticket acquired in the secondary ticket market under the same terms and conditions as other individuals who hold a ticket acquired in the secondary ticket market for the same event or series of events.

(2) If an individual with a disability acquires a ticket or series of tickets to an inaccessible seat through the secondary market, a public entity shall make reasonable modifications to its policies, practices, or procedures to allow the individual to exchange his ticket for one to an accessible seat in a comparable location if accessible seating is vacant at the time the individual presents the ticket to the public entity.

(h) *Prevention of fraud in purchase of tickets for accessible seating*. A public entity may not require proof of disability, including, for example, a doctor's note, before selling tickets for accessible seating.

(1) *Single-event tickets*. For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the tickets for accessible seating has a mobility disability or a disability that requires the use of the accessible features that are provided in accessible seating, or is purchasing the tickets for an individual who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

(2) *Series-of-events tickets.* For series-of-events tickets, it is permissible to ask the individual purchasing the tickets for accessible seating to attest in writing that the accessible seating is for a person who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

(3) *Investigation of fraud.* A public entity may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

§ 35.139 Direct threat.

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

Subpart C—Employment

§ 35.140 Employment discrimination prohibited.

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

(b)

(1) For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.

(2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

§§ 35.141—35.148 [Reserved]

Subpart D—Program Accessibility

§ 35.149 Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

§ 35.150 Existing facilities.

(a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety,

is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with §35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) *Methods.*

(1) *General*. A public entity may comply with the requirements of this section through such means as redesign or acquisition of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2)

(i) *Safe harbor.* Elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 Standards or in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984) are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

(ii) The safe harbor provided in § 35.150(b)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (*i.e.*, elements for which there are neither technical nor scoping specifications in the 1991 Standards). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows—

(A) *Residential facilities dwelling units*, sections 233 and 809.

(B) *Amusement rides*, sections 234 and 1002; 206.2.9; 216.12.

(C) *Recreational boating facilities*, sections 235 and 1003; 206.2.10.

(D) *Exercise machines and equipment*,

sections 236 and 1004; 206.2.13.

(E) *Fishing piers and platforms*, sections 237 and 1005; 206.2.14.

(F) *Golf facilities*, sections 238 and 1006; 206.2.15.

(G) *Miniature golf facilities*, sections 239 and 1007; 206.2.16.

(H) *Play areas*, sections 240 and 1008; 206.2.17.

(I) *Saunas and steam rooms*, sections 241 and 612.

(J) *Swimming pools, wading pools, and spas*, sections 242 and 1009.

(K) *Shooting facilities with firing positions*, sections 243 and 1010.

(L) *Miscellaneous*.

(1) Team or player seating, section 221.2.1.4.

(2) Accessible route to bowling lanes, section. 206.2.11.

(3) Accessible route in court sports facilities, section 206.2.12.

(3) *Historic preservation programs*. In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance*. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) *Transition plan*.

(1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum—

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied

with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

§ 35.151 New construction and alterations

(a) *Design and construction*.

(1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(2) *Exception for structural impracticability*.

(i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(iii) If providing accessibility in conformance with this section to individuals with certain disabilities (*e.g.,* those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities, (*e.g.,* those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

(b) *Alterations*.

(1) Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(2) The path of travel requirements of § 35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.

(3)

(i) Alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c).

(ii) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(4) *Path of travel*. An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

(i) *Primary function*. A "primary function" is a major activity for which the facility is intended. Areas that contain a primary function include, but are not limited to, the dining area of a cafeteria, the meeting rooms

in a conference center, as well as offices and other work areas in which the activities of the public entity using the facility are carried out.

(A) Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Restrooms are not areas containing a primary function unless the provision of restrooms is a primary purpose of the area, *e.g.,* in highway rest stops.

(B) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.

(ii) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

(A) An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.

(B) For the purposes of this section, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving the altered area.

(C) *Safe harbor*. If a public entity has constructed or altered required elements of a path of travel in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standards before March 15, 2012, the public entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

(iii) *Disproportionality*.

(A) Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20 % of the cost of the alteration to the primary function area.

(B) Costs that may be counted as expenditures required to provide an accessible path of travel may include:

(1) Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

(2) Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;

(3) Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a text telephone (TTY); and

(4) Costs associated with relocating an inaccessible drinking fountain.

(iv) *Duty to provide accessible features in the event of disproportionality*.

(A) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

(B) In choosing which accessible elements to provide, priority should be given

to those elements that will provide the greatest access, in the following order—

(1) An accessible entrance;

(2) An accessible route to the altered area;

(3) At least one accessible restroom for each sex or a single unisex restroom;

(4) Accessible telephones;

(5) Accessible drinking fountains; and

(6) When possible, additional accessible elements such as parking, storage, and alarms.

(v) *Series of smaller alterations*.

(A) The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.

(B)

(*1*) If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three-year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate.

(*2*) Only alterations undertaken on or after March 15, 2011 shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.

(c) *Accessibility standards and compliance date*.

(1) If physical construction or alterations commence after July 26, 1992, but prior to September 15, 2010, then new construction and alterations subject to this section must comply with either the UFAS or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply. Departures from particular requirements of either standard

Appendix to § 35.151(c)

Compliance Dates for New Construction and Alterations	**Applicable Standards**
Before September 15, 2010	1991 Standards or UFAS
On or after September 15, 2010, and before March 15, 2012	1991 Standards, UFAS, or 2010 Standards
On or after March 15, 2012	2010 Standards

by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(2) If physical construction or alterations commence on or after September 15, 2010, and before March 15, 2012, then new construction and alterations subject to this section may comply with one of the following: the 2010 Standards, UFAS, or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(3) If physical construction or alterations commence on or after March 15, 2012, then new construction and alterations subject to this section shall comply with the 2010 Standards.

(4) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation do not commence physical construction or alterations.

(5) *Noncomplying new construction and alterations*.

(i) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012, and that do not comply with the 1991 Standards or with UFAS shall before March 15, 2012, be made accessible in accordance with either the 1991 Standards, UFAS, or the 2010 Standards.

(ii) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards or with UFAS shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

(d) *Scope of coverage*. The 1991 Standards and the 2010 Standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site. Unless specifically stated otherwise, the advisory notes, appendix notes, and figures contained in the 1991 Standards and the 2010 Standards explain or illustrate the requirements of the rule; they do not establish enforceable requirements.

(e) *Social service center establishments*. Group homes, halfway houses, shelters, or similar social service center establishments that provide either temporary sleeping accommodations or residential dwelling units that are subject to this section shall comply with the provisions of the 2010 Standards applicable to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

(1) In sleeping rooms with more than 25 beds covered by this section, a minimum of 5% of the beds shall have clear floor space complying with section 806.2.3 of the 2010 Standards.

(2) Facilities with more than 50 beds covered by this section that provide common use bathing facilities, shall provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group.

(f) *Housing at a place of education*. Housing at a place of education that is subject to this section shall comply with the provisions of the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806 subject to the following exceptions. For the purposes of the application of this section,

the term "sleeping room" is intended to be used interchangeably with the term "guest room" as it is used in the transient lodging standards.

(1) Kitchens within housing units containing accessible sleeping rooms with mobility features (including suites and clustered sleeping rooms) or on floors containing accessible sleeping rooms with mobility features shall provide turning spaces that comply with section 809.2.2 of the 2010 Standards and kitchen work surfaces that comply with section 804.3 of the 2010 Standards.

(2) Multi-bedroom housing units containing accessible sleeping rooms with mobility features shall have an accessible route throughout the unit in accordance with section 809.2 of the 2010 Standards.

(3) Apartments or townhouse facilities that are provided by or on behalf of a place of education, which are leased on a year-round basis exclusively to graduate students or faculty, and do not contain any public use or common use areas available for educational programming, are not subject to the transient lodging standards and shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

(g) *Assembly areas*. Assembly areas subject to this section shall comply with the provisions of the 2010 Standards applicable to assembly areas, including, but not limited to, sections 221 and 802. In addition, assembly areas shall ensure that—

(1) In stadiums, arenas, and grandstands, wheelchair spaces and companion seats are dispersed to all levels that include seating served by an accessible route;

(2) Assembly areas that are required to horizontally disperse wheelchair spaces and companion seats by section 221.2.3.1 of the 2010 Standards and have seating encircling, in whole or in part, a field of play or performance area shall disperse wheelchair spaces and companion seats around that field of play or performance area;

(3) Wheelchair spaces and companion seats are not located on (or obstructed by) temporary platforms or other movable structures, except that when an entire seating section is placed on temporary platforms or other movable structures in an area where fixed seating is not provided, in order to increase seating for an event, wheelchair spaces and companion seats may be placed in that section. When wheelchair spaces and companion seats are not required to accommodate persons eligible for those spaces and seats, individual, removable seats may be placed in those spaces and seats;

(4) Stadium-style movie theaters shall locate wheelchair spaces and companion seats on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria—

(i) It is located within the rear 60% of the seats provided in an auditorium; or

(ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

(h) *Medical care facilities*. Medical care facilities that are subject to this section shall comply with the provisions of the 2010 Standards applicable to medical care facilities, including, but not limited to, sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 of the 2010 Standards in a manner that is proportionate by type of medical specialty.

(i) *Curb ramps*.

(1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

(j) *Facilities with residential dwelling units for sale to individual owners*.

(1) Residential dwelling units designed and constructed or altered by public entities that will be offered for sale to individuals shall comply with the requirements for residential facilities in the 2010 Standards including sections 233 and 809.

(2) The requirements of paragraph (1) also apply to housing programs that are operated by public entities where design and construction of particular residential dwelling units take place only after a specific buyer has been identified. In such programs, the covered entity must provide the units that comply with the requirements for accessible features to those pre-identified buyers with disabilities who have requested such a unit.

(k) *Detention and correctional facilities*.

(1) New construction of jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards except that public entities shall provide accessible mobility features complying with section 807.2 of the 2010 Standards for a minimum of 3%, but no fewer than one, of the total number of cells in a facility. Cells with mobility features shall be provided in each classification level.

(2) *Alterations to detention and correctional facilities*. Alterations to jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards except that public entities shall provide accessible mobility features complying with section 807.2 of the 2010 Standards for a minimum of 3%, but no fewer than one, of the total number of cells being altered until at least 3%, but no fewer than one, of the total number of cells in a facility shall provide mobility features complying with section 807.2. Altered cells with mobility features shall be provided in each classification level. However, when alterations are made to specific cells, detention and correctional facility operators may satisfy their obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (cells other than those where alterations are originally planned), provided that each substitute cell—

(i) Is located within the same prison site;

(ii) Is integrated with other cells to the maximum extent feasible;

(iii) Has, at a minimum, equal physical access as the altered cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees; and,

(iv) If it is technically infeasible to locate a substitute cell within the same prison site, a substitute cell must be provided at another prison site within the corrections system.

(3) With respect to medical and long-term care facilities in jails, prisons, and other detention and correctional facilities, public entities shall apply the 2010 Standards technical and scoping requirements for those facilities irrespective of whether those facilities are licensed.

§ 35.152 Jails, detention and correctional facilities, and community correctional facilities.

(a) *General*. This section applies to public entities that are responsible for the operation or management of adult and juvenile justice jails, detention and correctional facilities, and community correctional facilities, either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.

(b) *Discrimination prohibited*.

(1) Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a public entity–

(i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;

(ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed; and

(iv) Shall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.

(3) Public entities shall implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.

§§ 35.153—35.159 [Reserved]

Subpart E—Communications

§ 35.160 General.

(a)

(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

(2) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

(b)

(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(c)

(1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.

(2) A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(3) A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) *Video remote interpreting (VRI) services.* A public entity that chooses to provide qualified interpreters via VRI services shall ensure that it provides—

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

§ 35.161 Telecommunications.

(a) Where a public entity communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

(b) When a public entity uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay system, including Internet-based relay systems.

(c) A public entity shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

§ 35.162 Telephone emergency services.

Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDD's and computer modems.

§ 35.163 Information and signage.

(a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(b) A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

§ 35.164 Duties.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue

financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

§§ 35.165—35.169 [Reserved]

Subpart F—Compliance Procedures

§ 35.170 Complaints.

(a) *Who may file*. An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

(b) *Time for filing*. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.

(c) *Where to file*. An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in §35.171(a)(2).

§ 35.171 Acceptance of complaints.

(a) *Receipt of complaints*.

(1)

(i) Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall promptly review the complaint to determine whether it has jurisdiction over the complaint under section 504.

(ii) If the agency does not have section 504 jurisdiction, it shall promptly determine whether it is the designated agency under subpart G of this part responsible for complaints filed against that public entity.

(2)

(i) If an agency other than the Department of Justice determines that it does not have section 504 jurisdiction and is not the designated agency, it shall promptly refer the complaint to the appropriate designated agency, the agency that has section 504 jurisdiction, or the Department of Justice, and so notify the complainant.

(ii) When the Department of Justice receives a complaint for which it does not have jurisdiction under section 504 and is not the designated agency, it may exercise jurisdiction pursuant to § 35.190(e) or refer the complaint to an agency that does have jurisdiction under section 504 or to the appropriate agency designated in subpart G of this part or, in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

(3)

(i) If the agency that receives a complaint has section 504 jurisdiction, it shall process the complaint according to its procedures for enforcing section 504.

(ii) If the agency that receives a complaint does not have section 504 jurisdiction, but is the designated agency, it shall process the complaint according to the procedures established by this subpart.

(b) *Employment complaints*.

(1) If a complaint alleges employment discrimination subject to title I of the Act, and the agency has section 504 jurisdiction, the agency shall follow the procedures issued by the Department of Justice and the Equal Employment Opportunity Commission under section 107(b) of the Act.

(2) If a complaint alleges employment discrimination subject to title I of the Act, and the designated agency does not have section 504 jurisdiction, the agency shall refer the complaint to the Equal Employment Opportunity Commission for processing under title I of the Act.

(3) Complaints alleging employment discrimination subject to this part, but not to title I of the Act shall be processed in accordance with the procedures established by this subpart.

(c) *Complete complaints*.

(1) A designated agency shall accept all complete complaints under this section and shall promptly notify the complainant and the public entity of the receipt and acceptance of the complaint.

(2) If the designated agency receives a complaint that is not complete, it shall notify the complainant and specify the additional information that is needed to make the complaint a complete complaint. If the complainant fails to complete the complaint, the designated agency shall close the complaint without prejudice.

§ 35.172 Investigations and compliance reviews.

(a) The designated agency shall investigate complaints for which it is responsible under § 35.171.

(b) The designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part.

(c) Where appropriate, the designated agency shall attempt informal resolution of any matter being investigated under this section, and, if resolution is not achieved and a violation is found, issue to the public entity and the complainant, if any, a Letter of Findings that shall include—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found (including compensatory damages where appropriate); and

(3) Notice of the rights and procedures available under paragraph (d) of this section and §§ 35.173 and 35.174.

(d) At any time, the complainant may file a private suit pursuant to section 203 of the Act, 42 U.S.C. 12133, whether or not the designated agency finds a violation.

§ 35.173 Voluntary compliance agreements.

(a) When the designated agency issues a noncompliance Letter of Findings, the designated agency shall—

(1) Notify the Assistant Attorney General by forwarding a copy of the Letter of Findings to the Assistant Attorney General; and

(2) Initiate negotiations with the public entity to secure compliance by voluntary means.

(b) Where the designated agency is able to secure voluntary compliance, the voluntary compliance agreement shall—

(1) Be in writing and signed by the parties;

(2) Address each cited violation;

(3) Specify the corrective or remedial action to be taken, within a stated period of time, to come into compliance;

(4) Provide assurance that discrimination will not recur; and

(5) Provide for enforcement by the Attorney General.

§ 35.174 Referral.

If the public entity declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency shall refer the matter to the Attorney General with a recommendation for appropriate action.

§ 35.175 Attorney's fees.

In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 35.176 Alternative means of dispute resolution.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act and this part.

§ 35.177 Effect of unavailability of technical assistance.

A public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

§ 35.178 State immunity.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

§§ 35.179—35.189 [Reserved]

Subpart G—Designated Agencies

§ 35.190 Designated Agencies.

(a) The Assistant Attorney General shall coordinate the compliance activities of Federal agencies with respect to State and local government components, and shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part.
(b) The Federal agencies listed in paragraph (b)(1)-(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(1) *Department of Agriculture*: All programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services.

(2) *Department of Education:* All programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry,

nursing, and other health-related schools), and libraries.

(3) *Department of Health and Human Services*: All programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools, the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs, and preschool and daycare programs.

(4) *Department of Housing and Urban Development:* All programs, services, and regulatory activities relating to state and local public housing, and housing assistance and referral.

(5) *Department of Interior:* All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums.

(6) *Department of Justice:* All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (*e.g.,* audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

(7) *Department of Labor:* All programs, services, and regulatory activities relating to labor and the work force.

(8) *Department of Transportation:* All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.

(c) Responsibility for the implementation of subpart F of this part for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specific designated agencies by paragraph (b) of this section may be assigned to other specific agencies by the Department of Justice.

(d) If two or more agencies have apparent responsibility over a complaint, the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

(e) When the Department receives a complaint directed to the Attorney General alleging a violation of this part that may fall within the jurisdiction of a designated agency or another Federal agency that may have jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part.

§§ 35.191—35.999 [Reserved]

Title II Regulations

2010 Guidance and Section-by-Section Analysis

Department of Justice

Appendix A to Part 35—Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services

Note: This Appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR part 35 published on September 15, 2010.

Section-By-Section Analysis and Response to Public Comments

This section provides a detailed description of the Department's changes to the title II regulation, the reasoning behind those changes, and responses to public comments received on these topics. The Section-by-Section Analysis follows the order of the title II regulation itself, except that, if the Department has not changed a regulatory section, the unchanged section has not been mentioned.

Subpart A—General

Section 35.104 Definitions.

''1991 Standards'' and ''2004 ADAAG''
The Department has included in the final rule new definitions of both the ''1991 Standards'' and the ''2004 ADAAG.'' The term ''1991 Standards'' refers to the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to part 36. The term ''2004 ADAAG'' refers to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines, which were issued by the Access Board on July 23, 2004, 36 CFR 1191, app. B and D (2009), and which the Department has adopted in this final rule. These terms are included in the definitions section for ease of reference.

''2010 Standards''
The Department has added to the final rule a definition of the term ''2010 Standards.'' The term ''2010 Standards'' refers to the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in § 35.151.

''Auxiliary Aids and Services''
In the NPRM, the Department proposed revisions to the definition of auxiliary aids and services under § 35.104 to include several additional types of auxiliary aids that have become more readily available since the promulgation of the 1991 title II regulation, and in recognition of new technology and devices available in some places that may provide effective communication in some situations.

The NPRM proposed adding an explicit reference to written notes in the definition of ''auxiliary aids.'' Although this policy was already enunciated in the Department's 1993 Title II Technical Assistance Manual at II– 7.1000, the Department proposed inclusion in the regulation itself because some Title II entities do not understand that exchange of written notes using paper and pencil is an available option in some circumstances. *See* Department of Justice, *The Americans with Disabilities Act, Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1993), available at *http://www.ada.gov/ taman2.html.* Comments from several disability advocacy organizations and individuals discouraged the Department from including the exchange of written notes in the list of available auxiliary aids in § 35.104. Advocates and persons with disabilities requested explicit limits on the use of written notes as a form of auxiliary aid because, they argue, most exchanges are not simple and are not communicated effectively using handwritten notes. One major advocacy organization, for example, noted that the speed at which individuals communicate orally or use sign language averages about 200 words per minute or more while exchange of notes often leads to truncated or incomplete communication. For

persons whose primary language is American Sign Language (ASL), some commenters pointed out, using written English in exchange of notes often is ineffective because ASL syntax and vocabulary is dissimilar from English. By contrast, some commenters from professional medical associations sought more specific guidance on when notes are allowed, especially in the context of medical offices and health care situations.

Exchange of notes likely will be effective in situations that do not involve substantial conversation, for example, blood work for routine lab tests or regular allergy shots. Video Interpreting Services (hereinafter referred to as ''video remote interpreting services'' or VRI) or an interpreter should be used when the matter involves greater complexity, such as in situations requiring communication of medical history or diagnoses, in conversations about medical procedures and treatment decisions, or when giving instructions for care at home or elsewhere. In the Section-By-Section Analysis of § 35.160 (Communications) below, the Department discusses in greater detail the kinds of situations in which interpreters or captioning would be necessary. Additional guidance on this issue can be found in a number of agreements entered into with health-care providers and hospitals that are available on the Department's Web site at *http://www.ada.gov*.

In the NPRM, in paragraph (1) of the definition in § 35.104, the Department proposed replacing the term ''telecommunications devices for deaf persons (TDD)'' with the term ''text telephones (TTYs).'' TTY has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. Commenters representing advocates and persons with disabilities expressed approval of the substitution of TTY for TDD in the proposed regulation.

Commenters also expressed the view that the Department should expand paragraph (1) of the definition of auxiliary aids to include ''TTY's and other voice, text, and video-based telecommunications products and systems such as videophones and captioned telephones.'' The Department has considered these comments and has revised the definition of ''auxiliary aids'' to include references to voice, text, and video-based telecommunications products and systems, as well as accessible electronic and information technology.

In the NPRM, the Department also proposed including a reference in paragraph (1) to a new technology, Video Interpreting Services (VIS). The reference remains in the final rule. VIS is discussed in the Section-By- Section Analysis below in reference to § 35.160 (Communications), but is referred to as VRI in both the final rule and Appendix A to more accurately reflect the terminology used in other regulations and among users of the technology.

In the NPRM, the Department noted that technological advances in the 18 years since the ADA's enactment had increased the range of auxiliary aids and services for those who are blind or have low vision. As a result the Department proposed additional examples to paragraph (2) of the definition, including Brailled materials and displays, screen reader software, optical readers, secondary auditory programs (SAP), and accessible electronic and information technology. Some commenters asked for more detailed requirements for auxiliary aids for persons with vision disabilities. The Department has decided it will not make additional changes to that provision at this time.

Several comments suggested expanding the auxiliary aids provision for persons who are both deaf and blind, and in particular, to include in the list of auxiliary aids a new category, ''support service providers (SSP),'' which was described in comments as a navigator and communication facilitator. The Department believes that services provided by communication facilitators are already encompassed in the requirement to provide qualified interpreters. Moreover, the

Department is concerned that as described by the commenters, the category of support service providers would include some services that would be considered personal services and that do not qualify as auxiliary aids. Accordingly, the Department declines to add this new category to the list at this time.

Some commenters representing advocacy organizations and individuals asked the Department to explicitly require title II entities to make any or all of the devices or technology available in all situations upon the request of the person with a disability. The Department recognizes that such devices or technology may provide effective communication and in some circumstances may be effective for some persons, but the Department does not intend to require that every entity covered by title II provide every device or all new technology at all times as long as the communication that is provided is as effective as communication with others. The Department recognized in the preamble to the 1991 title II regulation that the list of auxiliary aids was ''not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology.'' 28 CFR part 35, app. A at 560 (2009). The Department continues to endorse that view; thus, the inclusion of a list of examples of possible auxiliary aids in the definition of ''auxiliary aids'' should not be read as a mandate for a title II entity to offer every possible auxiliary aid listed in the definition in every situation.

''Direct Threat''

In Appendix A of the Department's 1991 title II regulation, the Department included a detailed discussion of ''direct threat'' that, among other things, explained that principles established in § 36.208 of the Department's [title III] regulation'' were ''applicable'' as well to title II, insofar as ''questions of safety are involved.'' 28 CFR part 35, app. A at 565 (2009). In the final rule, the Department has included an explicit definition of ''direct threat'' that is parallel to the definition in the title III rule and placed it in the definitions section at § 35.104.

''Existing Facility''

The 1991 title II regulation provided definitions for ''new construction'' at § 35.151(a) and ''alterations'' at § 35.151(b). In contrast, the term ''existing facility'' was not explicitly defined, although it is used in the statute and regulations for title II. *See* 42 U.S.C. 12134(b); 28 CFR 35.150. It has been the Department's view that newly constructed or altered facilities are also existing facilities with continuing program access obligations, and that view is made explicit in this rule.

The classification of facilities under the ADA is neither static nor mutually exclusive. Newly constructed or altered facilities are also existing facilities. A newly constructed facility remains subject to the accessibility standards in effect at the time of design and construction, with respect to those elements for which, at that time, there were applicable ADA Standards. And at some point, the facility may undergo alterations, which are subject to the alterations requirements in effect at the time. *See* § 35.151(b)–(c). The fact that the facility is also an existing facility does not relieve the public entity of its obligations under the new construction and alterations requirements in this part.

For example, a facility constructed or altered after the effective date of the original title II regulations but prior to the effective date of the revised title II regulation and Standards, must have been built or altered in compliance with the Standards (or UFAS) in effect at that time, in order to be in compliance with the ADA. In addition, a ''newly constructed'' facility or ''altered'' facility is also an ''existing facility'' for purposes of application of the title II program accessibility requirements. Once the 2010 Standards take effect, they will become the new

reference point for determining the program accessibility obligations of all existing facilities. This is because the ADA contemplates that as our knowledge and understanding of accessibility advances and evolves, this knowledge will be incorporated into and result in increased accessibility in the built environment. Under title II, this goal is accomplished through the statute's program access framework. While newly constructed or altered facilities must meet the accessibility standards in effect at the time, the fact that these facilities are also existing facilities ensures that the determination of whether a program is accessible is not frozen at the time of construction or alteration. Program access may require consideration of potential barriers to access that were not recognized as such at the time of construction or alteration, including, but not limited to, the elements that are first covered in the 2010 Standards, as that term is defined in § 35.104. Adoption of the 2010 Standards establishes a new reference point for title II entities that choose to make structural changes to existing facilities to meet their program access requirements.

The NPRM included the following proposed definition of ''existing facility.'' ''A facility that has been constructed and remains in existence on any given date.'' 73 FR 34466, 34504 (June 17, 2008). The Department received a number of comments on this issue. The commenters urged the Department to clarify that all buildings remain subject to the standards in effect at the time of their construction, that is, that a facility designed and constructed for first occupancy between January 26, 1992, and the effective date of the final rule is still considered ''new construction'' and that alterations occurring between January 26, 1992, and the effective date of the final rule are still considered ''alterations.''

The final rule includes clarifying language to ensure that the Department's interpretation is accurately reflected. As established by this rule, existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part. Thus, this definition reflects the Department's interpretation that public entities have program access requirements that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

''Housing at a Place of Education''

The Department has added a new definition to § 35.104, ''housing at a place of education,'' to clarify the types of educational housing programs that are covered by this title. This section defines ''housing at a place of education'' as ''housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.'' This definition does not apply to social service programs that combine residential housing with social services, such as a residential job training program.

''Other Power-Driven Mobility Device'' and ''Wheelchair''

Because relatively few individuals with disabilities were using nontraditional mobility devices in 1991, there was no pressing need for the 1991 title II regulation to define the terms ''wheelchair'' or ''other power-driven mobility device,'' to expound on what would constitute a reasonable modification in policies, practices, or procedures under § 35.130(b)(7), or to set forth within that section specific requirements for the accommodation of mobility devices. Since the issuance of the 1991 title II regulation, however, the choices of mobility devices available to individuals with disabilities have increased dramatically. The Department has received complaints about and has become aware of situations where individuals with mobility disabilities have utilized devices that are not designed primarily for use by an individual with

a mobility disability, including the Segway ® Personal Transporter (Segway ® PT), golf cars, all-terrain vehicles (ATVs), and other locomotion devices.

The Department also has received questions from public entities and individuals with mobility disabilities concerning which mobility devices must be accommodated and under what circumstances. Indeed, there has been litigation concerning the legal obligations of covered entities to accommodate individuals with mobility disabilities who wish to use an electronic personal assistance mobility device (EPAMD), such as the Segway ® PT, as a mobility device. The Department has participated in such litigation as *amicus curiae*. *See Ault v. Walt Disney World Co.*, No. 6:07–cv–1785–Orl–31KRS, 2009 WL 3242028 (M.D. Fla. Oct. 6, 2009). Much of the litigation has involved shopping malls where businesses have refused to allow persons with disabilities to use EPAMDs. *See*, *e.g.*, *McElroy v. Simon Property Group*, No. 08– 404 RDR, 2008 WL 4277716 (D. Kan. Sept. 15, 2008) (enjoining mall from prohibiting the use of a Segway ® PT as a mobility device where an individual agrees to all of a mall's policies for use of the device, except indemnification); Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE 6 News, July 26, 2005, available at *http://www.wate.com/Global/ story.asp?s=3643674* (last visited June 24, 2010).

In response to questions and complaints from individuals with disabilities and covered entities concerning which mobility devices must be accommodated and under what circumstances, the Department began developing a framework to address the use of unique mobility devices, concerns about their safety, and the parameters for the circumstances under which these devices must be accommodated. As a result, the Department's NPRM proposed two new approaches to mobility devices. First, the Department proposed a two-tiered mobility device definition that defined the term ''wheelchair'' separately from ''other power-driven mobility device.'' Second, the Department proposed requirements to allow the use of devices in each definitional category. In § 35.137(a), the NPRM proposed that wheelchairs and manually-powered mobility aids used by individuals with mobility disabilities shall be permitted in any areas open to pedestrian use. Section 35.137(b) of the NPRM provided that a public entity ''shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration of the public entity's service, program, or activity.''
73 FR 34466, 34504 (June 17, 2008).

The Department sought public comment with regard to whether these steps would, in fact, achieve clarity on these issues. Toward this end, the Department's NPRM asked several questions relating to the definitions of ''wheelchair,'' ''other power-driven mobility device,'' and ''manually-powered mobility aids''; the best way to categorize different classes of mobility devices; the types of devices that should be included in each category; and the circumstances under which certain mobility devices must be accommodated or may be excluded pursuant to the policy adopted by the public entity.

Because the questions in the NPRM that concerned mobility devices and their accommodation were interrelated, many of the commenters' responses did not identify the specific question to which they were responding. Instead, the commenters grouped the questions together and provided comments accordingly. Most commenters spoke to the issues addressed in the Department's questions in broad terms and general concepts. As a result, the responses to the questions posed are discussed below in broadly grouped issue categories rather than on a question-by-question basis.

Two-tiered definitional approach. Commenters supported the Department's proposal to use a two-tiered definition of mobility device. Commenters nearly universally said that wheelchairs always should be accommodated and that they should never be subject to an assessment with regard to their admission to a particular public facility. In contrast, the vast majority of commenters indicated they were in favor of allowing public entities to conduct an assessment as to whether, and under which circumstances, other power-driven mobility devices would be allowed on-site.

Many commenters indicated their support for the two-tiered approach in responding to questions concerning the definition of ''wheelchair'' and ''other-powered mobility device.'' Nearly every disability advocacy group said that the Department's two-tiered approach strikes the proper balance between ensuring access for individuals with disabilities and addressing fundamental alteration and safety concerns held by public entities; however, a minority of disability advocacy groups wanted other power-driven mobility devices to be included in the definition of ''wheelchair.'' Most advocacy, nonprofit, and individual commenters supported the concept of a separate definition for ''other power-driven mobility device'' because it maintains existing legal protections for wheelchairs while recognizing that some devices that are not designed primarily for individuals with mobility disabilities have beneficial uses for individuals with mobility disabilities. They also favored this concept because it recognizes technological developments and that the innovative uses of varying devices may provide increased access to individuals with mobility disabilities.

Many environmental, transit system, and government commenters indicated they opposed in its entirety the concept of ''other power-driven mobility devices'' as a separate category. They believe that the creation of a second category of mobility devices will mean that other power-driven mobility devices, specifically ATVs and off-highway vehicles, must be allowed to go anywhere on national park lands, trails, recreational areas, etc.; will conflict with other Federal land management laws and regulations; will harm the environment and natural and cultural resources; will pose safety risks to users of these devices, as well as to pedestrians not expecting to encounter motorized devices in these settings; will interfere with the recreational enjoyment of these areas; and will require too much administrative work to regulate which devices are allowed and under which circumstances. These commenters all advocated a single category of mobility devices that excludes all fuel-powered devices.

Whether or not they were opposed to the two-tier approach in its entirety, virtually every environmental commenter and most government commenters associated with providing public transportation services or protecting land, natural resources, fish and game, etc., said that the definition of ''other power-driven mobility device'' is too broad. They suggested that they might be able to support the dual category approach if the definition of ''other power-driven mobility device'' were narrowed. They expressed general and program-specific concerns about permitting the use of other power-driven mobility devices. They noted the same concerns as those who opposed the two-tiered concept—that these devices create a host of environmental, safety, cost, administrative and conflict of law issues. Virtually all of these commenters indicated that their support for the dual approach and the concept of other power-driven mobility devices is, in large measure, due to the other power-driven mobility device assessment factors in § 35.137(c) of the NPRM.

By maintaining the two-tiered approach to mobility devices and defining ''wheelchair'' separately from ''other power-driven mobility device,'' the Department is able to preserve the protection users of traditional wheelchairs and other manually powered mobility aids have had since the ADA was enacted, while also

recognizing that human ingenuity, personal choice, and new technologies have led to the use of devices that may be more beneficial for individuals with certain mobility disabilities.

Moreover, the Department believes the two-tiered approach gives public entities guidance to follow in assessing whether reasonable modifications can be made to permit the use of other power-driven mobility devices on-site and to aid in the development of policies describing the circumstances under which persons with disabilities may use such devices. The two-tiered approach neither mandates that all other power-driven mobility devices be accommodated in every circumstance, nor excludes these devices. This approach, in conjunction with the factor assessment provisions in § 35.137(b)(2), will serve as a mechanism by which public entities can evaluate their ability to accommodate other power-driven mobility devices. As will be discussed in more detail below, the assessment factors in § 35.137(b)(2) are designed to provide guidance to public entities regarding whether it is appropriate to bar the use of a specific ''other power-driven mobility device in a specific facility. In making such a determination, a public entity must consider the device's type, size, weight, dimensions, and speed; the facility's volume of pedestrian traffic; the facility's design and operational characteristics; whether the device conflicts with legitimate safety requirements; and whether the device poses a substantial risk of serious harm to the immediate environment or natural or cultural resources, or conflicts with Federal land management laws or regulations. In addition, if under § 35.130(b)(7), the public entity claims that it cannot make reasonable modifications to its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with disabilities, the burden of proof to demonstrate that such devices cannot be operated in accordance with legitimate safety requirements rests upon the public entity.

Categorization of wheelchair versus other power-driven mobility devices. Implicit in the creation of the two-tiered mobility device concept is the question of how to categorize which devices are wheelchairs and which are other power-driven mobility devices. Finding weight and size to be too restrictive, the vast majority of advocacy, nonprofit, and individual commenters opposed using the Department of Transportation's definition of ''common wheelchair'' to designate the mobility device's appropriate category. Commenters who generally supported using weight and size as the method of categorization did so because of their concerns about potentially detrimental impacts on the environment and cultural and natural resources; on the enjoyment of the facility by other recreational users, as well as their safety; on the administrative components of government agencies required to assess which devices are appropriate on narrow, steeply sloped, or foot-and-hoof only trails; and about the impracticality of accommodating such devices in public transportation settings.

Many environmental, transit system, and government commenters also favored using the device's intended-use to categorize which devices constitute wheelchairs and which are other power-driven mobility devices. Furthermore, the intended-use determinant received a fair amount of support from advocacy, nonprofit, and individual commenters, either because they sought to preserve the broad accommodation of wheelchairs or because they sympathized with concerns about individuals without mobility disabilities fraudulently bringing other power-driven mobility devices into public facilities.

Commenters seeking to have the Segway® PT included in the definition of ''wheelchair'' objected to classifying mobility devices on the basis of their intended use because they felt that such a classification would be unfair and prejudicial to Segway® PT users and would stifle personal choice, creativity, and innovation. Other advocacy and nonprofit commenters

objected to employing an intended-use approach because of concerns that the focus would shift to an assessment of the device, rather than the needs or benefits to the individual with the mobility disability. They were of the view that the mobility-device classification should be based on its function—whether it is used for a mobility disability. A few commenters raised the concern that an intended-use approach might embolden public entities to assess whether an individual with a mobility disability really needs to use the other power-driven mobility device at issue or to question why a wheelchair would not provide sufficient mobility. Those citing objections to the intended use determinant indicated it would be more appropriate to make the categorization determination based on whether the device is being used for a mobility disability in the context of the impact of its use in a specific environment. Some of these commenters preferred this approach because it would allow the Segway® PT to be included in the definition of ''wheelchair.''

Many environmental and government commenters were inclined to categorize mobility devices by the way in which they are powered, such as battery-powered engines versus fuel or combustion engines. One commenter suggested using exhaust level as the determinant. Although there were only a few commenters who would make the determination based on indoor or outdoor use, there was nearly universal support for banning the indoor use of devices that are powered by fuel or combustion engines.

A few commenters thought it would be appropriate to categorize the devices based on their maximum speed. Others objected to this approach, stating that circumstances should dictate the appropriate speed at which mobility devices should be operated— for example, a faster speed may be safer when crossing streets than it would be for sidewalk use—and merely because a device can go a certain speed does not mean it will be operated at that speed. The Department has decided to maintain the device's intended use as the appropriate determinant for which devices are categorized as ''wheelchairs.'' However, because wheelchairs may be intended for use by individuals who have temporary conditions affecting mobility, the Department has decided that it is more appropriate to use the phrase ''primarily designed'' rather than ''solely designed'' in making such categorizations. The Department will not foreclose any future technological developments by identifying or banning specific devices or setting restrictions on size, weight, or dimensions. Moreover, devices designed primarily for use by individuals with mobility disabilities often are considered to be medical devices and are generally eligible for insurance reimbursement on this basis. Finally, devices designed primarily for use by individuals with mobility disabilities are less subject to fraud concerns because they were not designed to have a recreational component. Consequently, rarely, if ever, is any inquiry or assessment as to their appropriateness for use in a public entity necessary.

Definition of ''wheelchair.'' In seeking public feedback on the NPRM's definition of ''wheelchair,'' the Department explained its concern that the definition of ''wheelchair'' in section 508(c)(2) of the ADA (formerly section 507(c)(2), July 26, 1990, 104 Stat. 372, 42 U.S.C. 12207, renumbered section 508(c)(2), Public Law 110–325 section 6(a)(2), Sept. 25, 2008, 122 Stat. 3558), which pertains to Federal wilderness areas, is not specific enough to provide clear guidance in the array of settings covered by title II and that the stringent size and weight requirements for the Department of Transportation's definition of ''common wheelchair'' are not a good fit in the context of most public entities. The Department noted in the NPRM that it sought a definition of ''wheelchair'' that would include manually-operated and power-driven wheelchairs and mobility scooters (*i.e.*, those that typically are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian

areas), as well as a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. The NPRM defined a wheelchair as ''a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually-operated or power-driven.'' 73 FR 34466, 34479 (June 17, 2008). Although the NPRM's definition of ''wheelchair'' excluded mobility devices that are not designed solely for use by individuals with mobility disabilities, the Department, noting that the use of the Segway® PT by individuals with mobility disabilities is on the upswing, inquired as to whether this device should be included in the definition of ''wheelchair.'' Many environment and Federal government employee commenters objected to the Department's proposed definition of ''wheelchair'' because it differed from the definition of ''wheelchair'' found in section 508(c)(2) of the ADA—a definition used in the statute only in connection with a provision relating to the use of a wheelchair in a designated wilderness area. *See* 42 U.S.C. 12207(c)(1). Other government commenters associated with environmental issues wanted the phrase ''outdoor pedestrian use'' eliminated from the definition of ''wheelchair.'' Some transit system commenters wanted size, weight, and dimensions to be part of the definition because of concerns about costs associated with having to accommodate devices that exceed the dimensions of the ''common wheelchair'' upon which the 2004 ADAAG was based.

Many advocacy, nonprofit, and individual commenters indicated that as long as the Department intends the scope of the term ''mobility impairments'' to include other disabilities that cause mobility impairments (*e.g.,* respiratory, circulatory, stamina, etc.), they were in support of the language. Several commenters indicated a preference for the definition of ''wheelchair'' in section 508(c)(2) of the ADA. One commenter indicated a preference for the term ''assistive device,'' as it is defined in the Rehabilitation Act of 1973, over the term ''wheelchair.'' A few commenters indicated that strollers should be added to the preamble's list of examples of wheelchairs because parents of children with disabilities frequently use strollers as mobility devices until their children get older.

In the final rule, the Department has rearranged some wording and has made some changes in the terminology used in the definition of ''wheelchair,'' but essentially has retained the definition, and therefore the rationale, that was set forth in the NPRM. Again, the text of the ADA makes the definition of ''wheelchair'' contained in section 508(c)(2) applicable only to the specific context of uses in designated wilderness areas, and therefore does not compel the use of that definition for any other purpose. Moreover, the Department maintains that limiting the definition to devices suitable for use in an ''indoor pedestrian area'' as provided for in section 508(c)(2) of the ADA, would ignore the technological advances in wheelchair design that have occurred since the ADA went into effect and that the inclusion of the phrase ''indoor pedestrian area'' in the definition of ''wheelchair'' would set back progress made by individuals with mobility disabilities who, for many years now, have been using devices designed for locomotion in indoor and outdoor settings. The Department has concluded that same rationale applies to placing limits on the size, weight, and dimensions of wheelchairs.

With regard to the term ''mobility impairments,'' the Department intended a broad reading so that a wide range of disabilities, including circulatory and respiratory disabilities, that make walking difficult or impossible, would be included. In response to comments on this issue, the Department has revisited the issue and has concluded that the most apt term to achieve this intent is ''mobility disability.'' In addition, the Department has decided that it is more appropriate

to use the phrase ''primarily'' designed for use by individuals with disabilities in the final rule, rather than ''solely'' designed for use by individuals with disabilities—the phrase proposed in the NPRM. The Department believes that this phrase more accurately covers the range of devices the Department intends to fall within the definition of ''wheelchair.''

After receiving comments that the word ''typical'' is vague and the phrase ''pedestrian areas'' is confusing to apply, particularly in the context of similar, but not identical, terms used in the proposed Standards, the Department decided to delete the term ''typical indoor and outdoor pedestrian areas'' from the final rule. Instead, the final rule references ''indoor or of both indoor and outdoor locomotion,'' to make clear that the devices that fall within the definition of ''wheelchair'' are those that are used for locomotion on indoor and outdoor pedestrian paths or routes and not those that are intended exclusively for traversing undefined, unprepared, or unimproved paths or routes. Thus, the final rule defines the term ''wheelchair'' to mean ''a manually operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion.''

Whether the definition of ''wheelchair'' includes the Segway® PT. As discussed above, because individuals with mobility disabilities are using the Segway® PT as a mobility device, the Department asked whether it should be included in the definition of ''wheelchair.'' The basic Segway® PT model is a two-wheeled, gyroscopically-stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. Most Segway® PTs can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of three to four miles per hour and the approximate maximum speed for power-operated wheelchairs of six miles per hour. In a study of trail and other non-motorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of individuals using EPAMDs ranged from approximately 69 to 80 inches. *See* Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 14, 2004), available at *http://www.tfhrc.gov/safety/ pubs/04103* (last visited June 24, 2010). Thus, the Segway® PT can operate at much greater speeds than wheelchairs, and the average user stands much taller than most wheelchair users.

The Segway® PT has been the subject of debate among users, pedestrians, disability advocates, State and local governments, businesses, and bicyclists. The fact that the Segway® PT is not designed primarily for use by individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of to what extent individuals with disabilities should be allowed to operate them in areas and facilities where other power-driven mobility devices are not allowed. Those who question the use of the Segway® PT in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users.

Comments regarding whether to include the Segway® PT in the definition of ''wheelchair'' were, by far, the most numerous received in the category of comments regarding wheelchairs and other power-driven mobility devices. Significant numbers of veterans with disabilities, individuals with multiple sclerosis, and those advocating on their behalf made concise statements of general support for the inclusion of the Segway® PT in the definition of ''wheelchair.'' Two veterans offered extensive comments on the topic, along with a few advocacy and nonprofit groups and individuals with disabilities for whom sitting is uncomfortable or impossible.

While there may be legitimate safety issues for EPAMD users and bystanders in some

circumstances, EPAMDs and other nontraditional mobility devices can deliver real benefits to individuals with disabilities. Among the reasons given by commenters to include the Segway® PT in the definition of ''wheelchair'' were that the Segway® PT is well-suited for individuals with particular conditions that affect mobility including multiple sclerosis, Parkinson's disease, chronic obstructive pulmonary disease, amputations, spinal cord injuries, and other neurological disabilities, as well as functional limitations, such as gait limitation, inability to sit or discomfort in sitting, and diminished stamina issues. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. *See* Rachel Metz, *Disabled Embrace Segway*, New York Times, Oct. 14, 2004. Commenters specifically cited pressure relief, reduced spasticity, increased stamina, and improved respiratory, neurologic, and muscular health as secondary medical benefits from being able to stand.

Other arguments for including the Segway® PT in the definition of ''wheelchair'' were based on commenters' views that the Segway® PT offers benefits not provided by wheelchairs and mobility scooters, including its intuitive response to body movement, ability to operate with less coordination and dexterity than is required for many wheelchairs and mobility scooters, and smaller footprint and turning radius as compared to most wheelchairs and mobility scooters. Several commenters mentioned improved visibility, either due to the Segway® PT's raised platform or simply by virtue of being in a standing position. And finally, some commenters advocated for the inclusion of the Segway® PT simply based on civil rights arguments and the empowerment and self-esteem obtained from having the power to select the mobility device of choice. Many commenters, regardless of their position on whether to include the Segway® PT in the definition of ''wheelchair,'' noted that the Segway® PT's safety record is as good as, if not better, than the record for wheelchairs and mobility scooters.

Most environmental, transit system, and government commenters were opposed to including the Segway® PT in the definition of ''wheelchair'' but were supportive of its inclusion as an ''other power-driven mobility device.'' Their concerns about including the Segway® PT in the definition of ''wheelchair'' had to do with the safety of the operators of these devices (*e.g.*, height clearances on trains and sloping trails in parks) and of pedestrians, particularly in confined and crowded facilities or in settings where motorized devices might be unexpected; the potential harm to the environment; the additional administrative, insurance, liability, and defensive litigation costs; potentially detrimental impacts on the environment and cultural and natural resources; and the impracticality of accommodating such devices in public transportation settings. Other environmental, transit system, and government commenters would have banned all fuel-powered devices as mobility devices. In addition, these commenters would have classified non-motorized devices as ''wheelchairs'' and would have categorized motorized devices, such as the Segway® PT, battery-operated wheelchairs, and mobility scooters as ''other power-driven mobility devices.'' In support of this position, some of these commenters argued that because their equipment and facilities have been designed to comply with the dimensions of the ''common wheelchair'' upon which the ADAAG is based, any device that is larger than the prototype wheelchair would be misplaced in the definition of ''wheelchair.''

Still others in this group of commenters wished for only a single category of mobility devices and would have included wheelchairs, mobility scooters, and the Segway® PT as ''mobility devices'' and excluded fuel-powered devices from that definition.

Many disability advocacy and nonprofit commenters did not support the inclusion of the Segway® PT in the definition of ''wheelchair.'' Paramount to these commenters was the maintenance of existing protections for wheelchair users. Because there was unanimous agreement that wheelchair use rarely, if ever, may be restricted, these commenters strongly favored categorizing wheelchairs separately from the Segway® PT and other power-driven mobility devices and applying the intended-use determinant to assign the devices to either category. They indicated that while they support the greatest degree of access in public entities for all persons with disabilities who require the use of mobility devices, they recognize that under certain circumstances, allowing the use of other power-driven mobility devices would result in a fundamental alteration of programs, services, or activities, or run counter to legitimate safety requirements necessary for the safe operation of a public entity. While these groups supported categorizing the Segway® PT as an ''other power-driven mobility device,'' they universally noted that in their view, because the Segway® PT does not present environmental concerns and is as safe to use as, if not safer than, a wheelchair, it should be accommodated in most circumstances.

The Department has considered all the comments and has concluded that it should not include the Segway® PT in the definition of ''wheelchair.'' The final rule provides that the test for categorizing a device as a wheelchair or an other power-driven mobility device is whether the device is designed primarily for use by individuals with mobility disabilities. Mobility scooters are included in the definition of ''wheelchair'' because they are designed primarily for users with mobility disabilities. However, because the current generation of EPAMDs, including the Segway® PT, was designed for recreational users and not primarily for use by individuals with mobility disabilities, the Department has decided to continue its approach of excluding EPAMDs from the definition of ''wheelchair'' and including them in the definition of ''other power-driven mobility device.'' Although EPAMDs, such as the Segway® PT, are not included in the definition of a ''wheelchair,'' public entities must assess whether they can make reasonable modifications to permit individuals with mobility disabilities to use such devices on their premises. The Department recognizes that the Segway® PT provides many benefits to those who use them as mobility devices, including a measure of privacy with regard to the nature of one's particular disability, and believes that in the vast majority of circumstances, the application of the factors described in § 35.137 for providing access to other-powered mobility devices will result in the admission of the Segway® PT.

Treatment of ''manually-powered mobility aids.'' The Department's NPRM did not define the term ''manually-powered mobility aids.'' Instead, the NPRM included a non- exhaustive list of examples in § 35.137(a). The NPRM queried whether the Department should maintain this approach to manually powered mobility aids or whether it should adopt a more formal definition.

Only a few commenters addressed ''manually-powered mobility aids.'' Virtually all commenters were in favor of maintaining a non-exhaustive list of examples of ''manually-powered mobility aids'' rather than adopting a definition of the term. Of those who commented, a few sought clarification of the term ''manually-powered.'' One commenter suggested that the term be changed to ''human-powered.'' Other commenters requested that the Department include ordinary strollers in the non-exhaustive list of ''manually-powered mobility aids.'' Since strollers are not devices designed primarily for individuals with mobility disabilities, the Department does not consider them to be manually-powered mobility aids; however, strollers used in the context of transporting individuals with disabilities are subject to the same assessment required by the ADA's title II reasonable modification standards at

§ 35.130(b)(7). The Department believes that because the existing approach is clear and understood easily by the public, no formal definition of the term ''manually-powered mobility aids'' is required.

Definition of ''other power-driven mobility device.'' The Department's NPRM defined the term ''other power-driven mobility device'' in § 35.104 as ''any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes.'' 73 FR 34466, 34504 (June 17, 2008).

Nearly all environmental, transit systems, and government commenters who supported the two-tiered concept of mobility devices said that the Department's definition of ''other power-driven mobility device'' is overbroad because it includes fuel-powered devices. These commenters sought a ban on fuel-powered devices in their entirety because they believe they are inherently dangerous and pose environmental and safety concerns. They also argued that permitting the use of many of the contemplated other power-driven mobility devices, fuel-powered ones especially, would fundamentally alter the programs, services, or activities of public entities.

Advocacy, nonprofit, and several individual commenters supported the definition of ''other power-driven mobility device'' because it allows new technologies to be added in the future, maintains the existing legal protections for wheelchairs, and recognizes that some devices, particularly the Segway® PT, which are not designed primarily for individuals with mobility disabilities, have beneficial uses for individuals with mobility disabilities. Despite support for the definition of ''other power-driven mobility device,'' however, most advocacy and nonprofit commenters expressed at least some hesitation about the inclusion of fuel-powered mobility devices in the definition. While virtually all of these commenters noted that a blanket exclusion of any device that falls under the definition of ''other power-driven mobility device'' would violate basic civil rights concepts, they also specifically stated that certain devices, particularly, off-highway vehicles, cannot be permitted in certain circumstances. They also made a distinction between the Segway® PT and other power-driven mobility devices, noting that the Segway® PT should be accommodated in most circumstances because it satisfies the safety and environmental elements of the policy analysis. These commenters indicated that they agree that other power-driven mobility devices must be assessed, particularly as to their environmental impact, before they are accommodated.

Although many commenters had reservations about the inclusion of fuel-powered devices in the definition of other power-driven mobility devices, the Department does not want the definition to be so narrow that it would foreclose the inclusion of new technological developments (whether powered by fuel or by some other means). It is for this reason that the Department has maintained the phrase ''any mobility device designed to operate in areas without defined pedestrian routes'' in the final rule's definition of other power-driven mobility devices. The Department believes that the limitations provided by ''fundamental alteration'' and the ability to impose legitimate safety requirements will likely prevent the use of fuel and combustion engine-driven devices indoors, as well as in outdoor areas with heavy pedestrian traffic. The Department notes, however, that in the future, technological developments may result in the production of safe fuel-powered mobility devices that do not pose environmental and safety concerns. The final rule allows consideration to be given as to whether the use of a fuel-powered device would create a substantial risk of serious harm to the environment

or natural or cultural resources, and to whether the use of such a device conflicts with Federal land management laws or regulations; this aspect of the final rule will further limit the inclusion of fuel-powered devices where they are not appropriate. Consequently, the Department has maintained fuel-powered devices in the definition of ''other power-driven mobility device.'' The Department has also added language to the definition of ''other power-driven mobility device'' to reiterate that the definition does not apply to Federal wilderness areas, which are not covered by title II of the ADA; the use of wheelchairs in such areas is governed by section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2). '

''Qualified Interpreter''

In the NPRM, the Department proposed adding language to the definition of ''qualified interpreter'' to clarify that the term includes, but is not limited to, sign language interpreters, oral interpreters, and cued-speech interpreters. As the Department explained, not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily qualified to interpret orally. In addition, someone with only a rudimentary familiarity with sign language or finger spelling is not qualified, nor is someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

As further explained, different situations will require different types of interpreters. For example, an oral interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing may be necessary for an individual who was raised orally and taught to read lips or was diagnosed with hearing loss later in life and does not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker's voice is unclear, if there is a quick-paced exchange of communication (*e.g.,* in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued-speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code or cue to represent each speech sound.

The Department received many comments regarding the proposed modifications to the definition of ''interpreter.'' Many commenters requested that the Department include within the definition a requirement that interpreters be certified, particularly if they reside in a State that licenses or certifies interpreters. Other commenters opposed a certification requirement as unduly limiting, noting that an interpreter may well be qualified even if that same interpreter is not certified. These commenters noted the absence of nationwide standards or universally accepted criteria for certification.

On review of this issue, the Department has decided against imposing a certification requirement under the ADA. It is sufficient under the ADA that the interpreter be qualified. However, as the Department stated in the original preamble, this rule does not invalidate or limit State or local laws that impose standards for interpreters that are equal to or more stringent than those imposed by this definition. *See* 28 CFR part 35, app. A at 566 (2009). For instance, the definition would not supersede any requirement of State law for use of a certified interpreter in court proceedings.

With respect to the proposed additions to the rule, most commenters supported the expansion of the list of qualified interpreters, and some advocated for the inclusion of other types of interpreters on the list as well, such as deaf-blind interpreters, certified deaf interpreters, and speech-to-speech interpreters. As these commenters explained, deaf-blind interpreters are interpreters who have specialized skills and training to interpret for individuals who are deaf and blind; certified deaf interpreters are deaf

or hard of hearing interpreters who work with hearing sign language interpreters to meet the specific communication needs of deaf individuals; and speech-to-speech interpreters have special skill and training to interpret for individuals who have speech disabilities.

The list of interpreters in the definition of qualified interpreter is illustrative, and the Department does not believe it necessary or appropriate to attempt to provide an exhaustive list of qualified interpreters. Accordingly, the Department has decided not to expand the proposed list. However, if a deaf and blind individual needs interpreter services, an interpreter who is qualified to handle the needs of that individual may be required. The guiding criterion is that the public entity must provide appropriate auxiliary aids and services to ensure effective communication with the individual. Commenters also suggested various definitions for the term ''cued-speech interpreters,'' and different descriptions of the tasks they performed. After reviewing the various comments, the Department has determined that it is more accurate and appropriate to refer to such individuals as ''cued-language transliterators.'' Likewise, the Department has changed the term ''oral interpreters'' to ''oral transliterators.'' These two changes have been made to distinguish between sign language interpreters, who translate one language into another language (*e.g.*, ASL to English and English to ASL), from transliterators who interpret within the same language between deaf and hearing individuals. A cued-language transliterator is an interpreter who has special skill and training in the use of the Cued Speech system of handshapes and placements, along with non-manual information, such as facial expression and body language, to show auditory information visually, including speech and environmental sounds. An oral transliterator is an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. While the Department included definitions for ''cued speech interpreter'' and ''oral interpreter'' in the regulatory text proposed in the NPRM, the Department has decided that it is unnecessary to include such definitions in the text of the final rule.

Many commenters questioned the proposed deletion of the requirement that a qualified interpreter be able to interpret both receptively and expressively, noting the importance of both these skills. Commenters stated that this phrase was carefully crafted in the original regulation to make certain that interpreters both (1) are capable of understanding what a person with a disability is saying and (2) have the skills needed to convey information back to that individual. These are two very different skill sets and both are equally important to achieve effective communication. For example, in a medical setting, a sign language interpreter must have the necessary skills to understand the grammar and syntax used by an ASL user (receptive skills) and the ability to interpret complicated medical information—presented by medical staff in English—back to that individual in ASL (expressive skills). The Department agrees and has put the phrase ''both receptively and expressively'' back in the definition.

Several advocacy groups suggested that the Department make clear in the definition of qualified interpreter that the interpreter may appear either on-site or remotely using a video remote interpreting (VRI) service. Given that the Department has included in this rule both a definition of VRI services and standards that such services must satisfy, such an addition to the definition of qualified interpreter is appropriate.

After consideration of all relevant information submitted during the public comment period, the Department has modified the definition from that initially proposed in the NPRM. The final definition now states that ''[q]ualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively,

accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.''

''Qualified Reader''

The 1991 title II regulation identifies a qualified reader as an auxiliary aid, but did not define the term. *See* 28 CFR 35.104(2). Based upon the Department's investigation of complaints alleging that some entities have provided ineffective readers, the Department proposed in the NPRM to define ''qualified reader'' similarly to ''qualified interpreter'' to ensure that entities select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. This proposal was suggested in order to make clear to public entities that a failure to provide a qualified reader to a person with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

The Department received comments supporting inclusion in the regulation of a definition of a ''qualified reader.'' Some commenters suggested the Department add to the definition a requirement prohibiting the use of a reader whose accent, diction, or pronunciation makes full comprehension of material being read difficult. Another commenter requested that the Department include a requirement that the reader ''will follow the directions of the person for whom he or she is reading.'' Commenters also requested that the Department define ''accurately'' and ''effectively'' as used in this definition.

While the Department believes that its proposed regulatory definition adequately addresses these concerns, the Department emphasizes that a reader, in order to be ''qualified,'' must be skilled in reading the language and subject matter and must be able to be easily understood by the individual with the disability. For example, if a reader is reading aloud the questions for a college microbiology examination, that reader, in order to be qualified, must know the proper pronunciation of scientific terminology used in the text, and must be sufficiently articulate to be easily understood by the individual with a disability for whom he or she is reading. In addition, the terms ''effectively'' and ''accurately'' have been successfully used and understood in the Department's existing definition of ''qualified interpreter'' since 1991 without specific regulatory definitions. Instead, the Department has relied upon the common use and understanding of those terms from standard English dictionaries. Thus, the definition of ''qualified reader'' has not been changed from that contained in the NPRM. The final rule defines ''qualified reader'' to mean ''a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.''

''Service Animal''

Although there is no specific language in the 1991 title II regulation concerning service animals, title II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary in order to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. *See* 28 CFR 35.130(b)(7). The 1991 title III regulation, 28 CFR 36.104, defines a ''service animal'' as ''any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.'' Section 36.302(c)(1) of the 1991 title III regulation requires that ''[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a

disability.'' Section 36.302(c)(2) of the 1991 title III regulation states that ''a public accommodation [is not required] to supervise or care for a service animal.''

The Department has issued guidance and provided technical assistance and publications concerning service animals since the 1991 regulations became effective. In the NPRM, the Department proposed to modify the definition of service animal, added the definition to title II, and asked for public input on several issues related to the service animal provisions of the title II regulation: whether the Department should clarify the phrase ''providing minimal protection'' in the definition or remove it; whether there are any circumstances where a service animal ''providing minimal protection'' would be appropriate or expected; whether certain species should be eliminated from the definition of ''service animal,'' and, if so, which types of animals should be excluded; whether ''common domestic animal'' should be part of the definition; and whether a size or weight limitation should be imposed for common domestic animals even if the animal satisfies the ''common domestic animal'' part of the NPRM definition.

The Department received extensive comments on these issues, as well as requests to clarify the obligations of State and local government entities to accommodate individuals with disabilities who use service animals, and has modified the final rule in response. In the interests of avoiding unnecessary repetition, the Department has elected to discuss the issues raised in the NPRM questions about service animals and the corresponding public comments in the following discussion of the definition of ''service animal.''

The Department's final rule defines ''service animal'' as ''any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.''

This definition has been designed to clarify a key provision of the ADA. Many covered entities indicated that they are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals. Individuals with disabilities who use trained guide or service dogs are concerned that if untrained or unusual animals are termed ''service animals,'' their own right to use guide or service dogs may become unnecessarily restricted or questioned. Some individuals who are not individuals with disabilities have claimed, whether fraudulently or sincerely (albeit mistakenly), that their animals are service animals covered by the ADA, in order to gain access to courthouses, city or county administrative offices, and other title II facilities. The increasing use of wild, exotic, or unusual species, many of which are untrained, as service animals has also added to the confusion.

Finally, individuals with disabilities who have the legal right under the Fair Housing Act (FHAct) to use certain animals in their homes as

a reasonable accommodation to their disabilities have assumed that their animals also qualify under the ADA. This is not necessarily the case, as discussed below.

The Department recognizes the diverse needs and preferences of individuals with disabilities protected under the ADA, and does not wish to unnecessarily impede individual choice. Service animals play an integral role in the lives of many individuals with disabilities and, with the clarification provided by the final rule, individuals with disabilities will continue to be able to use their service animals as they go about their daily activities and civic interactions. The clarification will also help to ensure that the fraudulent or mistaken use of other animals not qualified as service animals under the ADA will be deterred. A more detailed analysis of the elements of the definition and the comments responsive to the service animal provisions of the NPRM follows.

Providing minimal protection. As previously noted, the 1991 title II regulation does not contain specific language concerning service animals. The 1991 title III regulation included language stating that ''minimal protection'' was a task that could be performed by an individually trained service animal for the benefit of an individual with a disability. In the Department's ''ADA Business Brief on Service Animals'' (2002), the Department interpreted the ''minimal protection'' language within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). The Department received many comments in response to the question of whether the ''minimal protection'' language should be clarified. Many commenters urged the removal of the ''minimal protection'' language from the service animal definition for two reasons: (1) The phrase can be interpreted to allow any dog that is trained to be aggressive to qualify as a service animal simply by pairing the animal with a person with a disability; and (2) the phrase can be interpreted to allow any untrained pet dog to qualify as a service animal, since many consider the mere presence of a dog to be a crime deterrent, and thus sufficient to meet the minimal protection standard. These commenters argued, and the Department agrees, that these interpretations were not contemplated under the original title III regulation, and, for the purposes of the final title II regulations, the meaning of ''minimal protection'' must be made clear.

While many commenters stated that they believe that the ''minimal protection'' language should be eliminated, other commenters recommended that the language be clarified, but retained. Commenters favoring clarification of the term suggested that the Department explicitly exclude the function of attack or exclude those animals that are trained solely to be aggressive or protective. Other commenters identified nonviolent behavioral tasks that could be construed as minimally protective, such as interrupting self-mutilation, providing safety checks and room searches, reminding the individual to take medications, and protecting the individual from injury resulting from seizures or unconsciousness.

Several commenters noted that the existing direct threat defense, which allows the exclusion of a service animal if the animal exhibits unwarranted or unprovoked violent behavior or poses a direct threat, prevents the use of ''attack dogs'' as service animals. One commenter noted that the use of a service animal trained to provide ''minimal protection'' may impede access to care in an emergency, for example, where the first responder, usually a title II entity, is unable or reluctant to approach a person with a disability because the individual's service animal is in a protective posture suggestive of aggression.

Many organizations and individuals stated that in the general dog training community, ''protection'' is code for attack or aggression training and should be removed from the definition. Commenters stated that there appears to be a broadly held misconception that aggression-trained animals are appropriate service

animals for persons with post traumatic stress disorder (PTSD). While many individuals with PTSD may benefit by using a service animal, the work or tasks performed appropriately by such an animal would not involve unprovoked aggression but could include actively cuing the individual by nudging or pawing the individual to alert to the onset of an episode and removing the individual from the anxiety-provoking environment.

The Department recognizes that despite its best efforts to provide clarification, the ''minimal protection'' language appears to have been misinterpreted. While the Department maintains that protection from danger is one of the key functions that service animals perform for the benefit of persons with disabilities, the Department recognizes that an animal individually trained to provide aggressive protection, such as an attack dog, is not appropriately considered a service animal. Therefore, the Department has decided to modify the ''minimal protection'' language to read ''nonviolent protection,'' thereby excluding so-called ''attack dogs'' or dogs with traditional ''protection training'' as service animals. The Department believes that this modification to the service animal definition will eliminate confusion, without restricting unnecessarily the type of work or tasks that service animals may perform. The Department's modification also clarifies that the crime-deterrent effect of a dog's presence, by itself, does not qualify as work or tasks for purposes of the service animal definition.

Alerting to intruders. The phrase ''alerting to intruders'' is related to the issues of minimal protection and the work or tasks an animal may perform to meet the definition of a service animal. In the original 1991 regulatory text, this phrase was intended to identify service animals that alert individuals who are deaf or hard of hearing to the presence of others. This language has been misinterpreted by some to apply to dogs that are trained specifically to provide aggressive protection, resulting in the assertion that such training qualifies a dog as a service animal under the ADA. The Department reiterates that title II entities are not required to admit any animal whose use poses a direct threat under § 35.139. In addition, the Department has decided to remove the word ''intruders'' from the service animal definition and replace it with the phrase ''the presence of people or sounds.'' The Department believes this clarifies that so-called ''attack training'' or other aggressive response types of training that cause a dog to provide an aggressive response do not qualify a dog as a service animal under the ADA.

Conversely, if an individual uses a breed of dog that is perceived to be aggressive because of breed reputation, stereotype, or the history or experience the observer may have with other dogs, but the dog is under the control of the individual with a disability and does not exhibit aggressive behavior, the title II entity cannot exclude the individual or the animal from a State or local government program, service, or facility. The animal can only be removed if it engages in the behaviors mentioned in § 35.136(b) (as revised in the final rule) or if the presence of the animal constitutes a fundamental alteration to the nature of the service, program, or activity of the title II entity.

Doing ''work'' or ''performing tasks.'' The NPRM proposed that the Department maintain the requirement, first articulated in the 1991 title III regulation, that in order to qualify as a service animal, the animal must ''perform tasks'' or ''do work'' for the individual with a disability. The phrases ''perform tasks'' and ''do work'' describe what an animal must do for the benefit of an individual with a disability in order to qualify as a service animal.

The Department received a number of comments in response to the NPRM proposal urging the removal of the term ''do work'' from the definition of a service animal. These commenters argued that the Department should emphasize the performance of tasks instead. The

Department disagrees. Although the common definition of work includes the performance of tasks, the definition of work is somewhat broader, encompassing activities that do not appear to involve physical action.

One service dog user stated that in some cases, ''critical forms of assistance can't be construed as physical tasks,'' noting that the manifestations of ''brain-based disabilities,'' such as psychiatric disorders and autism, are as varied as their physical counterparts. The Department agrees with this statement but cautions that unless the animal is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal. A pet or support animal may be able to discern that the individual is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal.

The NPRM contained an example of ''doing work'' that stated ''a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place.'' 73 FR 34466, 34504 (June 17, 2008). Several commenters objected to the use of this example, arguing that grounding was not a ''task'' and therefore, the example inherently contradicted the basic premise that a service animal must perform a task in order to mitigate a disability. Other commenters stated that ''grounding'' should not be included as an example of ''work'' because it could lead to some individuals claiming that they should be able to use emotional support animals in public because the dog makes them feel calm or safe. By contrast, one commenter with experience in training service animals explained that grounding is a trained task based upon very specific behavioral indicators that can be observed and measured. These tasks are based upon input from mental health practitioners, dog trainers, and individuals with a history of working with psychiatric service dogs.

It is the Department's view that an animal that is trained to ''ground'' a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: Recognition and response. For example, if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event.

One commenter suggested defining the term ''task,'' presumably to improve the understanding of the types of services performed by an animal that would be sufficient to qualify the animal for coverage. The Department believes that the common definition of the word ''task'' is sufficiently clear and that it is not necessary to add to the definitions section. However, the Department has added examples of other kinds of work or tasks to help illustrate and provide clarity to the definition. After careful evaluation of this issue, the Department has concluded that the phrases ''do work'' and ''perform tasks'' have been effective during the past two decades to illustrate the varied services provided by service animals for the benefit of individuals with all types of disabilities. Thus, the Department declines to depart from its longstanding approach at this time.

Species limitations. When the Department originally issued its title III regulation in the early 1990s, the Department did not define the parameters of acceptable animal species. At that time, few anticipated the variety of animals that would be promoted as service animals in the years to come, which ranged from pigs and

miniature horses to snakes, iguanas, and parrots. The Department has followed this particular issue closely, keeping current with the many unusual species of animals represented to be service animals. Thus, the Department has decided to refine further this aspect of the service animal definition in the final rule.

The Department received many comments from individuals and organizations recommending species limitations. Several of these commenters asserted that limiting the number of allowable species would help stop erosion of the public's trust, which has resulted in reduced access for many individuals with disabilities who use trained service animals that adhere to high behavioral standards. Several commenters suggested that other species would be acceptable if those animals could meet nationally recognized behavioral standards for trained service dogs. Other commenters asserted that certain species of animals (*e.g.,* reptiles) cannot be trained to do work or perform tasks, so these animals would not be covered.

In the NPRM, the Department used the term ''common domestic animal'' in the service animal definition and excluded reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents from the service animal definition. 73 FR 34466, 34478 (June 17, 2008). However, the term ''common domestic animal'' is difficult to define with precision due to the increase in the number of domesticated species. Also, several State and local laws define a ''domestic'' animal as an animal that is not wild. The Department agrees with commenters' views that limiting the number and types of species recognized as service animals will provide greater predictability for State and local government entities as well as added assurance of access for individuals with disabilities who use dogs as service animals. As a consequence, the Department has decided to limit this rule's coverage of service animals to dogs, which are the most common service animals used by individuals with disabilities.

Wild animals, monkeys, and other nonhuman primates. Numerous business entities endorsed a narrow definition of acceptable service animal species, and asserted that there are certain animals (*e.g.,* reptiles) that cannot be trained to do work or perform tasks. Other commenters suggested that the Department should identify excluded animals, such as birds and llamas, in the final rule. Although one commenter noted that wild animals bred in captivity should be permitted to be service animals, the Department has decided to make clear that all wild animals, whether born or bred in captivity or in the wild, are eliminated from coverage as service animals. The Department believes that this approach reduces risks to health or safety attendant with wild animals. Some animals, such as certain nonhuman primates including certain monkeys, pose a direct threat; their behavior can be unpredictably aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement advising against the use of monkeys as service animals, stating that ''[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, and the potential for serious injury and zoonotic [animal to human disease transmission] risks.'' AVMA Position Statement, *Nonhuman Primates as Assistance Animals,* (2005) available at *http://www.avma.org/issues/policy/ nonhuman_primates.asp* (last visited June 24, 2010).

An organization that trains capuchin monkeys to provide in-home services to individuals with paraplegia and quadriplegia was in substantial agreement with the AVMA's views but requested a limited recognition in the service animal definition for the capuchin monkeys it trains to provide assistance for persons with disabilities. The organization commented that its trained capuchin monkeys undergo scrupulous veterinary examinations to ensure that the animals pose

no health risks, and are used by individuals with disabilities exclusively in their homes. The organization acknowledged that the capuchin monkeys it trains are not necessarily suitable for use in State or local government facilities. The organization noted that several State and local government entities have local zoning, licensing, health, and safety laws that prohibit nonhuman primates, and that these prohibitions would prevent individuals with disabilities from using these animals even in their homes.

The organization argued that including capuchin monkeys under the service animal umbrella would make it easier for individuals with disabilities to obtain reasonable modifications of State and local licensing, health, and safety laws that would permit the use of these monkeys. The organization argued that this limited modification to the service animal definition was warranted in view of the services these monkeys perform, which enable many individuals with paraplegia and quadriplegia to live and function with increased independence.

The Department has carefully considered the potential risks associated with the use of nonhuman primates as service animals in State and local government facilities, as well as the information provided to the Department about the significant benefits that trained capuchin monkeys provide to certain individuals with disabilities in residential settings. The Department has determined, however, that nonhuman primates, including capuchin monkeys, will not be recognized as service animals for purposes of this rule because of their potential for disease transmission and unpredictable aggressive behavior. The Department believes that these characteristics make nonhuman primates unsuitable for use as service animals in the context of the wide variety of public settings subject to this rule. As the organization advocating the inclusion of capuchin monkeys acknowledges, capuchin monkeys are not suitable for use in public facilities.

The Department emphasizes that it has decided only that capuchin monkeys will not be included in the definition of service animals for purposes of its regulation implementing the ADA. This decision does not have any effect on the extent to which public entities are required to allow the use of such monkeys under other Federal statutes. For example, under the FHAct, an individual with a disability may have the right to have an animal other than a dog in his or her home if the animal qualifies as a ''reasonable accommodation'' that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming that the use of the animal does not pose a direct threat. In some cases, the right of an individual to have an animal under the FHAct may conflict with State or local laws that prohibit all individuals, with or without disabilities, from owning a particular species. However, in this circumstance, an individual who wishes to request a reasonable modification of the State or local law must do so under the FHAct, not the ADA.

Having considered all of the comments about which species should qualify as service animals under the ADA, the Department has determined the most reasonable approach is to limit acceptable species to dogs.

Size or weight limitations. The vast majority of commenters did not support a size or weight limitation. Commenters were typically opposed to a size or weight limit because many tasks performed by service animals require large, strong dogs. For instance, service animals may perform tasks such as providing balance and support or pulling a wheelchair. Small animals may not be suitable for large adults. The weight of the service animal user is often correlated with the size and weight of the service animal. Others were concerned that adding a size and weight limit would further complicate the difficult process of finding an appropriate service animal. One commenter noted that there is no need for a limit because ''if, as a practical matter, the size or weight of an individual's service animal

creates a direct threat or fundamental alteration to a particular public entity or accommodation, there are provisions that allow for the animal's exclusion or removal.'' Some common concerns among commenters in support of a size and weight limit were that a larger animal may be less able to fit in various areas with its handler, such as toilet rooms and public seating areas, and that larger animals are more difficult to control.

Balancing concerns expressed in favor of and against size and weight limitations, the Department has determined that such limitations would not be appropriate. Many individuals of larger stature require larger dogs. The Department believes it would be inappropriate to deprive these individuals of the option of using a service dog of the size required to provide the physical support and stability these individuals may need to function independently. Since large dogs have always served as service animals, continuing their use should not constitute fundamental alterations or impose undue burdens on title II entities.

Breed limitations. A few commenters suggested that certain breeds of dogs should not be allowed to be used as service animals. Some suggested that the Department should defer to local laws restricting the breeds of dogs that individuals who reside in a community may own. Other commenters opposed breed restrictions, stating that the breed of a dog does not determine its propensity for aggression and that aggressive and non-aggressive dogs exist in all breeds.

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others. Breed restrictions differ significantly from jurisdiction to jurisdiction. Some jurisdictions have no breed restrictions. Others have restrictions that, while well-meaning, have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades without a history of the type of unprovoked aggression or attacks that would pose a direct threat, *e.g.,* German Shepherds. Other jurisdictions prohibit animals over a certain weight, thereby restricting breeds without invoking an express breed ban. In addition, deference to breed restrictions contained in local laws would have the unacceptable consequence of restricting travel by an individual with a disability who uses a breed that is acceptable and poses no safety hazards in the individual's home jurisdiction but is nonetheless banned by other jurisdictions. State and local government entities have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

Recognition of psychiatric service animals but not "emotional support animals." The definition of ''service animal'' in the NPRM stated the Department's longstanding position that emotional support animals are not included in the definition of ''service animal.'' The proposed text in § 35.104 provided that ''[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits or to promote emotional well-being are not service animals.'' 73 FR 34466, 34504 (June 17, 2008).

Many advocacy organizations expressed concern and disagreed with the exclusion of comfort and emotional support animals. Others have been more specific, stating that individuals with disabilities may need their emotional support animals in order to have equal access. Some commenters noted that individuals with

disabilities use animals that have not been trained to perform tasks directly related to their disability. These animals do not qualify as service animals under the ADA. These are emotional support or comfort animals.

Commenters asserted that excluding categories such as ''comfort'' and ''emotional support'' animals recognized by laws such as the FHAct or the Air Carrier Access Act (ACAA) is confusing and burdensome. Other commenters noted that emotional support and comfort animals perform an important function, asserting that animal companionship helps individuals who experience depression resulting from multiple sclerosis.

Some commenters explained the benefits emotional support animals provide, including emotional support, comfort, therapy, companionship, therapeutic benefits, and the promotion of emotional well-being. They contended that without the presence of an emotional support animal in their lives they would be disadvantaged and unable to participate in society. These commenters were concerned that excluding this category of animals will lead to discrimination against, and the excessive questioning of, individuals with non-visible or non-apparent disabilities. Other commenters expressing opposition to the exclusion of individually trained ''comfort'' or ''emotional support'' animals asserted that the ability to soothe or de-escalate and control emotion is ''work'' that benefits the individual with the disability.

Many commenters requested that the Department carve out an exception that permits current or former members of the military to use emotional support animals. They asserted that a significant number of service members returning from active combat duty have adjustment difficulties due to combat, sexual assault, or other traumatic experiences while on active duty. Commenters noted that some current or former members of the military service have been prescribed animals for conditions such as PTSD. One commenter stated that service women who were sexually assaulted while in the military use emotional support animals to help them feel safe enough to step outside their homes. The Department recognizes that many current and former members of the military have disabilities as a result of service-related injuries that may require emotional support and that such individuals can benefit from the use of an emotional support animal and could use such animal in their home under the FHAct. However, having carefully weighed the issues, the Department believes that its final rule appropriately addresses the balance of issues and concerns of both the individual with a disability and the public entity. The Department also notes that nothing in this part prohibits a public entity from allowing current or former military members or anyone else with disabilities to utilize emotional support animals if it wants to do so.

Commenters asserted the view that if an animal's ''mere presence'' legitimately provides such benefits to an individual with a disability and if those benefits are necessary to provide equal opportunity given the facts of the particular disability, then such an animal should qualify as a ''service animal.'' Commenters noted that the focus should be on the nature of a person's disability, the difficulties the disability may impose and whether the requested accommodation would legitimately address those difficulties, not on evaluating the animal involved. The Department understands this approach has benefitted many individuals under the FHAct and analogous State law provisions, where the presence of animals poses fewer health and safety issues, and where emotional support animals provide assistance that is unique to residential settings. The Department believes, however, that the presence of such animals is not required in the context of title II entities such as courthouses, State and local government administrative buildings, and similar title II facilities.

Under the Department's previous regulatory framework, some individuals and entities assumed

that the requirement that service animals must be individually trained to do work or perform tasks excluded all individuals with mental disabilities from having service animals. Others assumed that any person with a psychiatric condition whose pet provided comfort to them was covered by the 1991 title II regulation. The Department reiterates that psychiatric service animals that are trained to do work or perform a task for individuals whose disability is covered by the ADA are protected by the Department's present regulatory approach. Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the individual to take medicine, providing safety checks or room searches for persons with PTSD, interrupting self-mutilation, and removing disoriented individuals from dangerous situations.

The difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulation was promulgated, service animals have been trained to assist individuals with many different types of disabilities.

In the final rule, the Department has retained its position on the exclusion of emotional support animals from the definition of ''service animal.'' The definition states that ''[t]he provision of emotional support, well-being, comfort, or companionship, * * * do[es] not constitute work or tasks for the purposes of this definition.'' The Department notes, however, that the exclusion of emotional support animals from coverage in the final rule does not mean that individuals with psychiatric or mental disabilities cannot use service animals that meet the regulatory definition. The final rule defines service animal as follows: ''[s]ervice animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.'' This language simply clarifies the Department's longstanding position.

The Department's position is based on the fact that the title II and title III regulations govern a wider range of public settings than the housing and transportation settings for which the Department of Housing and Urban Development (HUD) and DOT regulations allow emotional support animals or comfort animals. The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities. Accordingly, other Federal agency regulations, case law, and possibly State or local laws governing those situations may provide appropriately for increased access for animals other than service animals as defined under the ADA. Public officials, housing providers, and others who make decisions relating to animals in residential and transportation settings should consult the Federal, State, and local laws that apply in those areas (*e.g.,* the FHAct regulations of HUD and the ACAA) and not rely on the ADA as a basis for reducing those obligations.

Retain term "service animal." Some commenters asserted that the term ''assistance animal'' is a term of art and should replace the term ''service animal.'' However, the majority of commenters preferred the term ''service animal'' because it is more specific. The Department has decided to retain the term ''service animal'' in the final rule. While some agencies, like HUD, use the term ''assistance animal,'' ''assistive animal,'' or ''support animal,'' these terms are used to denote a broader category of animals

than is covered by the ADA. The Department has decided that changing the term used in the final rule would create confusion, particularly in view of the broader parameters for coverage under the FHAct, *cf*., preamble to HUD's Final Rule for Pet Ownership for the Elderly and Persons with Disabilities, 73 FR 63834–38 (Oct. 27, 2008); HUD Handbook No. 4350.3 Rev–1, Chapter 2, Occupancy Requirements of Subsidized Multifamily Housing Programs (June 2007), available at *http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4350.3* (last visited June 24, 2010). Moreover, as discussed above, the Department's definition of ''service animal'' in the title II final rule does not affect the rights of individuals with disabilities who use assistance animals in their homes under the FHAct or who use ''emotional support animals'' that are covered under the ACAA and its implementing regulations. *See* 14 CFR 382.7 *et seq*.; *see also* Department of Transportation, *Guidance Concerning Service Animals in Air Transportation*, 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on aircraft).

''Video Remote Interpreting'' (VRI) Services

In the NPRM, the Department proposed adding Video Interpreting Services (VIS) to the list of auxiliary aids available to provide effective communication described in § 35.104. In the preamble to the NPRM, VIS was defined as ''a technology composed of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image.'' 73 FR 34446, 34479 (June 17, 2008). Comments from advocacy organizations and individuals unanimously requested that the Department use the term ''video remote interpreting (VRI),'' instead of VIS, for consistency with Federal Communications Commission (FCC) regulations. *See* FCC Public Notice, DA– 0502417 (Sept. 7, 2005), and with common usage by consumers. The Department has made that change throughout the regulation to avoid confusion and to make the regulation more consistent with existing regulations.

Many commenters also requested that the Department distinguish between VRI and ''video relay service (VRS).'' Both VRI and VRS use a remote interpreter who is able to see and communicate with a deaf person and a hearing person, and all three individuals may be connected by a video link. VRI is a fee-based interpreting service conveyed via videoconferencing where at least one person, typically the interpreter, is at a separate location. VRI can be provided as an on-demand service or by appointment. VRI normally involves a contract in advance for the interpreter who is usually paid by the covered entity.

VRS is a telephone service that enables persons with disabilities to use the telephone to communicate using video connections and is a more advanced form of relay service than the traditional voice to text telephones (TTY) relay systems that were recognized in the 1991 title II regulation. More specifically, VRS is a video relay service using interpreters connected to callers by video hook-up and is designed to provide telephone services to persons who are deaf and use American Sign Language that are functionally equivalent to those provided to users who are hearing. VRS is funded through the Interstate Telecommunications Relay Services Fund and overseen by the FCC. *See* 47 CFR 64.601(a)(26). There are no fees for callers to use the VRS interpreters and the video connection, although there may be relatively inexpensive initial costs

to the title II entities to purchase the videophone or camera for on-line video connection, or other equipment to connect to the VRS service. The FCC has made clear that VRS functions as a telephone service and is not intended to be used for interpreting services where both parties are in the same room; the latter is reserved for VRI. The Department agrees that VRS cannot be used as a substitute for in-person interpreters or for VRI in situations that would not, absent one party's disability, entail use of the telephone.

Many commenters strongly recommended limiting the use of VRI to circumstances where it will provide effective communication. Commenters from advocacy groups and persons with disabilities expressed concern that VRI may not always be appropriate to provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who could not see the image because the signal was interrupted, causing unnatural pauses in the communication, or the image was grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI, and some recommended requirements for equipment maintenance, high-speed, wide-bandwidth video links using dedicated lines or wireless systems, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's face, head, arms, hands, and eyes in all transmissions. Finally, one State agency asked for additional guidance, outreach, and mandated advertising about the availability of VRI in title II situations so that local government entities would budget for and facilitate the use of VRI in libraries, schools, and other places.

After consideration of the comments and the Department's own research and experience, the Department has determined that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. For example, VRI should be effective in many situations involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is available; however, VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast-paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals. To ensure that VRI is effective in situations where it is appropriate, the Department has established performance standards in § 35.160(d).

Subpart B—General Requirements

Section 35.130(h) Safety.

Section 36.301(b) of the 1991 title III regulation provides that a public accommodation ''may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks, and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.'' 28 CFR 36.301(b). Although the 1991 title II regulation did not include similar language, the Department's 1993 ADA Title II Technical Assistance Manual at II–3.5200 makes clear the Department's view that public entities also have the right to impose legitimate safety requirements necessary for the safe operation of services, programs, or activities. To ensure consistency between the title II and title III regulations, the Department has added a new

§ 35.130(h) in the final rule incorporating this longstanding position relating to imposition of legitimate safety requirements.

Section 35.133 Maintenance of accessible features.

Section 35.133 in the 1991 title II regulation provides that a public entity must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by qualified individuals with disabilities. *See* 28 CFR 35.133(a). In the NPRM, the Department clarified the application of this provision and proposed one change to the section to address the discrete situation in which the scoping requirements provided in the 2010 Standards reduce the number of required elements below the requirements of the 1991 Standards. In that discrete event, a public entity may reduce such accessible features in accordance with the requirements in the 2010 Standards.

The Department received only four comments on this proposed amendment. None of the commenters opposed the change. In the final rule, the Department has revised the section to make it clear that if the 2010 Standards reduce either the technical requirements or the number of required accessible elements below that required by the 1991 Standards, then the public entity may reduce the technical requirements or the number of accessible elements in a covered facility in accordance with the requirements of the 2010 Standards.

One commenter urged the Department to amend § 35.133(b) to expand the language of the section to restocking of shelves as a permissible activity for isolated or temporary interruptions in service or access. It is the Department's position that a temporary interruption that blocks an accessible route, such as restocking of shelves, is already permitted by § 35.133(b), which clarifies that ''isolated or temporary interruptions in service or access due to maintenance or repairs'' are permitted. Therefore, the Department will not make any additional changes in the final rule to the language of § 35.133(b) other than those discussed in the preceding paragraph.

Section 35.136 Service animals.

The 1991 title II regulation states that ''[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.'' 28 CFR 130(b)(7). Unlike the title III regulation, the 1991 title II regulation did not contain a specific provision addressing service animals.

In the NPRM, the Department stated the intention of providing the broadest feasible access to individuals with disabilities and their service animals, unless a public entity can demonstrate that making the modifications to policies excluding animals would fundamentally alter the nature of the public entity's service, program, or activity. The Department proposed creating a new § 35.136 addressing service animals that was intended to retain the scope of the 1991 title III regulation at § 36.302(c), while clarifying the Department's longstanding policies and interpretations, as outlined in published technical assistance, *Commonly Asked Questions About Service Animals in Places of Business* (1996), available at *http:// www.ada.gov/qasrvc.ftm* and *ADA Guide for Small Businesses* (1999), available at *http:// www.ada.gov/smbustxt.htm*, and to add that a public entity may exclude a service animal in certain circumstances where the service animal fails to meet certain behavioral standards. The Department received extensive comments in response to proposed § 35.136 from individuals, disability advocacy groups, organizations involved in training service animals, and public entities.

Those comments and the Department's response are discussed below.

Exclusion of service animals. In the NPRM, the Department proposed incorporating the title III regulatory language of § 36.302(c) into new § 35.136(a), which states that ''[g]enerally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability, unless the public entity can demonstrate that the use of a service animal would fundamentally alter the public entity's service, program, or activity.'' The final rule retains this language with some modifications.

In addition, in the NPRM, the Department proposed clarifying those circumstances where otherwise eligible service animals may be excluded by public entities from their programs or facilities. The Department proposed in § 35.136(b)(1) of the NPRM that a public entity may ask an individual with a disability to remove a service animal from a title II service, program, or activity if: ''[t]he animal is out of control and the animal's handler does not take effective action to control it.'' 73 FR 34466, 34504 (June 17, 2008).

The Department has long held that a service animal must be under the control of the handler at all times. Commenters overwhelmingly were in favor of this language, but noted that there are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched. While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the public entity must give the handler a reasonable opportunity to gain control of the animal. Further, if the individual with a disability asserts that the animal was provoked or injured, or if the public entity otherwise has reason to suspect that provocation or injury has occurred, the public entity should seek to determine the facts and, if provocation or injury occurred, the public entity should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the public entity. This language is unchanged in the final rule.

The NPRM also proposed language at § 35.136(b)(2) to permit a public entity to exclude a service animal if the animal is not housebroken (*i.e.*, trained so that, absent illness or accident, the animal controls its waste elimination) or the animal's presence or behavior fundamentally alters the nature of the service the public entity provides (*e.g.,* repeated barking during a live performance). Several commenters were supportive of this NPRM language, but cautioned against overreaction by the public entity in these instances. One commenter noted that animals get sick, too, and that accidents occasionally happen. In these circumstances, simple clean up typically addresses the incident. Commenters noted that the public entity must be careful when it excludes a service animal on the basis of ''fundamental alteration,'' asserting for example that a public entity should not exclude a service animal for barking in an environment where other types of noise, such as loud cheering or a child crying, is tolerated. The Department maintains that the appropriateness of an exclusion can be assessed by reviewing how a public entity addresses comparable situations that do not involve a service animal. The Department has retained in § 35.136(b) of the final rule the exception requiring animals to be housebroken. The Department has not retained the specific NPRM language stating that animals can be excluded if their presence or behavior fundamentally alters the nature of the service provided by the public entity, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7).

The NPRM also proposed at § 35.136(b)(3) that a service animal can be excluded where ''[t]he animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications.'' 73 FR 34466, 34504 (June 17, 2008). Commenters were universally supportive of this provision as it makes express the discretion of a public entity to exclude a service animal that poses a direct threat. Several commenters cautioned against the overuse of this provision and suggested that the Department provide an example of the rule's application. The Department has decided not to include regulatory language specifically stating that a service animal can be excluded if it poses a direct threat. The Department believes that the addition of new § 35.139, which incorporates the language of the title III provisions at § 36.302 relating to the general defense of direct threat, is sufficient to establish the availability of this defense to public entities.

Access to a public entity following the proper exclusion of a service animal. The NPRM proposed that in the event a public entity properly excludes a service animal, the public entity must give the individual with a disability the opportunity to access the programs, services, and facilities of the public entity without the service animal. Most commenters welcomed this provision as a common sense approach. These commenters noted that they do not wish to preclude individuals with disabilities from the full and equal enjoyment of the State or local government's programs, services, or facilities, simply because of an isolated problem with a service animal. The Department has elected to retain this provision in § 35.136(a).

Other requirements. The NPRM also proposed that the regulation include the following requirements: that the work or tasks performed by the service animal must be directly related to the handler's disability; that a service animal must be individually trained to do work or perform a task, be housebroken, and be under the control of the handler; and that a service animal must have a harness, leash, or other tether. Most commenters addressed at least one of these issues in their responses. Most agreed that these provisions are important to clarify further the 1991 service animal regulation. The Department has moved the requirement that the work or tasks performed by the service animal must be related directly to the individual's disability to the definition of ''service animal'' in § 35.104. In addition, the Department has modified the proposed language in § 35.136(d) relating to the handler's control of the animal with a harness, leash, or other tether to state that ''[a] service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.*, voice control, signals, or other effective means).'' The Department has retained the requirement that the service animal must be individually trained (*see* Appendix A discussion of § 35.104, definition of ''service animal''), as well as the requirement that the service animal be housebroken.

Responsibility for supervision and care of a service animal. The NPRM proposed language at § 35.136(e) stating that ''[a] public entity is not responsible for caring for or supervising a service animal.'' 73 FR 34466, 34504 (June 17, 2008). Most commenters did not address this particular provision. The Department recognizes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the

service animal would be satisfied. The language of this section is retained, with minor modifications, in § 35.136(e) of the final rule.

Inquiries about service animals. The NPRM proposed language at § 35.136(f) setting forth parameters about how a public entity may determine whether an animal qualifies as a service animal. The proposed section stated that a public entity may ask if the animal is required because of a disability and what task or work the animal has been trained to do but may not require proof of service animal certification or licensing. Such inquiries are limited to eliciting the information necessary to make a decision without requiring disclosure of confidential disability-related information that a State or local government entity does not need. This language is consistent with the policy guidance outlined in two Department publications, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at *http:// www.ada.gov/qasrvc.htm*, and *ADA Guide for Small Businesses,* (1999), available at *http:// www.ada.gov/smbustxt.htm*.

Although some commenters contended that the NPRM service animal provisions leave unaddressed the issue of how a public entity can distinguish between a psychiatric service animal, which is covered under the final rule, and a comfort animal, which is not, other commenters noted that the Department's published guidance has helped public entities to distinguish between service animals and pets on the basis of an individual's response to these questions. Accordingly, the Department has retained the NPRM language incorporating its guidance concerning the permissible questions into the final rule.

Some commenters suggested that a title II entity be allowed to require current documentation, no more than one year old, on letterhead from a mental health professional stating the following: (1) That the individual seeking to use the animal has a mental health-related disability; (2) that having the animal accompany the individual is necessary to the individual's mental health or treatment or to assist the person otherwise; and (3) that the person providing the assessment of the individual is a licensed mental health professional and the individual seeking to use the animal is under that individual's professional care. These commenters asserted that this will prevent abuse and ensure that individuals with legitimate needs for psychiatric service animals may use them. The Department believes that this proposal would treat persons with psychiatric, intellectual, and other mental disabilities less favorably than persons with physical or sensory disabilities. The proposal would also require persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities—something individuals without disabilities have not been required to do. Accordingly, the Department has concluded that a documentation requirement of this kind would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.

Areas of a public entity open to the public, participants in services, programs, or activities, or invitees. The NPRM proposed at § 35.136(g) that an individual with a disability who uses a service animal has the same right of access to areas of a title II entity as members of the public, participants in services, programs, or activities, or invitees. Commenters indicated that allowing individuals with disabilities to go with their service animals into the same areas as members of the public, participants in programs, services, or activities, or invitees is accepted practice by most State and local government entities. The Department has included a slightly modified version of this provision in § 35.136(g) of the final rule.

The Department notes that under the final rule, a healthcare facility must also permit a person with a disability to be accompanied by a service animal in all areas of the facility in which that

person would otherwise be allowed. There are some exceptions, however. The Department follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting. Zoonotic diseases can be transmitted to humans through bites, scratches, direct contact, arthropod vectors, or aerosols.

Consistent with CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, such as operating rooms and burn units. *See* Centers for Disease Control and Prevention, *Guidelines for Environmental Infection Control in Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee* (June 2003), available at *http://www.cdc.gov/hicpac/pdf/guidelines/ eic_in_HCF_03.pdf* (last visited June 24, 2010). A service animal may accompany its handler to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, restrooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without added precaution.

Prohibition against surcharges for use of a service animal. In the NPRM, the Department proposed to incorporate the previously mentioned policy guidance, which prohibits the assessment of a surcharge for the use of a service animal, into proposed § 35.136(h). Several commenters agreed that this provision makes clear the obligation of a public entity to admit an individual with a service animal without surcharges, and that any additional costs imposed should be factored into the overall cost of administering a program, service, or activity, and passed on as a charge to all participants, rather than an individualized surcharge to the service animal user. Commenters also noted that service animal users cannot be required to comply with other requirements that are not generally applicable to other persons. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal. The Department has retained this language, with minor modifications, in the final rule at § 35.136(h).

Training requirement. Certain commenters recommended the adoption of formal training requirements for service animals. The Department has rejected this approach and will not impose any type of formal training requirements or certification process, but will continue to require that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability. While some groups have urged the Department to modify this position, the Department has determined that such a modification would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal to perform tasks or do work to accommodate their disability. A training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.

Some commenters proposed specific behavior or training standards for service animals, arguing that without such standards, the public has no way to differentiate between untrained pets and service animals. Many of the suggested behavior or training standards were lengthy and detailed. The Department believes that this rule addresses service animal behavior sufficiently by including provisions that address the obligations of the service animal user and the circumstances under which a service animal may be excluded, such as the requirements that an animal be housebroken and under the control of its handler.

Miniature horses. The Department has been persuaded by commenters and the available research to include a provision that would require

public entities to make reasonable modifications to policies, practices, or procedures to permit the use of a miniature horse by a person with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The traditional service animal is a dog, which has a long history of guiding individuals who are blind or have low vision, and over time dogs have been trained to perform an even wider variety of services for individuals with all types of disabilities. However, an organization that developed a program to train miniature horses, modeled on the program used for guide dogs, began training miniature horses in 1991.

Although commenters generally supported the species limitations proposed in the NPRM, some were opposed to the exclusion of miniature horses from the definition of a service animal. These commenters noted that these animals have been providing assistance to persons with disabilities for many years. Miniature horses were suggested by some commenters as viable alternatives to dogs for individuals with allergies, or for those whose religious beliefs preclude the use of dogs. Another consideration mentioned in favor of the use of miniature horses is the longer life span and strength of miniature horses in comparison to dogs. Specifically, miniature horses can provide service for more than 25 years while dogs can provide service for approximately 7 years, and, because of their strength, miniature horses can provide services that dogs cannot provide. Accordingly, use of miniature horses reduces the cost involved to retire, replace, and train replacement service animals.

The miniature horse is not one specific breed, but may be one of several breeds, with distinct characteristics that produce animals suited to service animal work. The animals generally range in height from 24 inches to 34 inches measured to the withers, or shoulders, and generally weigh between 70 and 100 pounds. These characteristics are similar to those of large breed dogs such as Labrador Retrievers, Great Danes, and Mastiffs. Similar to dogs, miniature horses can be trained through behavioral reinforcement to be ''housebroken.'' Most miniature service horse handlers and organizations recommend that when the animals are not doing work or performing tasks, the miniature horses should be kept outside in a designated area, instead of indoors in a house.

According to information provided by an organization that trains service horses, these miniature horses are trained to provide a wide array of services to their handlers, primarily guiding individuals who are blind or have low vision, pulling wheelchairs, providing stability and balance for individuals with disabilities that impair the ability to walk, and supplying leverage that enables a person with a mobility disability to get up after a fall. According to the commenter, miniature horses are particularly effective for large stature individuals. The animals can be trained to stand (and in some cases, lie down) at the handler's feet in venues where space is at a premium, such as assembly areas or inside some vehicles that provide public transportation. Some individuals with disabilities have traveled by train and have flown commercially with their miniature horses.

The miniature horse is not included in the definition of service animal, which is limited to dogs. However, the Department has added a specific provision at § 35.136(i) of the final rule covering miniature horses. Under this provision, a public entity must make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The public entity may take into account a series of assessment factors in determining whether to allow a miniature horse into a specific facility. These include the type, size, and weight of the miniature horse; whether the handler has sufficient

control of the miniature horse; whether the miniature horse is housebroken; and whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)–(h) of this section, which are applicable to dogs, also apply to miniature horses.

Ponies and full-size horses are not covered by § 35.136(i). Also, because miniature horses can vary in size and can be larger and less flexible than dogs, covered entities may exclude this type of service animal if the presence of the miniature horse, because of its larger size and lower level of flexibility, results in a fundamental alteration to the nature of the programs activities, or services provided.

Section 35.137 Mobility devices.

Section 35.137 of the NPRM clarified the scope and circumstances under which covered entities are legally obligated to accommodate various ''mobility devices.'' Section 35.137 set forth specific requirements for the accommodation of ''mobility devices,'' including wheelchairs, manually-powered mobility aids, and other power-driven mobility devices.

In both the NPRM and the final rule, § 35.137(a) states the general rule that in any areas open to pedestrians, public entities shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, including walkers, crutches, canes, braces, or similar devices. Because mobility scooters satisfy the definition of ''wheelchair'' (*i.e.*, ''manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion''), the reference to them in § 35.137(a) of the final rule has been omitted to avoid redundancy.

Some commenters expressed concern that permitting the use of other power-driven mobility devices by individuals with mobility disabilities would make such devices akin to wheelchairs and would require them to make physical changes to their facilities to accommodate their use. This concern is misplaced. If a facility complies with the applicable design requirements in the 1991 Standards or the 2010 Standards, the public entity will not be required to exceed those standards to accommodate the use of wheelchairs or other power-driven mobility devices that exceed those requirements.

Legal standard for other power-driven mobility devices. The NPRM version of § 35.137(b) provided that ''[a] public entity shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the public entity's service, program, or activity.'' 73 FR 34466, 34505 (June 17, 2008). In other words, public entities are by default required to permit the use of other power-driven mobility devices; the burden is on them to prove the existence of a valid exception.

Most commenters supported the notion of assessing whether the use of a particular device is reasonable in the context of a particular venue. Commenters, however, disagreed about the meaning of the word ''reasonable'' as it is used in § 35.137(b) of the NPRM. Advocacy and nonprofit groups almost universally objected to the use of a general reasonableness standard with regard to the assessment of whether a particular device should be allowed at a particular venue. They argued that the assessment should be based on whether reasonable modifications could be made to allow a particular device at a particular venue, and that the only factors that should be part of the calculus that results in the exclusion of a particular device are undue burden, direct threat, and fundamental alteration.

A few commenters opposed the proposed provision requiring public entities to assess whether reasonable modifications can be made to allow other power-driven mobility devices, preferring instead that the Department issue guidance materials so that public entities would not have to incur the cost of such analyses. Another commenter noted a ''fox guarding the hen house''-type of concern with regard to public entities developing and enforcing their own modification policy.

In response to comments received, the Department has revised § 35.137(b) to provide greater clarity regarding the development of legitimate safety requirements regarding other power-driven mobility devices and has added a new § 35.130(h) (Safety) to the title II regulation which specifically permits public entities to impose legitimate safety requirements necessary for the safe operation of their services, programs, and activities. (*See* discussion below.) The Department has not retained the proposed NPRM language stating that an other power-driven mobility device can be excluded if a public entity can demonstrate that its use is unreasonable or will result in a fundamental alteration of the entity's service, program, or activity, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7).

Assessment factors. Section 35.137(c) of the NPRM required public entities to ''establish policies to permit the use of other power-driven mobility devices'' and articulated four factors upon which public entities must base decisions as to whether a modification is reasonable to allow the use of a class of other power-driven mobility devices by individuals with disabilities in specific venues (*e.g.*, parks, courthouses, office buildings, etc.). 73 FR 34466, 34504 (June 17, 2008).

The Department has relocated and modified the NPRM text that appeared in § 35.137(c) to new paragraph § 35.137(b)(2) to clarify what factors the public entity shall use in determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification. Section 35.137(b)(2) now states that ''[i]n determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under (b)(1), a public entity shall consider'' certain enumerated factors. The assessment factors are designed to assist public entities in determining whether allowing the use of a particular other power-driven mobility device in a specific facility is reasonable. Thus, the focus of the analysis must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.

The NPRM proposed the following specific assessment factors: (1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair; (2) the potential risk of harm to others by the operation of the mobility device; (3) the risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and (4) the ability of the public entity to stow the mobility device when not in use, if requested by the user.

Factor 1 was designed to help public entities assess whether a particular device was appropriate, given its particular physical features, for a particular location. Virtually all commenters said the physical features of the device affected their view of whether a particular device was appropriate for a particular location. For example, while many commenters supported the use of another power-driven mobility device if the device were a Segway® PT, because of environmental and health concerns they did not offer the same level of support if the device were an off-highway vehicle, all-terrain vehicle (ATV), golf car, or other device with a fuel-powered or combustion engine. Most commenters noted that indicators such as speed, weight, and dimension really were an assessment of the appropriateness of a

particular device in specific venues and suggested that factor 1 say this more specifically.

The term ''in relation to a wheelchair'' in the NPRM's factor 1 apparently created some concern that the same legal standards that apply to wheelchairs would be applied to other power-driven mobility devices. The Department has omitted the term ''in relation to a wheelchair'' from § 35.137(b)(2)(i) to clarify that if a facility that is in compliance with the applicable provisions of the 1991 Standards or the 2010 Standards grants permission for an other power-driven mobility device to go on-site, it is not required to exceed those standards to accommodate the use of other power-driven mobility devices.

In response to requests that NPRM factor 1 state more specifically that it requires an assessment of an other power-driven mobility device's appropriateness under particular circumstances or in particular venues, the Department has added several factors and more specific language. In addition, although the NPRM made reference to the operation of other power-driven mobility devices in ''specific venues,'' the Department's intent is captured more clearly by referencing ''specific facility'' in paragraph (b)(2). The Department also notes that while speed is included in factor 1, public entities should not rely solely on a device's top speed when assessing whether the device can be accommodated; instead, public entities should also consider the minimum speeds at which a device can be operated and whether the development of speed limit policies can be established to address concerns regarding the speed of the device. Finally, since the ability of the public entity to stow the mobility device when not in use is an aspect of its design and operational characteristics, the text proposed as factor 4 in the NPRM has been incorporated in paragraph (b)(2)(iii).

The NPRM's version of factor 2 provided that the ''risk of potential harm to others by the operation of the mobility device'' is one of the determinants in the assessment of whether other power-driven mobility devices should be excluded from a site. The Department intended this requirement to be consistent with the Department's longstanding interpretation, expressed in § II–3.5200 (Safety) of the 1993 Title II Technical Assistance Manual, which provides that public entities may ''impose legitimate safety requirements that are necessary for safe operation.'' (This language parallels the provision in the title III regulation at § 36.301(b).) However, several commenters indicated that they read this language, particularly the phrase ''risk of potential harm,'' to mean that the Department had adopted a concept of risk analysis different from that which is in the existing standards. The Department did not intend to create a new standard and has changed the language in paragraphs (b)(1) and (b)(2) to clarify the applicable standards, thereby avoiding the introduction of new assessments of risk beyond those necessary for the safe operation of the public entity. In addition, the Department has added a new section, 35.130(h), which incorporates the existing safety standard into the title II regulation.

While all applicable affirmative defenses are available to public entities in the establishment and execution of their policies regarding other power-driven mobility devices, the Department did not explicitly incorporate the direct threat defense into the assessment factors because § 35.130(h) provides public entities the appropriate framework with which to assess whether legitimate safety requirements that may preclude the use of certain other power-driven mobility devices are necessary for the safe operation of the public entities. In order to be legitimate, the safety requirement must be based on actual risks and not mere speculation regarding the device or how it will be operated. Of course, public entities may enforce legitimate safety rules established by the public entity for the operation of other power-driven mobility devices (*e.g.*, reasonable speed restrictions). Finally, NPRM

factor 3 concerning environmental resources and conflicts of law has been relocated to § 35.137(b)(2)(v).

As a result of these comments and requests, NPRM factors 1, 2, 3, and 4 have been revised and renumbered within paragraph (b)(2) in the final rule.

Several commenters requested that the Department provide guidance materials or more explicit concepts of which considerations might be appropriate for inclusion in a policy that allows the use of other power-driven mobility devices. A public entity that has determined that reasonable modifications can be made in its policies, practices, or procedures to allow the use of other power-driven mobility devices should develop a policy that clearly states the circumstances under which the use of other power-driven mobility devices by individuals with a mobility disability will be permitted. It also should include clear, concise statements of specific rules governing the operation of such devices. Finally, the public entity should endeavor to provide individuals with disabilities who use other power-driven mobility devices with advanced notice of its policy regarding the use of such devices and what rules apply to the operation of these devices.

For example, the U.S. General Services Administration (GSA) has developed a policy allowing the use of the Segway® PT and other EPAMDs in all Federal buildings under GSA's jurisdiction. *See* General Services Administration, I*nterim Segway® Personal Transporter Policy* (Dec. 3, 2007), available at *http://www.gsa.gov/graphics/pbs/ Interim_Segway_Policy_121007.pdf* (last visited June 24, 2010). The GSA policy defines the policy's scope of coverage by setting out what devices are and are not covered by the policy. The policy also sets out requirements for safe operation, such as a speed limit, prohibits the use of EPAMDs on escalators, and provides guidance regarding security screening of these devices and their operators.

A public entity that determines that it can make reasonable modifications to permit the use of an other power-driven mobility device by an individual with a mobility disability might include in its policy the procedure by which claims that the other power-driven mobility device is being used for a mobility disability will be assessed for legitimacy (*i.e.*, a credible assurance that the device is being used for a mobility disability, including a verbal representation by the person with a disability that is not contradicted by observable fact, or the presentation of a disability parking space placard or card, or State-issued proof of disability); the type or classes of other power-driven mobility devices are permitted to be used by individuals with mobility disabilities; the size, weight, and dimensions of the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the speed limit for the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the places, times, or circumstances under which the use of the other power-driven mobility device is or will be restricted or prohibited; safety, pedestrian, and other rules concerning the use of the other power-driven mobility device; whether, and under which circumstances, storage for the other power-driven mobility device will be made available; and how and where individuals with a mobility disability can obtain a copy of the other power-driven mobility device policy.

Public entities also might consider grouping other power-driven mobility devices by type (*e.g.,* EPAMDs, golf cars, gasoline-powered vehicles, and other devices). For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing use of EPAMDs by members

of the general public who do not have mobility disabilities.

The Department anticipates that, in many circumstances, public entities will be able to develop policies that will allow the use of other power-driven mobility devices by individuals with mobility disabilities. Consider the following example:

A county courthouse has developed a policy whereby EPAMDs may be operated in the pedestrian areas of the courthouse if the operator of the device agrees not to operate the device faster than pedestrians are walking; to yield to pedestrians; to provide a rack or stand so that the device can stand upright; and to use the device only in courtrooms that are large enough to accommodate such devices. If the individual is selected for jury duty in one of the smaller courtrooms, the county's policy indicates that if it is not possible for the individual with the disability to park the device and walk into the courtroom, the location of the trial will be moved to a larger courtroom.

Inquiry into the use of other power-driven mobility device. The NPRM version of § 35.137(d) provided that ''[a] public entity may ask a person using a power-driven mobility device if the mobility device is needed due to the person's disability. A public entity shall not ask a person using a mobility device questions about the nature and extent of the person's disability.'' 73 FR 34466, 34504 (June 17, 2008).

Many environmental, transit system, and government commenters expressed concern about people feigning mobility disabilities to be able to use other power-driven mobility devices in public entities in which their use is otherwise restricted. These commenters felt that a mere inquiry into whether the device is being used for a mobility disability was an insufficient mechanism by which to detect fraud by other power-driven mobility device users who do not have mobility disabilities. These commenters believed they should be given more latitude to make inquiries of other power-driven mobility device users claiming a mobility disability than they would be given for wheelchair users. They sought the ability to establish a policy or method by which public entities may assess the legitimacy of the mobility disability. They suggested some form of certification, sticker, or other designation. One commenter suggested a requirement that a sticker bearing the international symbol for accessibility be placed on the device or that some other identification be required to signal that the use of the device is for a mobility disability. Other suggestions included displaying a disability parking placard on the device or issuing EPAMDs, like the Segway® PT, a permit that would be similar to permits associated with parking spaces reserved for those with disabilities.

Advocacy, nonprofit, and several individual commenters balked at the notion of allowing any inquiry beyond whether the device is necessary for a mobility disability and encouraged the Department to retain the NPRM's language on this topic. Other commenters, however, were empathetic with commenters who had concerns about fraud. At least one Segway® PT advocate suggested it would be permissible to seek documentation of the mobility disability in the form of a simple sign or permit.

The Department has sought to find common ground by balancing the needs of public entities and individuals with mobility disabilities wishing to use other power-driven mobility devices with the Department's longstanding, well-established policy of not allowing public entities or establishments to require proof of a mobility disability. There is no question that public entities have a legitimate interest in ferreting out fraudulent representations of mobility disabilities, especially given the recreational use of other power-driven mobility devices and the potential safety concerns created by having too many such devices in a specific facility at one time. However, the privacy of individuals with mobility disabilities and respect for those individuals, is also vitally important.

Neither § 35.137(d) of the NPRM nor § 35.137(c) of the final rule permits inquiries into the nature of a person's mobility disability. However, the Department does not believe it is unreasonable or overly intrusive for an individual with a mobility disability seeking to use an other power-driven mobility device to provide a credible assurance to verify that the use of the other power-driven mobility device is for a mobility disability. The Department sought to minimize the amount of discretion and subjectivity exercised by public entities in assessing whether an individual has a mobility disability and to allow public entities to verify the existence of a mobility disability. The solution was derived from comments made by several individuals who said they have been admitted with their Segway® PTs into public entities and public accommodations that ordinarily do not allow these devices on-site when they have presented or displayed State-issued disability parking placards. In the examples provided by commenters, the parking placards were accepted as verification that the Segway® PTs were being used as mobility devices.

Because many individuals with mobility disabilities avail themselves of State programs that issue disability parking placards or cards and because these programs have penalties for fraudulent representations of identity and disability, utilizing the parking placard system as a means to establish the existence of a mobility disability strikes a balance between the need for privacy of the individual and fraud protection for the public entity. Consequently, the Department has decided to include regulatory text in § 35.137(c)(2) of the final rule that requires public entities to accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as verification that an individual uses the other power-driven mobility device for his or her mobility disability. A ''valid'' disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards. Public entities are required to accept a valid, State-issued disability parking placard or card, or State-issued proof of disability as a credible assurance, but they cannot demand or require the presentation of a valid disability placard or card, or State-issued proof of disability, as a prerequisite for use of an other power-driven mobility device, because not all persons with mobility disabilities have such means of proof. If an individual with a mobility disability does not have such a placard or card, or State-issued proof of disability, he or she may present other information that would serve as a credible assurance of the existence of a mobility disability.

In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a verbal representation, not contradicted by observable fact, shall be accepted as a credible assurance that the other power-driven mobility device is being used because of a mobility disability. This does not mean, however, that a mobility disability must be observable as a condition for allowing the use of an other power-driven mobility device by an individual with a mobility disability, but rather that if an individual represents that a device is being used for a mobility disability and that individual is observed thereafter engaging in a physical activity that is contrary to the nature of the represented disability, the assurance given is no longer credible and the individual may be prevented from using the device.

Possession of a valid, State-issued disability parking placard or card or a verbal assurance does not trump a public entity's valid restrictions on the use of other power-driven mobility devices. Accordingly, a credible assurance that the other power-driven mobility device is being used because of a mobility disability is not a guarantee of entry to a public entity because, notwithstanding such credible assurance, use of the device in a particular venue may be at odds with the legal standard in § 35.137(b)(1) or with

one or more of the § 35.137(b)(2) factors. Only after an individual with a disability has satisfied all of the public entity's policies regarding the use of other power-driven mobility devices does a credible assurance become a factor in allowing the use of the device. For example, if an individual seeking to use an other power-driven mobility device fails to satisfy any of the public entity's stated policies regarding the use of other power-driven mobility devices, the fact that the individual legitimately possesses and presents a valid, State-issued disability parking placard or card, or State-issued proof of disability, does not trump the policy and require the public entity to allow the use of the device. In fact, in some instances, the presentation of a legitimately held placard or card, or State-issued proof of disability, will have no relevance or bearing at all on whether the other power-driven mobility device may be used, because the public entity's policy does not permit the device in question on-site under any circumstances (*e.g.,* because its use would create a substantial risk of serious harm to the immediate environment or natural or cultural resources). Thus, an individual with a mobility disability who presents a valid disability placard or card, or State-issued proof of disability, will not be able to use an ATV as an other power-driven mobility device in a State park if the State park has adopted a policy banning their use for any or all of the above-mentioned reasons. However, if a public entity permits the use of a particular other power-driven mobility device, it cannot refuse to admit an individual with a disability who uses that device if the individual has provided a credible assurance that the use of the device is for a mobility disability.

Section 35.138 Ticketing

The 1991 title II regulation did not contain specific regulatory language on ticketing. The ticketing policies and practices of public entities, however, are subject to title II's nondiscrimination provisions. Through the investigation of complaints, enforcement actions, and public comments related to ticketing, the Department became aware that some venue operators, ticket sellers, and distributors were violating title II's nondiscrimination mandate by not providing individuals with disabilities the same opportunities to purchase tickets for accessible seating as they provided to spectators purchasing conventional seats. In the NPRM, the Department proposed § 35.138 to provide explicit direction and guidance on discriminatory practices for entities involved in the sale or distribution of tickets.

The Department received comments from advocacy groups, assembly area trade associations, public entities, and individuals. Many commenters supported the addition of regulatory language pertaining to ticketing and urged the Department to retain it in the final rule. Several commenters, however, questioned why there were inconsistencies between the title II and title III provisions and suggested that the same language be used for both titles. The Department has decided to retain ticketing regulatory language and to ensure consistency between the ticketing provisions in title II and title III.

Because many in the ticketing industry view season tickets and other multi-event packages differently from individual tickets, the Department bifurcated some season ticket provisions from those concerning single-event tickets in the NPRM. This structure, however, resulted in some provisions being repeated for both types of tickets but not for others even though they were intended to apply to both types of tickets. The result was that it was not entirely clear that some of the provisions that were not repeated also were intended to apply to season tickets. The Department is addressing the issues raised by these commenters using a different approach. For the purposes of this section, a *single event* refers to an individual performance for which tickets may be purchased. In contrast, *a series of events* includes, but is not limited to, subscription events,

event packages, season tickets, or any other tickets that may be purchased for multiple events of the same type over the course of a specified period of time whose ownership right reverts to the public entity at the end of each season or time period. Series-of-events tickets that give their holders an enhanced ability to purchase such tickets from the public entity in seasons or periods of time that follow, such as a right of first refusal or higher ranking on waiting lists for more desirable seats, are subject to the provisions in this section. In addition, the final rule merges together some NPRM paragraphs that dealt with related topics and has reordered and renamed some of the paragraphs that were in the NPRM.

Ticket sales. In the NPRM, the Department proposed, in § 35.138(a), a general rule that a public entity shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating for an event or series of events in the same way as others (*i.e.*, during the same hours and through the same distribution methods as other seating is sold). 73 FR 34466, 34504 (June 17, 2008). ''Accessible seating'' is defined in §35.138(a)(1) of the final rule to mean ''wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (d) of this section.'' The defined term does not include designated aisle seats. A ''wheelchair space'' refers to a space for a single wheelchair and its occupant.

The NPRM proposed requiring that accessible seats be sold through the ''same methods of distribution'' as non-accessible seats. Comments from venue managers and others in the business community, in general, noted that multiple parties are involved in ticketing, and because accessible seats may not be allotted to all parties involved at each stage, such parties should be protected from liability. For example, one commenter noted that a third-party ticket vendor, like Ticketmaster, can only sell the tickets it receives from its client. Because § 35.138(a)(2)(iii) of the final rule requires venue operators to make available accessible seating through the same methods of distribution they use for their regular tickets, venue operators that provide tickets to third-party ticket vendors are required to provide accessible seating to the third-party ticket vendor. This provision will enhance third-party ticket vendors' ability to acquire and sell accessible seating for sale in the future. The Department notes that once third-party ticket vendors acquire accessible tickets, they are obligated to sell them in accordance with these rules.

The Department also has received frequent complaints that individuals with disabilities have not been able to purchase accessible seating over the Internet, and instead have had to engage in a laborious process of calling a customer service line, or sending an e-mail to a customer service representative and waiting for a response. Not only is such a process burdensome, but it puts individuals with disabilities at a disadvantage in purchasing tickets for events that are popular and may sell out in minutes. Because § 35.138(e) of the final rule authorizes venues to release accessible seating in case of a sellout, individuals with disabilities effectively could be cut off from buying tickets unless they also have the ability to purchase tickets in real time over the Internet. The Department's new regulatory language is designed to address this problem.

Several commenters representing assembly areas raised concerns about offering accessible seating for sale over the Internet. They contended that this approach would increase the incidence of fraud since anyone easily could purchase accessible seating over the Internet. They also asserted that it would be difficult technologically to provide accessible seating for sale in real time over the Internet, or that to do so would require simplifying the rules concerning the purchase of multiple additional accompanying

seats. Moreover, these commenters argued that requiring an individual purchasing accessible seating to speak with a customer service representative would allow the venue to meet the patron's needs most appropriately and ensure that wheelchair spaces are reserved for individuals with disabilities who require wheelchair spaces. Finally, these commenters argued that individuals who can transfer effectively and conveniently from a wheelchair to a seat with a movable armrest seat could instead purchase designated aisle seats.

The Department considered these concerns carefully and has decided to continue with the general approach proposed in the NPRM. Although fraud is an important concern, the Department believes that it is best combated by other means that would not have the effect of limiting the ability of individuals with disabilities to purchase tickets, particularly since restricting the purchase of accessible seating over the Internet will, of itself, not curb fraud. In addition, the Department has identified permissible means for covered entities to reduce the incidence of fraudulent accessible seating ticket purchases in § 35.138(h) of the final rule.

Several commenters questioned whether ticket websites themselves must be accessible to individuals who are blind or have low vision, and if so, what that requires. The Department has consistently interpreted the ADA to cover websites that are operated by public entities and stated that such sites must provide their services in an accessible manner or provide an accessible alternative to the website that is available 24 hours a day, seven days a week. The final rule, therefore, does not impose any new obligation in this area. The accessibility of websites is discussed in more detail in the section of Appendix A entitled ''Other Issues.''

In § 35.138(b) of the NPRM, the Department also proposed requiring public entities to make accessible seating available during all stages of tickets sales including, but not limited to, pre-sales, promotions, lotteries, waitlists, and general sales. For example, if tickets will be presold for an event that is open only to members of a fan club, or to holders of a particular credit card, then tickets for accessible seating must be made available for purchase through those means. This requirement does not mean that any individual with a disability would be able to purchase those seats. Rather, it means that an individual with a disability who meets the requirement for such a sale (*e.g.,* who is a member of the fan club or holds that credit card) will be able to participate in the special promotion and purchase accessible seating. The Department has maintained the substantive provisions of the NPRM's § 35.138(a) and (b) but has combined them in a single paragraph at § 35.138(a)(2) of the final rule so that all of the provisions having to do with the manner in which tickets are sold are located in a single paragraph.

Identification of available accessible seating. In the NPRM, the Department proposed § 35.138(c), which, as modified and renumbered as paragraph (b)(3) in the final rule, requires a facility to identify available accessible seating through seating maps, brochures, or other methods if that information is made available about other seats sold to the general public. This rule requires public entities to provide information about accessible seating to the same degree of specificity that it provides information about general seating. For example, if a seating map displays color-coded blocks pegged to prices for general seating, then accessible seating must be similarly color-coded. Likewise, if covered entities provide detailed maps that show exact seating and pricing for general seating, they must provide the same for accessible seating.

The NPRM did not specify a requirement to identify prices for accessible seating. The final rule requires that if such information is provided for general seating, it must be provided for accessible seating as well.

In the NPRM, the Department proposed in

§ 35.138(d) that a public entity, upon being asked, must inform persons with disabilities and their companions of the locations of all unsold or otherwise available seating. This provision is intended to prevent the practice of ''steering'' individuals with disabilities to certain accessible seating so that the facility can maximize potential ticket sales by releasing unsold accessible seating, especially in preferred or desirable locations, for sale to the general public. The Department received no significant comment on this proposal. The Department has retained this provision in the final rule but has added it, with minor modifications, to § 35.138(b) as paragraph (1).

Ticket prices. In the NPRM, the Department proposed § 35.138(e) requiring that ticket prices for accessible seating be set no higher than the prices for other seats in that seating section for that event. The NPRM's provision also required that accessible seating be made available at every price range, and if an existing facility has barriers to accessible seating within a particular price range, a proportionate amount of seating (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) must be offered in an accessible location at that same price. Under this rule, for example, if a public entity has a 20,000-seat facility built in 1980 with inaccessible seating in the $20-price category, which is on the upper deck, and it chooses not to put accessible seating in that section, then it must place a proportionate number of seats in an accessible location for $20. If the upper deck has 2,000 seats, then the facility must place 10 percent of its accessible seating in an accessible location for $20 provided that it is part of a seating section where ticket prices are equal to or more than $20—a facility may not place the $20-accessible seating in a $10-seating section. The Department received no significant comment on this rule, and it has been retained, as amended, in the final rule in § 35.138(c).

Purchase of multiple tickets. In the NPRM, the Department proposed § 35.138(i) to address one of the most common ticketing complaints raised with the Department: That individuals with disabilities are not able to purchase more than two tickets. The Department proposed this provision to facilitate the ability of individuals with disabilities to attend events with friends, companions, or associates who may or may not have a disability by enabling individuals with disabilities to purchase the maximum number of tickets allowed per transaction to other spectators; by requiring venues to place accompanying individuals in general seating as close as possible to accessible seating (in the event that a group must be divided because of the large size of the group); and by allowing an individual with a disability to purchase up to three additional contiguous seats per wheelchair space if they are available at the time of sale. Section 35.138(i)(2) of the NPRM required that a group containing one or more wheelchair users must be placed together, if possible, and that in the event that the group could not be placed together, the individuals with disabilities may not be isolated from the rest of the group.

The Department asked in the NPRM whether this rule was sufficient to effectuate the integration of individuals with disabilities. Many advocates and individuals praised it as a welcome and much-needed change, stating that the trade-off of being able to sit with their family or friends was worth reducing the number of seats available for individuals with disabilities. Some commenters went one step further and suggested that the number of additional accompanying seats should not be restricted to three.

Although most of the substance of the proposed provision on the purchase of multiple tickets has been maintained in the final rule, it has been renumbered as § 35.138(d), reorganized, and supplemented. To preserve the availability of accessible seating for other individuals with disabilities, the Department has not expanded the rule beyond three additional contiguous seats. Section 35.138(d)(1) of the final rule requires

public entities to make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space provided that at the time of the purchase there are three such seats available. The requirement that the additional seats be ''contiguous with the wheelchair space'' does not mean that each of the additional seats must be in actual contact or have a border in common with the wheelchair space; however, at least one of the additional seats should be immediately adjacent to the wheelchair space. The Department recognizes that it will often be necessary to use vacant wheelchair spaces to provide for contiguous seating.

The Department has added paragraphs (d)(2) and (d)(3) to clarify that in situations where there are insufficient unsold seats to provide three additional contiguous seats per wheelchair space or a ticket office restricts sales of tickets to a particular event to less than four tickets per customer, the obligation to make available three additional contiguous seats per wheelchair space would be affected. For example, if at the time of purchase, there are only two additional contiguous seats available for purchase because the third has been sold already, then the ticket purchaser would be entitled to two such seats. In this situation, the public entity would be required to make up the difference by offering one additional ticket for sale that is as close as possible to the accessible seats. Likewise, if ticket purchases for an event are limited to two per customer, a person who uses a wheelchair who seeks to purchase tickets would be entitled to purchase only one additional contiguous seat for the event.

The Department also has added paragraph (d)(4) to clarify that the requirement for three additional contiguous seats is not intended to serve as a cap if the maximum number of tickets that may be purchased by members of the general public exceeds the four tickets an individual with a disability ordinarily would be allowed to purchase (*i.e.*, a wheelchair space and three additional contiguous seats). If the maximum number of tickets that may be purchased by members of the general public exceeds four, an individual with a disability is to be allowed to purchase the maximum number of tickets; however, additional tickets purchased by an individual with a disability beyond the wheelchair space and the three additional contiguous seats provided in § 35.138(d)(1) do not have to be contiguous with the wheelchair space.

The NPRM proposed at § 35.138(i)(2) that for group sales, if a group includes one or more individuals who use a wheelchair, then the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from the rest of the members of their group. The final rule retains the NPRM language in paragraph (d)(5).

Hold-and-release of unsold accessible seating. The Department recognizes that not all accessible seating will be sold in all assembly areas for every event to individuals with disabilities who need such seating and that public entities may have opportunities to sell such seating to the general public. The Department proposed in the NPRM a provision aimed at striking a balance between affording individuals with disabilities adequate time to purchase accessible seating and the entity's desire to maximize ticket sales. In the NPRM, the Department proposed § 35.138(f), which allowed for the release of accessible seating under the following circumstances: (i) When all seating in the facility has been sold, excluding luxury boxes, club boxes, or suites; (ii) when all seating in a designated area has been sold and the accessible seating being released is in the same area; or (iii) when all seating in a designated price range has been sold and the accessible seating being released is within the same price range.

The Department's NPRM asked ''whether additional regulatory guidance is required or appropriate in terms of a more detailed or set

schedule for the release of tickets in conjunction with the three approaches described above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?'' 73 FR 34466, 34484 (June 17, 2008).

The Department received comments both supporting and opposing the inclusion of a hold-and-release provision. One side proposed loosening the restrictions on the release of unsold accessible seating. One commenter from a trade association suggested that tickets should be released regardless of whether there is a sell-out, and that these tickets should be released according to a set schedule. Conversely, numerous individuals, advocacy groups, and at least one public entity urged the Department to tighten the conditions under which unsold tickets for accessible seating may be released. These commenters suggested that venues should not be permitted to release tickets during the first two weeks of sale, or alternatively, that they should not be permitted to be released earlier than 48 hours before a sold-out event. Many of these commenters criticized the release of accessible seating under the second and third prongs of § 35.138(f) in the NPRM (when there is a sell-out in general seating in a designated seating area or in a price range), arguing that it would create situations where general seating would be available for purchase while accessible seating would not be.

Numerous commenters—both from the industry and from advocacy groups—asked for clarification of the term ''sell-out.'' Business groups commented that industry practice is to declare a sell-out when there are only ''scattered singles'' available— isolated seats that cannot be purchased as a set of adjacent pairs. Many of those same commenters also requested that ''sell-out'' be qualified with the phrase ''of all seating available for sale'' since it is industry practice to hold back from release tickets to be used for groups connected with that event (*e.g.,* the promoter, home team, or sports league). They argued that those tickets are not available for sale and any return of these tickets to the general inventory happens close to the event date. Noting the practice of holding back tickets, one advocacy group suggested that covered entities be required to hold back accessible seating in proportion to the number of tickets that are held back for later release.

The Department has concluded that it would be inappropriate to interfere with industry practice by defining what constitutes a ''sell-out'' and that a public entity should continue to use its own approach to defining a ''sell-out.'' If, however, a public entity declares a sell-out by reference to those seats that are available for sale, but it holds back tickets that it reasonably anticipates will be released later, it must hold back a proportional percentage of accessible seating to be released as well.

Adopting any of the alternatives proposed in the comments summarized above would have upset the balance between protecting the rights of individuals with disabilities and meeting venues' concerns about lost revenue from unsold accessible seating. As a result, the Department has retained § 35.138(f) (renumbered as § 35.138(e)) in the final rule.

The Department has, however, modified the regulation text to specify that accessible seating may be released only when ''all nonaccessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area.'' As stated in the NPRM, the Department intended for this provision to allow, for example, the release of accessible seating at the orchestra level when all other seating at the orchestra level is sold. The

Department has added this language to the final rule at § 35.138(e)(1)(ii) to clarify that venues cannot designate or redesignate seating areas for the purpose of maximizing the release of unsold accessible seating. So, for example, a venue may not determine on an ad hoc basis that a group of seats at the orchestra level is a designated seating area in order to release unsold accessible seating in that area.

The Department also has maintained the hold-and-release provisions that appeared in the NPRM but has added a provision to address the release of accessible seating for series-of-events tickets on a series-of-events basis. Many commenters asked the Department whether unsold accessible seating may be converted to general seating and released to the general public on a season-ticket basis or longer when tickets typically are sold as a season-ticket package or other long-term basis. Several disability rights organizations and individual commenters argued that such a practice should not be permitted, and, if it were, that conditions should be imposed to ensure that individuals with disabilities have future access to those seats.

The Department interprets the fundamental principle of the ADA as a requirement to give individuals with disabilities equal, not better, access to those opportunities available to the general public. Thus, for example, a public entity that sells out its facility on a seasonticket only basis is not required to leave unsold its accessible seating if no persons with disabilities purchase those season-ticket seats. Of course, public entities may choose to go beyond what is required by reserving accessible seating for individuals with disabilities (or releasing such seats for sale to the general public) on an individual-game basis.

If a covered entity chooses to release unsold accessible seating for sale on a season-ticket or other long-term basis, it must meet at least two conditions. Under § 35.138(g) of the final rule, public entities must leave flexibility for game-day changeouts to accommodate ticket transfers on the secondary market. And public entities must modify their ticketing policies so that, in future years, individuals with disabilities will have the ability to purchase accessible seating on the same basis as other patrons (*e.g.,* as season tickets). Put differently, releasing accessible seating to the general public on a season-ticket or other long-term basis cannot result in that seating being lost to individuals with disabilities in perpetuity. If, in future years, season tickets become available and persons with disabilities have reached the top of the waiting list or have met any other eligibility criteria for seasonticket purchases, public entities must ensure that accessible seating will be made available to the eligible individuals. In order to accomplish this, the Department has added § 35.138(e)(3)(i) to require public entities that release accessible season tickets to individuals who do not have disabilities that require the features of accessible seating to establish a process to prevent the automatic reassignment of such ticket holders to accessible seating. For example, a public entity could have in place a system whereby accessible seating that was released because it was not purchased by individuals with disabilities is not in the pool of tickets available for purchase for the following season unless and until the conditions for ticket release have been satisfied in the following season. Alternatively, a public entity might release tickets for accessible seating only when a purchaser who does not need its features agrees that he or she has no guarantee of or right to the same seats in the following season, or that if season tickets are guaranteed for the following season, the purchaser agrees that the offer to purchase tickets is limited to non-accessible seats having to the extent practicable, comparable price, view, and amenities to the accessible seats such individuals held in the prior year. The Department is aware that this rule may require some administrative changes but believes that this process will not create undue financial and administrative burdens. The Department believes that this approach is balanced and beneficial. It will allow public entities to sell all

of their seats and will leave open the possibility, in future seasons or series of events, that persons who need accessible seating may have access to it.

The Department also has added § 35.138(e)(3)(ii) to address how season tickets or series-of-events tickets that have attached ownership rights should be handled if the ownership right returns to the public entity (*e.g.,* when holders forfeit their ownership right by failing to purchase season tickets or sell their ownership right back to a public entity). If the ownership right is for accessible seating, the public entity is required to adopt a process that allows an eligible individual with a disability who requires the features of such seating to purchase the rights and tickets for such seating.

Nothing in the regulatory text prevents a public entity from establishing a process whereby such ticket holders agree to be voluntarily reassigned from accessible seating to another seating area so that individuals with mobility disabilities or disabilities that require the features of accessible seating and who become newly eligible to purchase season tickets have an opportunity to do so. For example, a public entity might seek volunteers to relocate to another location that is at least as good in terms of its location, price, and amenities, or a public entity might use a seat with forfeited ownership rights as an inducement to get a ticket holder to give up accessible seating he or she does not need.

Ticket transfer. The Department received many comments asking whether accessible seating has the same transfer rights as general seats. The proposed regulation at § 35.138(e) required that individuals with disabilities must be allowed to purchase season tickets for accessible seating on the same terms and conditions as individuals purchasing season tickets for general seating, including the right—if it exists for other ticket-holders—to transfer individual tickets to friends or associates. Some commenters pointed out that the NPRM proposed explicitly allowing individuals with disabilities holding season tickets to transfer tickets but did not address the transfer of tickets purchased for individual events. Several commenters representing assembly areas argued that persons with disabilities holding tickets for an individual event should not be allowed to sell or transfer them to third parties because such ticket transfers would increase the risk of fraud or would make unclear the obligation of the entity to accommodate secondary ticket transfers. They argued that individuals holding accessible seating should either be required to transfer their tickets to another individual with a disability or return them to the facility for a refund.

Although the Department is sympathetic to concerns about administrative burden, curtailing transfer rights for accessible seating when other ticket holders are permitted to transfer tickets would be inconsistent with the ADA's guiding principle that individuals with disabilities must have rights equal to others. Thus, the Department has added language in the final rule in § 35.138(f) that requires that individuals with disabilities holding accessible seating for any event have the same transfer rights accorded other ticket holders for that event. Section 35.138(f) also preserves the rights of individuals with disabilities who hold tickets to accessible seats for a series of events to transfer individual tickets to others, regardless of whether the transferee needs accessible seating. This approach recognizes the common practice of individuals splitting season tickets or other multi-event ticket packages with friends, colleagues, or other spectators to make the purchase of season tickets affordable; individuals with disabilities should not be placed in the burdensome position of having to find another individual with a disability with whom to share the package.

This provision, however, does not require public entities to seat an individual who holds a ticket to an accessible seat in such seating if the individual does not need the accessible features of the seat. A public entity may reserve the right to switch these individuals to different seats if they are available, but a public entity is not required

to remove a person without a disability who is using accessible seating from that seating, even if a person who uses a wheelchair shows up with a ticket from the secondary market for a non-accessible seat and wants accessible seating.

Secondary ticket market. Section 35.138(g) is a new provision in the final rule that requires a public entity to modify its policies, practices, or procedures to ensure that an individual with a disability, who acquires a ticket in the secondary ticket market, may use that ticket under the same terms and conditions as other ticket holders who acquire a ticket in the secondary market for an event or series of events. This principle was discussed in the NPRM in connection with § 35.138(e), pertaining to season-ticket sales. There, the Department asked for public comment regarding a public entity's proposed obligation to accommodate the transfer of accessible seating tickets on the secondary ticket market to those who do not need accessible seating and vice versa.

The secondary ticket market, for the purposes of this rule, broadly means any transfer of tickets after the public entity's initial sale of tickets to individuals or entities. It thus encompasses a wide variety of transactions, from ticket transfers between friends to transfers using commercial exchange systems. Many commenters noted that the distinction between the primary and secondary ticket market has become blurred as a result of agreements between teams, leagues, and secondary market sellers. These commenters noted that the secondary market may operate independently of the public entity, and parts of the secondary market, such as ticket transfers between friends, undoubtedly are outside the direct jurisdiction of the public entity.

To the extent that venues seat persons who have purchased tickets on the secondary market, they must similarly seat persons with disabilities who have purchased tickets on the secondary market. In addition, some public entities may acquire ADA obligations directly by formally entering the secondary ticket market.

The Department's enforcement experience with assembly areas also has revealed that venues regularly provide for and make last-minute seat transfers. As long as there are vacant wheelchair spaces, requiring venues to provide wheelchair spaces for patrons who acquired inaccessible seats and need wheelchair spaces is an example of a reasonable modification of a policy under title II of the ADA. Similarly, a person who has a ticket for a wheelchair space but who does not require its accessible features could be offered non-accessible seating if such seating is available.

The Department's longstanding position that title II of the ADA requires venues to make reasonable modifications in their policies to allow individuals with disabilities who acquired non-accessible tickets on the secondary ticket market to be seated in accessible seating, where such seating is vacant, is supported by the only Federal court to address this issue. *See Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1159, 1171 (D. Or. 1998). The Department has incorporated this position into the final rule at § 35.138(g)(2).

The NPRM contained two questions aimed at gauging concern with the Department's consideration of secondary ticket market sales. The first question asked whether a secondary purchaser who does not have a disability and who buys an accessible seat should be required to move if the space is needed for someone with a disability.

Many disability rights advocates answered that the individual should move provided that there is a seat of comparable or better quality available for him and his companion. Some venues, however, expressed concerns about this provision, and asked how they are to identify who should be moved and what obligations apply if there are no seats available that are equivalent or better in quality.

The Department's second question asked

whether there are particular concerns about the obligation to provide accessible seating, including a wheelchair space, to an individual with a disability who purchases an inaccessible seat through the secondary market.

Industry commenters contended that this requirement would create a ''logistical nightmare,'' with venues scrambling to reseat patrons in the short time between the opening of the venues' doors and the commencement of the event. Furthermore, they argued that they might not be able to reseat all individuals and that even if they were able to do so, patrons might be moved to inferior seats (whether in accessible or non-accessible seating). These commenters also were concerned that they would be sued by patrons moved under such circumstances.

These commenters seem to have misconstrued the rule. Covered entities are not required to seat every person who acquires a ticket for inaccessible seating but needs accessible seating, and are not required to move any individual who acquires a ticket for accessible seating but does not need it. Covered entities that allow patrons to buy and sell tickets on the secondary market must make reasonable modifications to their policies to allow persons with disabilities to participate in secondary ticket transfers. The Department believes that there is no one-size-fits-all rule that will suit all assembly areas. In those circumstances where a venue has accessible seating vacant at the time an individual with a disability who needs accessible seating presents his ticket for inaccessible seating at the box office, the venue must allow the individual to exchange his ticket for an accessible seat in a comparable location if such an accessible seat is vacant. Where, however, a venue has sold all of its accessible seating, the venue has no obligation to provide accessible seating to the person with a disability who purchased an inaccessible seat on the secondary market. Venues may encourage individuals with disabilities who hold tickets for inaccessible seating to contact the box office before the event to notify them of their need for accessible seating, even though they may not require ticketholders to provide such notice.

The Department notes that public entities are permitted, though not required, to adopt policies regarding moving patrons who do not need the features of an accessible seat. If a public entity chooses to do so, it might mitigate administrative concerns by marking tickets for accessible seating as such, and printing on the ticket that individuals who purchase such seats but who do not need accessible seating are subject to being moved to other seats in the facility if the accessible seating is required for an individual with a disability. Such a venue might also develop and publish a ticketing policy to provide transparency to the general public and to put holders of tickets for accessible seating who do not require it on notice that they may be moved.

Prevention of fraud in purchase of accessible seating. Assembly area managers and advocacy groups have informed the Department that the fraudulent purchase of accessible seating is a pressing concern. Curbing fraud is a goal that public entities and individuals with disabilities share. Steps taken to prevent fraud, however, must be balanced carefully against the privacy rights of individuals with disabilities. Such measures also must not impose burdensome requirements upon, nor restrict the rights of, individuals with disabilities.

In the NPRM, the Department struck a balance between these competing concerns by proposing § 35.138(h), which prohibited public entities from asking for proof of disability before the purchase of accessible seating but provided guidance in two paragraphs on appropriate measures for curbing fraud. Paragraph (1) proposed allowing a public entity to ask individuals purchasing single-event tickets for accessible seating whether they are wheelchair users. Paragraph (2) proposed allowing a public entity to require the individuals purchasing accessible seating for season tickets or other multi-event ticket packages

to attest in writing that the accessible seating is for a wheelchair user. Additionally, the NPRM proposed to permit venues, when they have good cause to believe that an individual has fraudulently purchased accessible seating, to investigate that individual.

Several commenters objected to this rule on the ground that it would require a wheelchair user to be the purchaser of tickets. The Department has reworded this paragraph to reflect that the individual with a disability does not have to be the ticket purchaser. The final rule allows third parties to purchase accessible tickets at the request of an individual with a disability.

Commenters also argued that other individuals with disabilities who do not use wheelchairs should be permitted to purchase accessible seating. Some individuals with disabilities who do not use wheelchairs urged the Department to change the rule, asserting that they, too, need accessible seating. The Department agrees that such seating, although designed for use by a wheelchair user, may be used by non-wheelchair users, if those persons are persons with a disability who need to use accessible seating because of a mobility disability or because their disability requires the use of the features that accessible seating provides (*e.g.,* individuals who cannot bend their legs because of braces, or individuals who, because of their disability, cannot sit in a straight-back chair).

Some commenters raised concerns that allowing venues to ask questions to determine whether individuals purchasing accessible seating are doing so legitimately would burden individuals with disabilities in the purchase of accessible seating. The Department has retained the substance of this provision in § 35.138(h) of the final rule, but emphasizes that such questions should be asked at the initial time of purchase. For example, if the method of purchase is via the Internet, then the question(s) should be answered by clicking a yes or no box during the transaction. The public entity may warn purchasers that accessible seating is for individuals with disabilities and that individuals purchasing such tickets fraudulently are subject to relocation.

One commenter argued that face-to-face contact between the venue and the ticket holder should be required in order to prevent fraud and suggested that individuals who purchase accessible seating should be required to pick up their tickets at the box office and then enter the venue immediately. The Department has declined to adopt that suggestion. It would be discriminatory to require individuals with disabilities to pick up tickets at the box office when other spectators are not required to do so. If the assembly area wishes to make face-to-face contact with accessible seating ticket holders to curb fraud, it may do so through its ushers and other customer service personnel located within the seating area.

Some commenters asked whether it is permissible for assembly areas to have voluntary clubs where individuals with disabilities self-identify to the public entity in order to become a member of a club that entitles them to purchase accessible seating reserved for club members or otherwise receive priority in purchasing accessible seating. The Department agrees that such clubs are permissible, provided that a reasonable amount of accessible seating remains available at all prices and dispersed at all locations for individuals with disabilities who are non-members.

§ 35.139 Direct threat.

In Appendix A of the Department's 1991 title II regulation, the Department included a detailed discussion of ''direct threat'' that, among other things, explained that ''the principles established in § 36.208 of the Department's [title III] regulation'' were ''applicable'' as well to title II, insofar as ''questions of safety are involved.'' 28 CFR part 35, app. A at 565 (2009). In the final rule, the Department has included specific requirements related to ''direct threat'' that parallel those in the title III rule. These

requirements are found in new § 35.139.

Subpart D—Program Accessibility

Section 35.150(b)(2) Safe harbor

The ''program accessibility'' requirement in regulations implementing title II of the Americans with Disabilities Act requires that each service, program, or activity, *when viewed in its entirety*, be readily accessible to and usable by individuals with disabilities. 28 CFR 35.150(a). Because title II evaluates a public entity's programs, services, and activities in their entirety, public entities have flexibility in addressing accessibility issues. Program access does not necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities, and public entities are not required to make structural changes to existing facilities where other methods are effective in achieving program access. *See id*. [3] Public entities do, however, have program access considerations that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

Where a public entity opts to alter existing facilities to comply with its program access requirements, the entity must meet the accessibility requirements for alterations set out in § 35.151. Under the final rule, these alterations will be subject to the 2010 Standards. The 2010 Standards introduce technical and scoping specifications for many elements not covered by the 1991 Standards. In existing facilities, these supplemental requirements need to be taken into account by a public entity in ensuring program access. Also included in the 2010 Standards are revised technical and scoping requirements for a number of elements that were addressed in the 1991 Standards. These revised requirements reflect incremental changes that were added either because of additional study by the Access Board or in order to harmonize requirements with the model codes.

Although the program accessibility standard offers public entities a level of discretion in determining how to achieve program access, in the NPRM, the Department proposed an addition to § 35.150 at § 35.150(b)(2), denominated ''Safe Harbor,'' to clarify that ''[i]f a public entity has constructed or altered elements * * * in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standard, such public entity is not, solely because of the Department's adoption of the [2010] Standards, required to retrofit such elements to reflect incremental changes in the proposed standards.'' 73 FR 34466, 34505 (June 17, 2008). In these circumstances, the public entity would be entitled to a safe harbor for the already compliant elements until those elements are altered. The safe harbor does not negate a public entity's new construction or alteration obligations. A public entity must comply with the new construction or alteration requirements in effect at the time of the construction or alteration. With respect to existing facilities designed and constructed after January 26, 1992, but before the public entities are required to comply with the 2010 Standards, the rule is that any elements in these facilities that were not constructed in conformance with UFAS or the 1991 Standards are in violation of the ADA and must be brought into compliance. If elements in existing facilities were altered after January 26, 1992, and those alterations were not made in conformance with the alteration requirements in effect at the time, then those alteration violations must be corrected. Section 35.150(b)(2) of the final rule specifies that until the compliance date for the Standards (18 months from the date of publication of the rule), facilities or elements covered by § 35.151(a) or (b) that are noncompliant with either the 1991 Standards or UFAS shall be made accessible in accordance with the 1991 Standards, UFAS, or

[3]The term ''existing facility'' is defined in § 35.104 as amended by this rule.

the 2010 Standards. Once the compliance date is reached, such noncompliant facilities or elements must be made accessible in accordance with the 2010 Standards.

The Department received many comments on the safe harbor during the 60-day public comment period. Advocacy groups were opposed to the safe harbor for compliant elements in existing facilities. These commenters objected to the Department's characterization of revisions between the 1991 and 2010 Standards as incremental changes and assert that these revisions represent important advances in accessibility for individuals with disabilities. Commenters saw no basis for ''grandfathering'' outdated accessibility standards given the flexibility inherent in the program access standard. Others noted that title II's ''undue financial and administrative burdens'' and ''fundamental alteration'' defenses eliminate any need for further exemptions from compliance. Some commenters suggested that entities' past efforts to comply with the program access standard of 28 CFR 35.150(a) might appropriately be a factor in determining what is required in the future.

Many public entities welcomed the Department's proposed safe harbor. These commenters contend that the safe harbor allows public entities needed time to evaluate program access in light of the 2010 Standards, and incorporate structural changes in a careful and thoughtful way toward increasing accessibility entity-wide. Many felt that it would be an ineffective use of public funds to update buildings to retrofit elements that had already been constructed or modified to Department-issued and sanctioned specifications. One entity pointed to the ''possibly budget-breaking'' nature of forcing compliance with incremental changes.

The Department has reviewed and considered all information received during the 60-day public comment period. Upon review, the Department has decided to retain the title II safe harbor with minor revisions. The Department believes that the safe harbor provides an important measure of clarity and certainty for public entities as to the effect of the final rule with respect to existing facilities. Additionally, by providing a safe harbor for elements already in compliance with the technical and scoping specifications in the 1991 Standards or UFAS, funding that would otherwise be spent on incremental changes and repeated retrofitting is freed up to be used toward increased entity-wide program access. Public entities may thereby make more efficient use of the resources available to them to ensure equal access to their services, programs, or activities for all individuals with disabilities.

The safe harbor adopted with this final rule is a narrow one, as the Department recognizes that this approach may delay, in some cases, the increased accessibility that the revised requirements would provide, and that for some individuals with disabilities the impact may be significant. This safe harbor operates only with respect to elements that are in compliance with the scoping and technical specifications in either the 1991 Standards or UFAS; it does not apply to supplemental requirements, those elements for which scoping and technical specifications are first provided in the 2010 Standards.

Existing Facilities

Existing play areas. The 1991 Standards do not include specific requirements for the design and construction of play areas. To meet program accessibility requirements where structural changes are necessary, public entities have been required to apply the general new construction and alteration standards to the greatest extent possible, including with respect to accessible parking, routes to the playground, playground equipment, and playground amenities (*e.g.*, picnic tables and restrooms). The Access Board published final guidelines for play areas in October 2000. The guidelines extended beyond general playground access to establish specific scoping and technical

requirements for ground-level and elevated play components, accessible routes connecting the components, accessible ground surfaces, and maintenance of those surfaces. These guidelines filled a void left by the 1991 Standards. They have been referenced in Federal playground construction and safety guidelines and have been used voluntarily when many play areas across the country have been altered or constructed.

In adopting the 2004 ADAAG (which includes the 2000 play area guidelines), the Department acknowledges both the importance of integrated, full access to play areas for children and parents with disabilities, as well as the need to avoid placing an untenable fiscal burden on public entities. In the NPRM, the Department stated it was proposing two specific provisions to reduce the impact on existing facilities that undertake structural modifications pursuant to the program accessibility requirement. First, the Department proposed in § 35.150(b)(4) that existing play areas that are not being altered would be permitted to meet a reduced scoping requirement with respect to their elevated play components. Elevated play components, which are found on most playgrounds, are the individual components that are linked together to form large-scale composite playground equipment (*e.g.,* the monkey bars attached to the suspension bridge attached to the tube slide, etc.) The 2010 Standards provide that a play area that includes both ground level and elevated play components must ensure that a specified number of the ground-level play components and at least 50 percent of the elevated play components are accessible.

In the NPRM, the Department asked for specific public comment with regard to whether existing play areas should be permitted to substitute additional ground-level play components for the elevated play components they would otherwise have been required to make accessible. The Department also queried if there were other requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping. Many commenters opposed permitting existing play areas to make such substitutions. Several commenters stated that the Access Board already completed significant negotiation and cost balancing in its rulemaking, so no additional exemptions should be added in either meeting program access requirements or in alterations. Others noted that elevated components are generally viewed as the more challenging and exciting by children, so making more ground than elevated play components accessible would result in discrimination against children with disabilities in general and older children with disabilities in particular. They argued that the ground components would be seen as equipment for younger children and children with disabilities, while elevated components would serve only older children without disabilities. In addition, commenters advised that including additional ground-level play components would require more accessible route and use zone surfacing, which would result in a higher cost burden than making elevated components accessible.

The Department also asked for public comment on whether it would be appropriate for the Access Board to consider issuing guidelines for alterations to play and recreational facilities that would permit reduced scoping of accessible components or substitution of ground-level play components in lieu of elevated play components. Most commenters opposed any additional reductions in scoping and substitutions. These commenters uniformly stated that the Access Board completed sufficient negotiation during its rulemaking on its play area guidelines published in 2000 and that those guidelines consequently should stand as is. One commenter advocated reduced scoping and substitution of ground play components during alterations only for those play areas built prior to the finalization of the guidelines.

The Department has considered the comments it has received and has determined that it is not

necessary to provide a specific exemption to the scoping for components for existing play areas or to recommend reduced scoping or additional exemptions for alteration, and has deleted the reduced scoping proposed in NPRM § 35.150(b)(4)(i) from the final rule. The Department believes that it is preferable for public entities to try to achieve compliance with the design standards established in the 2010 Standards. If this is not possible to achieve in an existing setting, the requirements for program accessibility provide enough flexibility to permit the covered entity to pursue alternative approaches to provide accessibility.

Second, in § 35.150(b)(5)(i) of the NPRM, the Department proposed language stating that existing play areas that are less than 1,000 square feet in size and are not otherwise being altered, need not comply with the scoping and technical requirements for play areas in section 240 of the 2004 ADAAG. The Department stated it selected this size based on the provision in section 1008.2.4.1 of the 2004 ADAAG, Exception 1, which permits play areas less than 1,000 square feet in size to provide accessible routes with a reduced clear width (44 inches instead of 60 inches). In its 2000 regulatory assessment for the play area guidelines, the Access Board assumed that such ''small'' play areas represented only about 20 percent of the play areas located in public schools, and none of the play areas located in city and State parks (which the Board assumed were typically larger than 1,000 square feet).

In the NPRM, the Department asked if existing play areas less than 1,000 square feet should be exempt from the requirements applicable to play areas. The vast majority of commenters objected to such an exemption. One commenter stated that many localities that have parks this size are already making them accessible; many cited concerns that this would leave all or most public playgrounds in small towns inaccessible; and two commenters stated that, since many of New York City's parks are smaller than 1,000 square feet, only scattered larger parks in the various boroughs would be obliged to become accessible. Residents with disabilities would then have to travel substantial distances outside their own neighborhoods to find accessible playgrounds. Some commenters responded that this exemption should not apply in instances where the play area is the only one in the program, while others said that if a play area is exempt for reasons of size, but is the only one in the area, then it should have at least an accessible route and 50 percent of its ground-level play components accessible. One commenter supported the exemption as presented in the question.

The Department is persuaded by these comments that it is inappropriate to exempt public play areas that are less than 1,000 square feet in size. The Department believes that the factors used to determine program accessibility, including the limits established by the undue financial and administrative burdens defense, provide sufficient flexibility to public entities in determining how to make their existing play areas accessible. In those cases where a title II entity believes that present economic concerns make it an undue financial and administrative burden to immediately make its existing playgrounds accessible in order to comply with program accessibility requirements, then it may be reasonable for the entity to develop a multiyear plan to bring its facilities into compliance.

In addition to requesting public comment about the specific sections in the NPRM, the Department also asked for public comment about the appropriateness of a general safe harbor for existing play areas and a safe harbor for public entities that have complied with State or local standards specific to play areas. In the almost 200 comments received on title II play areas, the vast majority of commenters strongly opposed all safe harbors, exemptions, and reductions in scoping. By contrast, one commenter advocated a safe harbor from compliance with the 2004 ADAAG play area requirements along with

reduced scoping and exemptions for both program accessibility and alterations; a second commenter advocated only the general safe harbor from compliance with the supplemental requirements.

In response to the question of whether the Department should exempt public entities from specific compliance with the supplemental requirements for play areas, commenters stated that since no specific standards previously existed, play areas are more than a decade behind in providing full access for individuals with disabilities. When accessible play areas were created, public entities, acting in good faith, built them according to the 2004 ADAAG requirements; many equipment manufacturers also developed equipment to meet those guidelines. If existing playgrounds were exempted from compliance with the supplemental guidelines, commenters said, those entities would be held to a lesser standard and left with confusion, a sense of wasted resources, and federally condoned discrimination and segregation. Commenters also cited Federal agency settlement agreements on play areas that required compliance with the guidelines. Finally, several commenters observed that the provision of a safe harbor in this instance was invalid for two reasons: (1) The rationale for other safe harbors—that entities took action to comply with the 1991 Standards and should not be further required to comply with new standards—does not exist; and (2) concerns about financial and administrative burdens are adequately addressed by program access requirements.

The question of whether accessibility of play areas should continue to be assessed on the basis of case-by-case evaluations elicited conflicting responses. One commenter asserted that there is no evidence that the case-by-case approach is not working and so it should continue until found to be inconsistent with the ADA's goals. Another commenter argued that case-by-case evaluations result in unpredictable outcomes which result in costly and long court actions. A third commenter, advocating against case-by-case evaluations, requested instead increased direction and scoping to define what constitutes an accessible play area program.

The Department has considered all of the comments it received in response to its questions and has concluded that there is insufficient basis to establish a safe harbor from compliance with the supplemental guidelines. Thus, the Department has eliminated the proposed exemption contained in § 35.150(b)(5)(i) of the NPRM for existing play areas that are less than 1,000 square feet. The Department believes that the factors used to determine program accessibility, including the limits established by the undue financial and administrative burdens defense, provide sufficient flexibility to public entities in determining how to make their existing play areas accessible.

In the NPRM, the Department also asked whether there are State and local standards addressing play and recreation area accessibility and, to the extent that there are such standards, whether facilities currently governed by, and in compliance with, such State and local standards or codes should be subject to a safe harbor from compliance with applicable requirements in the 2004 ADAAG. The Department also asked whether it would be appropriate for the Access Board to consider the implementation of guidelines that would permit such a safe harbor with respect to play and recreation areas undertaking alterations. In response, commenters stated that few State or local governments have standards that address issues of accessibility in play areas, and one commenter organization said that it was unaware of any State or local standards written specifically for accessible play areas. One commenter observed from experience that most State and local governments were waiting for the Access Board guidelines to become enforceable standards as they had no standards themselves to follow. Another commenter offered that public entities across the United States already include in their playground construction bid specifications language that requires compliance with the Access

Board's guidelines. A number of commenters advocated for the Access Board's guidelines to become comprehensive Federal standards that would complement any abbreviated State and local standards. One commenter, however, supported a safe harbor for play areas undergoing alterations if the areas currently comply with State or local standards.

The Department is persuaded by these comments that there is insufficient basis to establish a safe harbor for program access or alterations for play areas built in compliance with State or local laws.

In the NPRM, the Department asked whether ''a reasonable number, but at least one'' is a workable standard to determine the appropriate number of existing play areas that a public entity must make accessible. Many commenters objected to this standard, expressing concern that the phrase ''at least one'' would be interpreted as a maximum rather than a minimum requirement. Such commenters feared that this language would allow local governments to claim compliance by making just one public park accessible, regardless of the locality's size, budget, or other factors, and would support segregation, forcing children with disabilities to leave their neighborhoods to enjoy an accessible play area. While some commenters criticized what they viewed as a new analysis of program accessibility, others asserted that the requirements of program accessibility should be changed to address issues related to play areas that are not the main program in a facility but are essential components of a larger program (*e.g.*, drop-in child care for a courthouse).

The Department believes that those commenters who opposed the Department's ''reasonable number, but at least one'' standard for program accessibility misunderstood the Department's proposal. The Department did not intend any change in its longstanding interpretation of the program accessibility requirement. Program accessibility requires that each service, program, or activity be operated ''so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities,'' 28 CFR 35.150(a), subject to the undue financial and administrative burdens and fundamental alterations defenses provided in 28 CFR 35.150. In determining how many facilities of a multi-site program must be made accessible in order to make the overall program accessible, the standard has always been an assessment of what is reasonable under the circumstances to make the program readily accessible to and usable by individuals with disabilities, taking into account such factors as the size of the public entity, the particular program features offered at each site, the geographical distance between sites, the travel times to the sites, the number of sites, and availability of public transportation to the sites. In choosing among available methods for meeting this requirement, public entities are required to give priority ''to those methods that offer services, programs, and activities * * * in the most integrated setting appropriate.'' 28 CFR 35.150(b)(1). As a result, in cases where the sites are widely dispersed with difficult travel access and where the program features offered vary widely between sites, program accessibility will require a larger number of facilities to be accessible in order to ensure program accessibility than where multiple sites are located in a concentrated area with easy travel access and uniformity in program offerings.

Commenters responded positively to the Department's question in the NPRM whether the final rule should provide a list of factors that a public entity should use to determine how many of its existing play areas should be made accessible. Commenters also asserted strongly that the number of existing parks in the locality should not be the main factor. In addition to the Department's initial list—including number of play areas in an area, travel times or geographic distances between play areas, and the size of the public entity—commenters recommended such factors as availability of accessible pedestrian routes to

the playgrounds, ready availability of accessible transportation, comparable amenities and services in and surrounding the play areas, size of the playgrounds, and sufficient variety in accessible play components within the playgrounds. The Department agrees that these factors should be considered, where appropriate, in any determination of whether program accessibility has been achieved. However, the Department has decided that it need not address these factors in the final rule itself because the range of factors that might need to be considered would vary depending upon the circumstances of particular public entities. The Department does not believe any list would be sufficiently comprehensive to cover every situation.

The Department also requested public comment about whether there was a ''tipping point'' at which the costs of compliance with the new requirements for existing play areas would be so burdensome that the entity would simply shut down the playground. Commenters generally questioned the feasibility of determining a ''tipping point.'' No commenters offered a recommended ''tipping point.'' Moreover, most commenters stated that a ''tipping point'' is not a valid consideration for various reasons, including that ''tipping points'' will vary based upon each entity's budget and other mandates, and costs that are too high will be addressed by the limitations of the undue financial and administrative burdens defense in the program accessibility requirement and that a ''tipping point'' must be weighed against quality of life issues, which are difficult to quantify. The Department has decided that comments did not establish any clear ''tipping point'' and therefore provides no regulatory requirement in this area.

Swimming pools. The 1991 Standards do not contain specific scoping or technical requirements for swimming pools. As a result, under the 1991 title II regulation, title II entities that operate programs or activities that include swimming pools have not been required to provide an accessible route into those pools via a ramp or pool lift, although they are required to provide an accessible route to such pools. In addition, these entities continue to be subject to the general title II obligation to make their programs usable and accessible to persons with disabilities.

The 2004 ADAAG includes specific technical and scoping requirements for new and altered swimming pools at sections 242 and 1009. In the NPRM, the Department sought to address the impact of these requirements on existing swimming pools. Section 242.2 of the 2004 ADAAG states that swimming pools must provide two accessible means of entry, except that swimming pools with less than 300 linear feet of swimming pool wall are only required to provide one accessible means of entry, provided that the accessible means of entry is either a swimming pool lift complying with section 1009.2 or a sloped entry complying with section 1009.3.

In the NPRM, the Department proposed, in § 35.150(b)(4)(ii), that for measures taken to comply with title II's program accessibility requirements, existing swimming pools with at least 300 linear feet of swimming pool wall would be required to provide only one accessible means of access that complied with section 1009.2 or section 1009.3 of the 2004 ADAAG.

The Department specifically sought comment from public entities and individuals with disabilities on the question whether the Department should ''allow existing public entities to provide only one accessible means of access to swimming pools more than 300 linear feet long?'' The Department received significant public comment on this proposal.

Most commenters opposed any reduction in the scoping required in the 2004 ADAAG, citing the fact that swimming is a common therapeutic form of exercise for many individuals with disabilities. Many commenters also stated that the cost of a swimming pool lift, approximately $5,000, or other nonstructural options for pool access such as transfer steps, transfer walls,

and transfer platforms, would not be an undue financial and administrative burden for most title II entities. Other commenters pointed out that the undue financial and administrative burdens defense already provided public entities with a means to reduce their scoping requirements. A few commenters cited safety concerns resulting from having just one accessible means of access, and stated that because pools typically have one ladder for every 75 linear feet of pool wall, they should have more than one accessible means of access. One commenter stated that construction costs for a public pool are approximately $4,000– 4,500 per linear foot, making the cost of a pool with 300 linear feet of swimming pool wall approximately $1.2 million, compared to $5,000 for a pool lift. Some commenters did not oppose the one accessible means of access for larger pools so long as a lift was used. A few commenters approved of the one accessible means of access for larger pools. The Department also considered the American National Standard for Public Swimming Pools, ANSI/NSPI–1 2003, section 23 of which states that all pools should have at least two means of egress.

In the NPRM, the Department also proposed at § 35.150(b)(5)(ii) that existing swimming pools with less than 300 linear feet of swimming pool wall be exempted from having to comply with the provisions of section 242.2. The Department's NPRM requested public comment about the potential effect of this approach, asking whether existing swimming pools with less than 300 linear feet of pool wall should be exempt from the requirements applicable to swimming pools.

Most commenters were opposed to this proposal. A number of commenters stated, based on the Access Board estimates that 90 percent of public high school pools, 40 percent of public park and community center pools, and 30 percent of public college and university pools have less than 300 linear feet of pool wall, that a large number of public swimming pools would fall under this exemption. Other commenters pointed to the existing undue financial and administrative burdens defenses as providing public entities with sufficient protection from excessive compliance costs. Few commenters supported this exemption.

The Department also considered the fact that many existing swimming pools owned or operated by public entities are recipients of Federal financial assistance and therefore, are also subject to the program accessibility requirements of section 504 of the Rehabilitation Act.

The Department has carefully considered all the information available to it including the comments submitted on these two proposed exemptions for swimming pools owned or operated by title II entities. The Department acknowledges that swimming provides important therapeutic, exercise, and social benefits for many individuals with disabilities and is persuaded that exemption of many publicly owned or operated pools from the 2010 Standards is neither appropriate nor necessary. The Department agrees with the commenters that title II already contains sufficient limitations on public entities' obligations to make their programs accessible. In particular, the Department agrees that those public entities that can demonstrate that making particular existing swimming pools accessible in accordance with the 2010 Standards would be an undue financial and administrative burden are sufficiently protected from excessive compliance costs. Thus, the Department has eliminated proposed §§ 35.150(b)(4)(ii) and (b)(5)(ii) from the final rule.

In addition, although the NPRM contained no specific proposed regulatory language on this issue, the NPRM sought comment on what would be a workable standard for determining the appropriate number of existing swimming pools that a public entity must make accessible for its program to be accessible. The Department asked whether a ''reasonable number, but at least one'' would be a workable standard and, if not, whether there was a more appropriate specific standard. The Department also asked if, in the alternative,

the Department should provide ''a list of factors that a public entity could use to determine how many of its existing swimming pools to make accessible, *e.g.*, number of swimming pools, travel times or geographic distances between swimming pools, and the size of the public entity?"

A number of commenters expressed concern over the ''reasonable number, but at least one'' standard and contended that, in reality, public entities would never provide more than one accessible existing pool, thus segregating individuals with disabilities. Other commenters felt that the existing program accessibility standard was sufficient. Still others suggested that one in every three existing pools should be made accessible. One commenter suggested that all public pools should be accessible. Some commenters proposed a list of factors to determine how many existing pools should be accessible. Those factors include the total number of pools, the location, size, and type of pools provided, transportation availability, and lessons and activities available. A number of commenters suggested that the standard should be based on geographic areas, since pools serve specific neighborhoods. One commenter argued that each pool should be examined individually to determine what can be done to improve its accessibility.

The Department did not include any language in the final rule that specifies the ''reasonable number, but at least one'' standard for program access. However, the Department believes that its proposal was misunderstood by many commenters. Each service, program, or activity conducted by a public entity, when viewed in its entirety, must still be readily accessible to and usable by individuals with disabilities unless doing so would result in a fundamental alteration in the nature of the program or activity or in undue financial and administrative burdens. Determining which pool(s) to make accessible and whether more than one accessible pool is necessary to provide program access requires analysis of a number of factors, including, but not limited to, the size of the public entity, geographical distance between pool sites, whether more than one community is served by particular pools, travel times to the pools, the total number of pools, the availability of lessons and other programs and amenities at each pool, and the availability of public transportation to the pools. In many instances, making one existing swimming pool accessible will not be sufficient to ensure program accessibility. There may, however, be some circumstances where a small public entity can demonstrate that modifying one pool is sufficient to provide access to the public entity's program of providing public swimming pools. In all cases, a public entity must still demonstrate that its programs, including the program of providing public swimming pools, when viewed in their entirety, are accessible.

Wading pools. The 1991 Standards do not address wading pools. Section 242.3 of the 2004 ADAAG requires newly constructed or altered wading pools to provide at least one sloped means of entry to the deepest part of the pool. The Department was concerned about the potential impact of this new requirement on existing wading pools. Therefore, in the NPRM, the Department sought comments on whether existing wading pools that are not being altered should be exempt from this requirement, asking, ''[w]hat site constraints exist in existing facilities that could make it difficult or infeasible to install a sloped entry in an existing wading pool? Should existing wading pools that are not being altered be exempt from the requirement to provide a sloped entry? '' 73 FR 34466, 34487–88 (June 17, 2008). Most commenters agreed that existing wading pools that are not being altered should be exempt from this requirement. Almost all commenters felt that during alterations a sloped entry should be provided unless it was technically infeasible to do so. Several commenters felt that the required clear deck space surrounding a pool provided sufficient

space for a sloped entry during alterations.

The Department also solicited comments on the possibility of exempting existing wading pools from the obligation to provide program accessibility. Most commenters argued that installing a sloped entry in an existing wading pool is not very feasible. Because covered entities are not required to undertake modifications that would be technically infeasible, the Department believes that the rule as drafted provides sufficient protection from unwarranted expense to the operators of small existing wading pools. Other existing wading pools, particularly those larger pools associated with facilities such as aquatic centers or water parks, must be assessed on a case-by-case basis. Therefore, the Department has not included such an exemption for wading pools in its final rule.

Saunas and steam rooms. The 1991 Standards do not address saunas and steam rooms. Section 35.150(b)(5)(iii) of the NPRM exempted existing saunas and steam rooms that seat only two individuals and were not being altered from section 241 of the 2004 ADAAG, which requires an accessible turning space. Two commenters objected to this exemption as unnecessary, and argued that the cost of accessible saunas is not high and public entities still have an undue financial and administrative burdens defense.

The Department considered these comments and has decided to eliminate the exemption for existing saunas and steam rooms that seat only two people. Such an exemption is unnecessary because covered entities will not be subject to program accessibility requirements to make existing saunas and steam rooms accessible if doing so constitutes an undue financial and administrative burden. The Department believes it is likely that because of their prefabricated forms, which include built-in seats, it would be either technically infeasible or an undue financial and administrative burden to modify such saunas and steams rooms. Consequently, a separate exemption for saunas and steam rooms would have been superfluous. Finally, employing the program accessibility standard for small saunas and steam rooms is consistent with the Department's decisions regarding the proposed exemptions for play areas and swimming pools.

Several commenters also argued in favor of a specific exemption for existing spas. The Department notes that the technical infeasibility and program accessibility defenses are applicable equally to existing spas and declines to adopt such an exemption.

Other recreational facilities. In the NPRM, the Department asked about a number of issues relating to recreation facilities such as team or player seating areas, areas of sport activity, exercise machines, boating facilities, fishing piers and platforms, and miniature golf courses. The Department's questions addressed the costs and benefits of applying the 2004 ADAAG to these spaces and facilities and the application of the specific technical requirements in the 2004 ADAAG for these spaces and facilities. The discussion of the comments received by the Department on these issues and the Department's response to those comments can be found in either the section of Appendix A to this rule entitled ''Other Issues,'' or in Appendix B to the final title III rule, which will be published today elsewhere in this volume.

Section 35.151 New construction and alterations

Section 35.151(a), which provided that those facilities that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities, is unchanged in the final rule, but has been redesignated as § 35.151(a)(1). The Department has added a new section, designated as § 35.151(a)(2), to provide that full compliance with the requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the

requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. This exception was contained in the title III regulation and in the 1991 Standards (applicable to both public accommodations and facilities used by public entities), so it has applied to any covered facility that was constructed under the 1991 Standards since the effective date of the ADA. The Department added it to the text of § 35.151 to maintain consistency between the design requirements that apply under title II and those that apply under title III. The Department received no significant comments about this section.

Section 35.151(b) Alterations

The 1991 title II regulation does not contain any specific regulatory language comparable to the 1991 title III regulation relating to alterations and path of travel for covered entities, although the 1991 Standards describe standards for path of travel during alterations to a primary function. *See* 28 CFR part 36, app A., section 4.1.6(a) (2009).

The path of travel requirements contained in the title III regulation are based on section 303(a)(2) of the ADA, 42 U.S.C. 12183(a)(2), which provides that when an entity undertakes an alteration to a place of public accommodation or commercial facility that affects or could affect the usability of or access to an area that contains a primary function, the entity shall ensure that, to the maximum extent feasible, the path of travel to the altered area—and the restrooms, telephones, and drinking fountains serving it—is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The NPRM proposed amending § 35.151 to add both the path of travel requirements and the exemption relating to barrier removal (as modified to apply to the program accessibility standard in title II) that are contained in the title III regulation to the title II regulation. Proposed § 35.151(b)(4) contained the requirements for path of travel. Proposed § 35.151(b)(2) stated that the path of travel requirements of § 35.151(b)(4) shall not apply to measures taken solely to comply with program accessibility requirements.

Where the specific requirements for path of travel apply under title III, they are limited to the extent that the cost and scope of alterations to the path of travel are disproportionate to the cost of the overall alteration, as determined under criteria established by the Attorney General.

The Access Board included the path of travel requirement for alterations to facilities covered by the standards (other than those subject to the residential facilities standards) in section 202.4 of 2004 ADAAG. Section 35.151(b)(4)(iii) of the final rule establishes the criteria for determining when the cost of alterations to the path of travel is ''disproportionate'' to the cost of the overall alteration.

The NPRM also provided that areas such as supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Nor are restroom areas considered to contain a primary function unless the provision of restrooms is a primary purpose of the facility, such as at a highway rest stop. In that situation, a restroom would be considered to be an ''area containing a primary function'' of the facility.

The Department is not changing the requirements for program accessibility. As provided in § 35.151(b)(2) of the regulation, the path of travel requirements of § 35.151(b)(4) only apply to alterations undertaken solely for purposes other than to meet the program accessibility requirements. The exemption for the specific path of travel requirement was included in the regulation to ensure that the specific requirements and disproportionality exceptions for path of travel are not applied when areas are being altered to meet the title II program accessibility requirements in § 35.150.

In contrast, when areas are being altered to meet program accessibility requirements, they must comply with all of the applicable requirements referenced in section 202 of the 2010 Standards. A covered title II entity must provide accessibility to meet the requirements of § 35.150 unless doing so is an undue financial and administrative burden in accordance with § 35.150(a)(3). A covered title II entity may not use the disproportionality exception contained in the path of travel provisions as a defense to providing an accessible route as part of its obligation to provide program accessibility. The undue financial and administrative burden standard does not contain any bright line financial tests.

The Department's proposed § 35.151(b)(4) adopted the language now contained in § 36.403 of the title III regulation, including the disproportionality limitation (*i.e.*, alterations made to provide an accessible path of travel to the altered area would be deemed disproportionate to the overall alteration when the cost exceeds 20 percent of the cost of the alteration to the primary function area). Proposed § 35.151(b)(2) provided that the path of travel requirements do not apply to alterations undertaken solely to comply with program accessibility requirements.

The Department received a substantial number of comments objecting to the Department's adoption of the exemption for the path of travel requirements when alterations are undertaken solely to meet program accessibility requirements. These commenters argued that the Department had no statutory basis for providing this exemption nor does it serve any purpose. In addition, these commenters argued that the path of travel exemption has the effect of placing new limitations on the obligations to provide program access. A number of commenters argued that doing away with the path of travel requirement would render meaningless the concept of program access. They argued that just as the requirement to provide an accessible path of travel to an altered area (regardless of the reason for the alteration), including making the restrooms, telephones, and drinking fountains that serve the altered area accessible, is a necessary requirement in other alterations, it is equally necessary for alterations made to provide program access. Several commenters expressed concern that a readily accessible path of travel be available to ensure that persons with disabilities can get to the physical location in which programs are held. Otherwise, they will not be able to access the public entity's service, program, or activity. Such access is a cornerstone of the protections provided by the ADA. Another commenter argued that it would be a waste of money to create an accessible facility without having a way to get to the primary area. This commenter also stated that the International Building Code (IBC) requires the path of travel to a primary function area, up to 20 percent of the cost of the project. Another commenter opposed the exemption, stating that the trigger of an alteration is frequently the only time that a facility must update its facilities to comply with evolving accessibility standards.

In the Department's view, the commenters objecting to the path of travel exemption contained in § 35.151(b)(2) did not understand the intention behind the exemption. The exemption was not intended to eliminate any existing requirements related to accessibility for alterations undertaken in order to meet program access obligations under § 35.149 and § 35.150. Rather, it was intended to ensure that covered entities did not apply the path of travel requirements in lieu of the overarching requirements in this Subpart that apply when making a facility accessible in order to comply with program accessibility. The exemption was also intended to make it clear that the disproportionality test contained in the path of travel standards is not applicable in determining whether providing program access results in an undue financial and administration burden within the meaning of § 35.150(a)(3). The exemption

was also provided to maintain consistency with the title III path of travel exemption for barrier removal, *see* § 36.304(d), in keeping with the Department's regulatory authority under title II of the ADA. *See* 42 U.S.C. 12134(b); *see also* H. R Rep. No. 101B485, pt. 2, at 84 (1990) (''The committee intends, however, that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation.'').

For title II entities, the path of travel requirements are of significance in those cases where an alteration is being made solely for reasons other than program accessibility. For example, a public entity might have six courtrooms in two existing buildings and might determine that only three of those courtrooms and the public use and common use areas serving those courtrooms in one building are needed to be made accessible in order to satisfy its program access obligations. When the public entity makes those courtrooms and the public use and common use areas serving them accessible in order to meet its program access obligations, it will have to comply with the 2010 Standards unless the public entity can demonstrate that full compliance would result in undue financial and administrative burdens as described in § 35.150(a)(3). If such action would result in an undue financial or administrative burden, the public entity would nevertheless be required to take some other action that would not result in such an alteration or such burdens but would ensure that the benefits and services provided by the public entity are readily accessible to persons with disabilities. When the public entity is making modifications to meet its program access obligation, it may not rely on the path of travel exception under § 35.151(b)(4), which limits the requirement to those alterations where the cost and scope of the alterations are not disproportionate to the cost and scope of the overall alterations. If the public entity later decides to alter courtrooms in the other building, for purposes of updating the facility (and, as previously stated, has met its program access obligations) then in that case, the public entity would have to comply with the path of travel requirements in the 2010 Standards subject to the disproportionality exception set forth in § 35.151(b)(4).

The Department has slightly revised proposed § 35.151(b)(2) to make it clearer that the path of travel requirements only apply when alterations are undertaken solely for purposes other than program accessibility.

Section 35.151(b)(4)(ii)(C) Path of travel— safe harbor

In § 35.151(b)(4)(ii)(C) of the NPRM, the Department included a provision that stated that public entities that have brought required elements of path of travel into compliance with the 1991 Standards are not required to retrofit those elements in order to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area that is served by that path of travel. In these circumstances, the public entity is entitled to a safe harbor and is only required to modify elements to comply with the 2010 Standards if the public entity is planning an alteration to the element.

A substantial number of commenters objected to the Department's imposition of a safe harbor for alterations to facilities of public entities that comply with the 1991 Standards. These commenters argued that if a public entity is already in the process of altering its facility, there should be a legal requirement that individuals with disabilities be entitled to increased accessibility by using the 2010 Standards for path of travel work. They also stated that they did not believe there was a statutory basis for ''grandfathering'' facilities that comply with the 1991 Standards.

The ADA is silent on the issue of ''grandfathering'' or establishing a safe harbor for measuring compliance in situations where the covered entity is not undertaking a planned

alteration to specific building elements. The ADA delegates to the Attorney General the responsibility for issuing regulations that define the parameters of covered entities' obligations when the statute does not directly address an issue. This regulation implements that delegation of authority.

One commenter proposed that a previous record of barrier removal be one of the factors in determining, prospectively, what renders a facility, when viewed in its entirety, usable and accessible to persons with disabilities. Another commenter asked the Department to clarify, at a minimum, that to the extent compliance with the 1991 Standards does not provide program access, particularly with regard to areas not specifically addressed in the 1991 Standards, the safe harbor will not operate to relieve an entity of its obligations to provide program access.

One commenter supported the proposal to add a safe harbor for path of travel.

The final rule retains the safe harbor for required elements of a path of travel to altered primary function areas for public entities that have already complied with the 1991 Standards with respect to those required elements. The Department believes that this safe harbor strikes an appropriate balance between ensuring that individuals with disabilities are provided access to buildings and facilities and potential financial burdens on existing public entities that are undertaking alterations subject to the 2010 Standards. This safe harbor is not a blanket exemption for facilities. If a public entity undertakes an alteration to a primary function area, only the required elements of a path of travel to that area that already comply with the 1991 Standards are subject to the safe harbor. If a public entity undertakes an alteration to a primary function area and the required elements of a path of travel to the altered area do not comply with the 1991 Standards, then the public entity must bring those elements into compliance with the 2010 Standards.

Section 35.151(b)(3) Alterations to historic facilities

The final rule renumbers the requirements for alterations to historic facilities enumerated in current § 35.151(d)(1) and (2) as § 35.151(b)(3)(i) and (ii). Currently, the regulation provides that alterations to historic facilities shall comply to the maximum extent feasible with section 4.1.7 of UFAS or section 4.1.7 of the 1991 Standards. *See* 28 CFR 35.151(d)(1). Section 35.151(b)(3)(i) of the final rule eliminates the option of using UFAS for alterations that commence on or after March 15, 2012. The substantive requirement in current § 35.151(d)(2)—that alternative methods of access shall be provided pursuant to the requirements of § 35.150 if it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility—is contained in § 35.151(b)(3)(ii).

Section 35.151(c) Accessibility standards for new construction and alterations

Section 35.151(c) of the NPRM proposed to adopt ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the Americans with Disabilities Act and Architectural Barriers Act Guidelines (2004 ADAAG) into the ADA Standards for Accessible Design (2010 Standards). As the Department has noted, the development of these standards represents the culmination of a lengthy effort by the Access Board to update its guidelines, to make the Federal guidelines consistent to the extent permitted by law, and to harmonize the Federal requirements with the private sector model codes that form the basis of many State and local building code requirements. The full text of the 2010 Standards is available for public review on the ADA Home Page (*http://www.ada.gov*) and on the Access Board's Web site (*http:// www.access-board.gov/gs.htm*) (last visited June 24, 2010). The Access Board

site also includes an extensive discussion of the development of the 2004 ADA/ABA Guidelines, and a detailed comparison of the 1991 Standards, the 2004 ADA/ABA Guidelines, and the 2003 International Building Code.

Section 204 of the ADA, 42 U.S.C. 12134, directs the Attorney General to issue regulations to implement title II that are consistent with the minimum guidelines published by the Access Board. The Attorney General (or his designee) is a statutory member of the Access Board (*see* 29 U.S.C. 792(a)(1)(B(vii)) and was involved in the development of the 2004 ADAAG. Nevertheless, during the process of drafting the NPRM, the Department reviewed the 2004 ADAAG to determine if additional regulatory provisions were necessary. As a result of this review, the Department decided to propose new sections, which were contained in § 35.151(e)–(h) of the NPRM, to clarify how the Department will apply the proposed standards to social service center establishments, housing at places of education, assembly areas, and medical care facilities. Each of these provisions is discussed below.

Congress anticipated that there would be a need for close coordination of the ADA building requirements with State and local building code requirements. Therefore, the ADA authorized the Attorney General to establish an ADA code certification process under title III of the ADA. That process is addressed in 28 CFR part 36, subpart F. Revisions to that process are addressed in the regulation amending the title III regulation published elsewhere in the **Federal Register** today. In addition, the Department operates an extensive technical assistance program. The Department anticipates that once this rule is final, revised technical assistance material will be issued to provide guidance about its implementation.

Section 35.151(c) of the 1991 title II regulation establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with UFAS or with the 1991 Standards (which, at the time of the publication of the rule were also referred to as the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (1991 ADAAG)) is deemed to comply with the requirements of this section with respect to those facilities (except that if the 1991 Standards are chosen, the elevator exemption does not apply). The 1991 Standards were based on the 1991 ADAAG, which was initially developed by the Access Board as guidelines for the accessibility of buildings and facilities that are subject to title III. The Department adopted the 1991 ADAAG as the standards for places of public accommodation and commercial facilities under title III of the ADA and it was published as Appendix A to the Department's regulation implementing title III, 56 FR 35592 (July 26, 1991) as amended, 58 FR 17522 (April 5, 1993), and as further amended, 59 FR 2675 (Jan. 18, 1994), codified at 28 CFR part 36 (2009).

Section 35.151(c) of the final rule adopts the 2010 Standards and establishes the compliance date and triggering events for the application of those standards to both new construction and alterations. Appendix B of the final title III rule (Analysis and Commentary on the 2010 ADA Standards for Accessible Design) (which will be published today elsewhere in this volume and codified as Appendix B to 28 CFR part 36) provides a description of the major changes in the 2010 Standards (as compared to the 1991 ADAAG) and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. A number of commenters asked the Department to revise certain provisions in the 2004 ADAAG in a manner that would reduce either the required scoping or specific technical accessibility requirements. As previously stated, although the ADA requires the enforceable standards issued by the Department under title II and title III to be consistent with the minimum guidelines published by the Access Board, it is the sole responsibility

of the Attorney General to promulgate standards and to interpret and enforce those standards. The guidelines adopted by the Access Board are ''minimum guidelines.'' 42 U.S.C. 12186(c).

Compliance date. When the ADA was enacted, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Titles II and III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. *See* 42 U.S.C. 12131 note; 42 U.S.C. 12181 note. New construction under title II and alterations under either title II or title III had to comply with the design standards on that date. *See* 42 U.S.C. 12183(a)(1). For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—18 months after the 1991 Standards were published by the Department. In the NPRM, the Department proposed to amend § 35.151(c)(1) by revising the current language to limit the application of the 1991 standards to facilities on which construction commences within six months of the final rule adopting revised standards. The NPRM also proposed adding paragraph (c)(2) to § 35.151, which states that facilities on which construction commences on or after the date six months following the effective date of the final rule shall comply with the proposed standards adopted by that rule.

As a result, under the NPRM, for the first six months after the effective date, public entities would have the option to use either UFAS or the 1991 Standards and be in compliance with title II. Six months after the effective date of the rule, the new standards would take effect. At that time, construction in accordance with UFAS would no longer satisfy ADA requirements. The Department stated that in order to avoid placing the burden of complying with both standards on public entities, the Department would coordinate a government-wide effort to revise Federal agencies' section 504 regulations to adopt the 2004 ADAAG as the standard for new construction and alterations.

The purpose of the proposed six-month delay in requiring compliance with the 2010 Standards was to allow covered entities a reasonable grace period to transition between the existing and the proposed standards. For that reason, if a title II entity preferred to use the 2010 Standards as the standard for new construction or alterations commenced within the six-month period after the effective date of the final rule, such entity would be considered in compliance with title II of the ADA.

The Department received a number of comments about the proposed six-month effective date for the title II regulation that were similar in content to those received on this issue for the proposed title III regulation. Several commenters supported the six-month effective date. One commenter stated that any revisions to its State building code becomes effective six months after adoption and that this has worked well. In addition, this commenter stated that since 2004 ADAAG is similar to IBC 2006 and ICC/ANSI A117.1– 2003, the transition should be easy. By contrast, another commenter advocated for a minimum 12-month effective date, arguing that a shorter effective date could cause substantial economic hardships to many cities and towns because of the lengthy lead time necessary for construction projects. This commenter was concerned that a six-month effective date could lead to projects having to be completely redrawn, rebid, and rescheduled to ensure compliance with the new standards. Other commenters advocated that the effective date be extended to at least 18 months after the publication of the rule. One of these commenters expressed concern that the kinds of bureaucratic organizations subject to the title II regulations lack the internal resources to quickly evaluate the regulatory changes, determine whether they are currently compliant with the 1991 standards, and determine what they have to do to comply with the new standards. The other commenter argued that 18 months is

the minimum amount of time necessary to ensure that projects that have already been designed and approved do not have to undergo costly design revisions at taxpayer expense.

The Department is persuaded by the concerns raised by commenters for both the title II and III regulations that the six-month compliance date proposed in the NPRM for application of the 2010 Standards may be too short for certain projects that are already in the midst of the design and permitting process. The Department has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. Until the time compliance with the 2010 Standards is required, public entities will have the option of complying with the 2010 Standards, the UFAS, or the 1991 Standards. However, public entities that choose to comply with the 2010 Standards in lieu of the 1991 Standards or UFAS prior to the compliance date described in this rule must choose one of the three standards, and may not rely on some of the requirements contained in one standard and some of the requirements contained in the other standards.

Triggering event. In § 35.151(c)(2) of the NPRM, the Department proposed that the commencement of construction serve as the triggering event for applying the proposed standards to new construction and alterations under title II. This language is consistent with the triggering event set forth in § 35.151(a) of the 1991 title II regulation. The Department received only four comments on this section of the title II rule. Three commenters supported the use of ''start of construction'' as the triggering event. One commenter argued that the Department should use the ''last building permit or start of physical construction, whichever comes first,'' stating that ''altering a design after a building permit has been issued can be an undue burden.''

After considering these comments, the Department has decided to continue to use the commencement of physical construction as the triggering event for application of the 2010 Standards for entities covered by title II. The Department has also added clarifying language at § 35.151(c)(4) to the regulation to make it clear that the date of ceremonial groundbreaking or the date a structure is razed to make it possible for construction of a facility to take place does not qualify as the commencement of physical construction.

Section 234 of the 2010 Standards provides accessibility guidelines for newly designed and constructed amusement rides. The amusement ride provisions do not provide a ''triggering event'' for new construction or alteration of an amusement ride. An industry commenter requested that the triggering event of ''first use,'' as noted in the Advisory note to section 234.1 of the 2004 ADAAG, be included in the final rule. The Advisory note provides that ''[a] custom designed and constructed ride is new upon its first use, which is the first time amusement park patrons take the ride.'' The Department declines to treat amusement rides differently than other types of new construction and alterations. Under the final rule, they are subject to § 35.151(c). Thus, newly constructed and altered amusement rides shall comply with the 2010 Standards if the start of physical construction or the alteration is on or after 18 months from the publication date of this rule. The Department also notes that section 234.4.2 of the 2010 Standards only applies where the structural or operational characteristics of an amusement ride are altered. It does not apply in cases where the only change to a ride is the theme.

Noncomplying new construction and alterations. The element-by-element safe harbor referenced in § 35.150(b)(2) has no effect on new or altered elements in existing facilities that were subject to the 1991 Standards or UFAS on the date that they were constructed or altered, but do not comply with the technical and scoping specifications for those elements in the 1991 Standards or UFAS. Section 35.151(c)(5) of the

final rule sets forth the rules for noncompliant new construction or alterations in facilities that were subject to the requirements of this part. Under those provisions, noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012 shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards, UFAS, or the 2010 Standards. Noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012, shall, on or after March 15, 2012 be made accessible in accordance with the 2010 Standards.

Section 35.151(d) Scope of coverage

In the NPRM, the Department proposed a new provision, § 35.151(d), to clarify that the requirements established by § 35.151, including those contained in the 2004 ADAAG, prescribe what is necessary to ensure that buildings and facilities, including fixed or built-in elements in new or altered facilities, are accessible to individuals with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established in this final rule. Although the Department may use the requirements of the 2010 Standards as a guide to determining when and how to make equipment and furnishings accessible, those determinations fall within the discretionary authority of the Department.

The Department also wishes to clarify that the advisory notes, appendix notes, and figures that accompany the 1991 and 2010 Standards do not establish separately enforceable requirements unless specifically stated otherwise in the text of the standards. This clarification has been made to address concerns expressed by ANPRM commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (*e.g.,* Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosing to make them more visible to individuals with low vision). The Department received no significant comments on this section and it is unchanged in the final rule.

Definitions of residential facilities and transient lodging. The 2010 Standards add a definition of ''residential dwelling unit'' and modify the current definition of ''transient lodging.'' Under section 106.5 of the 2010 Standards, ''residential dwelling unit'' is defined as ''[a] unit intended to be used as a residence, that is primarily long-term in nature'' and does not include transient lodging, inpatient medical care, licensed long-term care, and detention or correctional facilities. Additionally, section 106.5 of the 2010 Standards changes the definition of ''transient lodging'' to a building or facility ''containing one or more guest room(s) for sleeping that provides accommodations that are primarily short-term in nature.'' ''Transient lodging'' does not include residential dwelling units intended to be used as a residence. The references to ''dwelling units'' and ''dormitories'' that are in the definition of the 1991 Standards are omitted from the 2010 Standards.

The comments about the application of transient lodging or residential standards to social service center establishments, and housing at a place of education are addressed separately below. The Department received one additional comment on this issue from an organization representing emergency response personnel seeking an exemption from the transient lodging accessibility requirements for crew quarters and common use areas serving those crew quarters (*e.g*., locker rooms, exercise rooms, day room) that are used exclusively by on-duty emergency response personnel and that are not used for any public purpose. The commenter argued that since emergency response personnel must meet certain physical qualifications that have the effect of

exempting persons with mobility disabilities, there is no need to build crew quarters and common use areas serving those crew quarters to meet the 2004 ADAAG. In addition, the commenter argued that applying the transient lodging standards would impose significant costs and create living space that is less usable for most emergency response personnel.

The ADA does not exempt spaces because of a belief or policy that excludes persons with disabilities from certain work. However, the Department believes that crew quarters that are used exclusively as a residence by emergency response personnel and the kitchens and bathrooms exclusively serving those quarters are more like residential dwelling units and are therefore covered by the residential dwelling standards in the 2010 Standards, not the transient lodging standards. The residential dwelling standards address most of the concerns of the commenter. For example, the commenter was concerned that sinks in kitchens and lavatories in bathrooms that are accessible under the transient lodging standards would be too low to be comfortably used by emergency response personnel. The residential dwelling standards allow such features to be adaptable so that they would not have to be lowered until accessibility was needed. Similarly, grab bars and shower seats would not have to be installed at the time of construction provided that reinforcement has been installed in walls and located so as to permit their installation at a later date.

Section 35.151(e) Social service center establishments

In the NPRM, the Department proposed a new § 35.151(e) requiring group homes, halfway houses, shelters, or similar social service center establishments that provide temporary sleeping accommodations or residential dwelling units to comply with the provisions of the 2004 ADAAG that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

The NPRM explained that this proposal was based on two important changes in the 2004 ADAAG. First, for the first time, residential dwelling units are explicitly covered in the 2004 ADAAG in section 233. Second, the 2004 ADAAG eliminates the language contained in the 1991 Standards addressing scoping and technical requirements for homeless shelters, group homes, and similar social service center establishments. Currently, such establishments are covered in section 9.5 of the transient lodging section of the 1991 Standards. The deletion of section 9.5 creates an ambiguity of coverage that must be addressed.

The NPRM explained the Department's belief that transferring coverage of social service center establishments from the transient lodging standards to the residential facilities standards would alleviate conflicting requirements for social service center providers. The Department believes that a substantial percentage of social service center establishments are recipients of Federal financial assistance from the Department of Housing and Urban Development (HUD). The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, these establishments are covered both by the ADA and section 504 of the Rehabilitation Act. UFAS is currently the design standard for new construction and alterations for entities subject to section 504. The two design standards for accessibility— the 1991 Standards and UFAS—have confronted many social service providers with separate, and sometimes conflicting, requirements for design and construction of facilities. To resolve these conflicts, the residential facilities standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the

1991 Standards from the 2004 ADAAG presented two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential facilities standards, which would harmonize the regulatory requirements under the ADA and section 504. The Department chose the option that harmonizes the regulatory requirements: coverage under the residential facilities standards.

In the NPRM, the Department expressed concern that the residential facilities standards do not include a requirement for clear floor space next to beds similar to the requirement in the transient lodging standards and as a result, the Department proposed adding a provision that would require certain social service center establishments that provide sleeping rooms with more than 25 beds to ensure that a minimum of 5 percent of the beds have clear floor space in accordance with section 806.2.3 of the 2004 ADAAG.

In the NPRM, the Department requested information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service center establishments, and from the clients of these facilities who would be affected by this proposed change, asking, ''[t]o what extent have conflicts between the ADA and section 504 affected these facilities? What would be the effect of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms?'' 73 FR 34466, 34491 (June 17, 2008).

Many of the commenters supported applying the residential facilities requirements to social service center establishments, stating that even though the residential facilities requirements are less demanding in some instances, the existence of one clear standard will result in an overall increased level of accessibility by eliminating the confusion and inaction that are sometimes caused by the current existence of multiple requirements. One commenter also stated that ''it makes sense to treat social service center establishments like residential facilities because this is how these establishments function in practice.''

Two commenters agreed with applying the residential facilities requirements to social service center establishments but recommended adding a requirement for various bathing options, such as a roll-in shower (which is not required under the residential standards).

One commenter objected to the change and asked the Department to require that social service center establishments continue to comply with the transient lodging standards. One commenter stated that it did not agree that the standards for residential coverage would serve persons with disabilities as well as the 1991 transient lodging standards. This commenter expressed concern that the Department had eliminated guidance for social service agencies and that the rule should be put on hold until those safeguards are restored. Another commenter argued that the rule that would provide the greatest access for persons with disabilities should prevail.

Several commenters argued for the application of the transient lodging standards to all social service center establishments except those that were ''intended as a person's place of abode,'' referencing the Department's question related to the definition of ''place of lodging'' in the title III NPRM. One commenter stated that the International Building Code requires accessible units in all transient facilities. The commenter expressed concern that group homes should be built to be accessible, rather than adaptable.

The Department continues to be concerned about alleviating the challenges for social service providers that are also subject to section 504 and would likely be subject to conflicting requirements if the transient lodging standards were applied. Thus, the Department has retained the requirement that social service center establishments comply with the residential dwelling standards. The Department believes,

however, that social service center establishments that provide emergency shelter to large transient populations should be able to provide bathing facilities that are accessible to persons with mobility disabilities who need roll-in showers. Because of the transient nature of the population of these large shelters, it will not be feasible to modify bathing facilities in a timely manner when faced with a need to provide a roll-in shower with a seat when requested by an overnight visitor. As a result, the Department has added a requirement that social service center establishments with sleeping accommodations for more than 50 individuals must provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group. This supplemental requirement to the residential facilities standards is in addition to the supplemental requirement that was proposed in the NPRM for clear floor space in sleeping rooms with more than 25 beds.

The Department also notes that while dwelling units at some social service center establishments are also subject to the Fair Housing Act (FHAct) design and construction requirements that require certain features of adaptable and accessible design, FHAct units do not provide the same level of accessibility that is required for residential facilities under the 2010 Standards. The FHAct requirements, where also applicable, should not be considered a substitute for the 2010 Standards. Rather, the 2010 Standards must be followed in addition to the FHAct requirements.

The Department also notes that whereas the NPRM used the term ''social service establishment,'' the final rule uses the term ''social service center establishment.'' The Department has made this editorial change so that the final rule is consistent with the terminology used in the ADA. *See* 42 U.S.C. 12181(7)(k).

Section 35.151(f) Housing at a place of education

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in postsecondary educational settings, including its requirements for architectural features. In addition, the Department of Housing and Urban Development (HUD) has enforcement responsibility for housing subject to title II of the ADA. Housing facilities in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In addition to title II of the ADA, public universities and schools that receive Federal financial assistance are also subject to section 504, which contains its own accessibility requirements through the application of UFAS. Residential housing in an educational setting is also covered by the FHAct, which requires newly constructed multifamily housing to include certain features of accessible and adaptable design. Covered entities subject to the ADA must always be aware of, and comply with, any other Federal statutes or regulations that govern the operation of residential properties.

Although the 1991 Standards mention dormitories as a form of transient lodging, they do not specifically address how the ADA applies to dormitories or other types of residential housing provided in an educational setting. The 1991 Standards also do not contain any specific provisions for residential facilities, allowing covered entities to elect to follow the residential standards contained in UFAS. Although the 2004 ADAAG contains provisions for both residential facilities and transient lodging, the guidelines do not indicate which requirements apply to housing provided in an educational setting, leaving it to the adopting agencies to make that choice. After evaluating both sets of standards, the Department concluded that the benefits

of applying the transient lodging standards outweighed the benefits of applying the residential facilities standards. Consequently, in the NPRM, the Department proposed a new § 35.151(f) that provided that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG.

Both public and private school housing facilities have varied characteristics. College and university housing facilities typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they are often used for short-term stays of one to three days, a week, or several months. Graduate and faculty housing is often provided year-round in the form of apartments, which may serve individuals or families with children. These housing facilities are diverse in their layout. Some are double-occupancy rooms with a shared toilet and bathing room, which may be inside or outside the unit. Others may contain cluster, suite, or group arrangements where several rooms are located inside a defined unit with bathing, kitchen, and similar common facilities. In some cases, these suites are indistinguishable in features from traditional apartments. Universities may build their own housing facilities or enter into agreements with private developers to build, own, or lease housing to the educational institution or to its students. Academic housing may be located on the campus of the university or may be located in nearby neighborhoods.

Throughout the school year and the summer, academic housing can become program areas in which small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms—both accessible rooms and standard rooms—in order to socialize, to study, and to use all public use and common use areas is an essential part of having access to these educational programs and activities. Academic housing is also used for short-term transient educational programs during the time students are not in regular residence and may be rented out to transient visitors in a manner similar to a hotel for special university functions.

The Department was concerned that applying the new construction requirements for residential facilities to educational housing facilities could hinder access to educational programs for students with disabilities. Elevators are not generally required under the 2004 ADAAG residential facilities standards unless they are needed to provide an accessible route from accessible units to public use and common use areas, while under the 2004 ADAAG as it applies to other types of facilities, multistory public facilities must have elevators unless they meet very specific exceptions. In addition, the residential facilities standards do not require accessible roll-in showers in bathrooms, while the transient lodging requirements require some of the accessible units to be served by bathrooms with roll-in showers. The transient lodging standards also require that a greater number of units have accessible features for persons with communication disabilities. The transient lodging standards provide for installation of the required accessible features so that they are available immediately, but the residential facilities standards allow for certain features of the unit to be adaptable. For example, only reinforcements for grab bars need to be provided in residential dwellings, but the actual grab bars must be installed under the transient lodging standards. By contrast, the residential facilities standards do require certain features that provide greater accessibility within units, such as more usable kitchens, and an accessible route throughout the dwelling. The residential facilities standards also require 5 percent of the units to be accessible to persons with mobility disabilities, which is a continuation of the same scoping that is currently required under UFAS, and is therefore applicable to any educational institution that is covered by section 504. The transient lodging

standards require a lower percentage of accessible sleeping rooms for facilities with large numbers of rooms than is required by UFAS. For example, if a dormitory had 150 rooms, the transient lodging standards would require seven accessible rooms while the residential standards would require eight. In a large dormitory with 500 rooms, the transient lodging standards would require 13 accessible rooms and the residential facilities standards would require 25. There are other differences between the two sets of standards as well with respect to requirements for accessible windows, alterations, kitchens, accessible route throughout a unit, and clear floor space in bathrooms allowing for a side transfer.

In the NPRM, the Department requested public comment on how to scope educational housing facilities, asking, ''[w]ould the residential facility requirements or the transient lodging requirements in the 2004 ADAAG be more appropriate for housing at places of education? How would the different requirements affect the cost when building new dormitories and other student housing?'' 73 FR 34466, 34492 (June 17, 2008).

The vast majority of the comments received by the Department advocated using the residential facilities standards for housing at a place of education instead of the transient lodging standards, arguing that housing at places of public education are in fact homes for the students who live in them. These commenters argued, however, that the Department should impose a requirement for a variety of options for accessible bathing and should ensure that all floors of dormitories be accessible so that students with disabilities have the same opportunities to participate in the life of the dormitory community that are provided to students without disabilities. Commenters representing persons with disabilities and several individuals argued that, although the transient lodging standards may provide a few more accessible features (such as roll-in showers), the residential facilities standards would ensure that students with disabilities have access to all rooms in their assigned unit, not just to the sleeping room, kitchenette, and wet bar. One commenter stated that, in its view, the residential facilities standards were congruent with overlapping requirements from HUD, and that access provided by the residential facilities requirements within alterations would ensure dispersion of accessible features more effectively. This commenter also argued that while the increased number of required accessible units for residential facilities as compared to transient lodging may increase the cost of construction or alteration, this cost would be offset by a reduced need to adapt rooms later if the demand for accessible rooms exceeds the supply. The commenter also encouraged the Department to impose a visitability (accessible doorways and necessary clear floor space for turning radius) requirement for both the residential facilities and transient lodging requirements to allow students with mobility impairments to interact and socialize in a fully integrated fashion.

Two commenters supported the Department's proposed approach. One commenter argued that the transient lodging requirements in the 2004 ADAAG would provide greater accessibility and increase the opportunity of students with disabilities to participate fully in campus life. A second commenter generally supported the provision of accessible dwelling units at places of education, and pointed out that the relevant scoping in the International Building Code requires accessible units ''consistent with hotel accommodations.''

The Department has considered the comments recommending the use of the residential facilities standards and acknowledges that they require certain features that are not included in the transient lodging standards and that should be required for housing provided at a place of education. In addition, the Department notes that since educational institutions often use their academic housing facilities as short-term transient lodging in the summers, it is important that accessible features be installed at the outset.

It is not realistic to expect that the educational institution will be able to adapt a unit in a timely manner in order to provide accessible accommodations to someone attending a one-week program during the summer.

The Department has determined that the best approach to this type of housing is to continue to require the application of transient lodging standards, but at the same time to add several requirements drawn from the residential facilities standards related to accessible turning spaces and work surfaces in kitchens, and the accessible route throughout the unit. This will ensure the maintenance of the transient lodging standard requirements related to access to all floors of the facility, roll-in showers in facilities with more than 50 sleeping rooms, and other important accessibility features not found in the residential facilities standards, but will also ensure usable kitchens and access to all the rooms in a suite or apartment.

The Department has added a new definition to § 35.104, ''Housing at a Place of Education,'' and has revised § 35.151(f) to reflect the accessible features that now will be required in addition to the requirements set forth under the transient lodging standards. The Department also recognizes that some educational institutions provide some residential housing on a year-round basis to graduate students and staff which is comparable to private rental housing, and which contains no facilities for educational programming.

Section 35.151(f)(3) exempts from the transient lodging standards apartments or townhouse facilities provided by or on behalf of a place of education that are leased on a year-round basis exclusively to graduate students or faculty, and do not contain any public use or common use areas available for educational programming; instead, such housing shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards. Section 35.151(f) uses the term ''sleeping room'' in lieu of the term ''guest room,'' which is the term used in the transient lodging standards. The Department is using this term because it believes that, for the most part, it provides a better description of the sleeping facilities used in a place of education than ''guest room.'' The final rule states that the Department intends the terms to be used interchangeably in the application of the transient lodging standards to housing at a place of education.

Section 35.151(g) Assembly areas

In the NPRM, the Department proposed § 35.151(g) to supplement the assembly area requirements of the 2004 ADAAG, which the Department is adopting as part of the 2010 Standards. The NPRM proposed at § 35.151(g)(1) to require wheelchair spaces and companion seating locations to be dispersed to all levels of the facility and are served by an accessible route. The Department received no significant comments on this paragraph and has decided to adopt the proposed language with minor modifications. The Department has retained the substance of this section in the final rule but has clarified that the requirement applies to stadiums, arenas, and grandstands. In addition, the Department has revised the phrase ''wheelchair and companion seating locations'' to ''wheelchair spaces and companion seats.''

Section 35.151(g)(1) ensures that there is greater dispersion of wheelchair spaces and companion seats throughout stadiums, arenas, and grandstands than would otherwise be required by sections 221 and 802 of the 2004 ADAAG. In some cases, the accessible route may not be the same route that other individuals use to reach their seats. For example, if other patrons reach their seats on the field by an inaccessible route (*e.g.*, by stairs), but there is an accessible route that complies with section 206.3 of the 2010 Standards that could be connected to seats on the field, wheelchair spaces and companion seats

must be placed on the field even if that route is not generally available to the public.

Regulatory language that was included in the 2004 ADAAG advisory, but that did not appear in the NPRM, has been added by the Department in § 35.151(g)(2). Section 35.151(g)(2) now requires an assembly area that has seating encircling, in whole or in part, a field of play or performance area such as an arena or stadium, to place wheelchair spaces and companion seats around the entire facility. This rule, which is designed to prevent a public entity from placing wheelchair spaces and companion seats on one side of the facility only, is consistent with the Department's enforcement practices and reflects its interpretation of section 4.33.3 of the 1991 Standards.

In the NPRM, the Department proposed § 35.151(g)(2) which prohibits wheelchair spaces and companion seating locations from being ''located on, (or obstructed by) temporary platforms or other moveable structures.'' Through its enforcement actions, the Department discovered that some venues place wheelchair spaces and companion seats on temporary platforms that, when removed, reveal conventional seating underneath, or cover the wheelchair spaces and companion seats with temporary platforms on top of which they place risers of conventional seating. These platforms cover groups of conventional seats and are used to provide groups of wheelchair seats and companion seats.

Several commenters requested an exception to the prohibition of the use of temporary platforms for public entities that sell most of their tickets on a season-ticket or other multi-event basis. Such commenters argued that they should be able to use temporary platforms because they know, in advance, that the patrons sitting in certain areas for the whole season do not need wheelchair spaces and companion seats. The Department declines to adopt such an exception. As it explained in detail in the NPRM, the Department believes that permitting the use of movable platforms that seat four or more wheelchair users and their companions have the potential to reduce the number of available wheelchair seating spaces below the level required, thus reducing the opportunities for persons who need accessible seating to have the same choice of ticket prices and amenities that are available to other patrons in the facility. In addition, use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of accessible seating will be lost when a platform is removed. *See* 73 FR 34466, 34493 (June 17, 2008). Further, use of temporary platforms allows facilities to limit persons who need accessible seating to certain seating areas, and to relegate accessible seating to less desirable locations. The use of temporary platforms has the effect of neutralizing dispersion and other seating requirements (*e.g.*, line of sight) for wheelchair spaces and companion seats. *Cf. Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1159, 1171 (D. Or. 1998) (holding that while a public accommodation may ''infill'' wheelchair spaces with removable seats when the wheelchair spaces are not needed to accommodate individuals with disabilities, under certain circumstances ''[s]uch a practice might well violate the rule that wheelchair spaces must be dispersed throughout the arena in a manner that is roughly proportionate to the overall distribution of seating''). In addition, using temporary platforms to convert unsold wheelchair spaces to conventional seating undermines the flexibility facilities need to accommodate secondary ticket markets exchanges as required by § 35.138(g) of the final rule.

As the Department explained in the NPRM, however, this provision was not designed to prohibit temporary seating that increases seating for events (*e.g.*, placing temporary seating on the floor of a basketball court for a concert). Consequently, the final rule, at § 35.151(g)(3), has been amended to clarify that if an entire seating

section is on a temporary platform for a particular event, then wheelchair spaces and companion seats may be in that seating section. However, adding a temporary platform to create wheelchair spaces and companion seats that are otherwise dissimilar from nearby fixed seating and then simply adding a small number of additional seats to the platform would not qualify as an ''entire seating section'' on the platform. In addition, § 35.151(g)(3) clarifies that facilities may fill in wheelchair spaces with removable seats when the wheelchair spaces are not needed by persons who use wheelchairs.

The Department has been responsive to assembly areas' concerns about reduced revenues due to unused accessible seating. Accordingly, the Department has reduced scoping requirements significantly—by almost half in large assembly areas—and determined that allowing assembly areas to infill unsold wheelchair spaces with readily removable temporary individual seats appropriately balances their economic concerns with the rights of individuals with disabilities. *See* section 221.2 of the 2010 Standards.

For stadium-style movie theaters, in § 35.151(g)(4) of the NPRM the Department proposed requiring placement of wheelchair seating spaces and companion seats on a riser or cross-aisle in the stadium section of the theater and placement of such seating so that it satisfies at least one of the following criteria: (1) It is located within the rear 60 percent of the seats provided in the auditorium; or (2) it is located within the area of the auditorium where the vertical viewing angles are between the 40th to 100th percentile of vertical viewing angles for all seats in that theater as ranked from the first row (1st percentile) to the back row (100th percentile). The vertical viewing angle is the angle between a horizontal line perpendicular to the seated viewer's eye to the screen and a line from the seated viewer's eye to the top of the screen.

The Department proposed this bright-line rule for two reasons: (1) The movie theater industry petitioned for such a rule; and (2) the Department has acquired expertise on the design of stadium style theaters from litigation against several major movie theater chains. *See U.S. v. AMC Entertainment*, 232 F. Supp. 2d 1092 (C.D. Ca. 2002), *rev'd in part*, 549 F. 3d 760 (9th Cir. 2008); *U.S. v. Cinemark USA, Inc*., 348 F. 3d 569 (6th Cir. 2003), *cert. denied*, 542 U.S. 937 (2004). Two industry commenters—at least one of whom otherwise supported this rule—requested that the Department explicitly state that this rule does not apply retroactively to existing theaters. Although this rule on its face applies to new construction and alterations, these commenters were concerned that the rule could be interpreted to apply retroactively because of the Department's statement in the ANPRM that this bright-line rule, although newly-articulated, does not represent a ''substantive change from the existing line-of-sight requirements'' of section 4.33.3 of the 1991 Standards. *See* 69 FR 58768, 58776 (Sept. 30, 2004).

Although the Department intends for § 35.151(g)(4) of this rule to apply prospectively to new construction and alterations, this rule is not a departure from, and is consistent with, the line-of-sight requirements in the 1991 Standards. The Department has always interpreted the line-of-sight requirements in the 1991 Standards to require viewing angles provided to patrons who use wheelchairs to be comparable to those afforded to other spectators. Section 35.151(g)(4) merely represents the application of these requirements to stadium-style movie theaters.

One commenter from a trade association sought clarification whether § 35.151(g)(4) applies to stadium-style theaters with more than 300 seats, and argued that it should not since dispersion requirements apply in those theaters. The Department declines to limit this rule to stadium-style theaters with 300 or fewer seats; stadium-style theaters of all sizes must comply with this rule. So, for example, stadium-style theaters that must vertically disperse wheelchair and

companion seats must do so within the parameters of this rule.

The NPRM included a provision that required assembly areas with more than 5,000 seats to provide at least five wheelchair spaces with at least three companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating is better addressed through ticketing policies rather than design and has deleted that provision from this section of the final rule.

Section 35.151(h) Medical care facilities

In the 1991 title II regulation, there was no provision addressing the dispersion of accessible sleeping rooms in medical care facilities. The Department is aware, however, of problems that individuals with disabilities face in receiving full and equal medical care when accessible sleeping rooms are not adequately dispersed. When accessible rooms are not fully dispersed, a person with a disability is often placed in an accessible room in an area that is not medically appropriate for his or her condition, and is thus denied quick access to staff with expertise in that medical specialty and specialized equipment. While the Access Board did not establish specific design requirements for dispersion in the 2004 ADAAG, in response to extensive comments in support of dispersion it added an advisory note, Advisory 223.1 General, encouraging dispersion of accessible rooms within the facility so that accessible rooms are more likely to be proximate to appropriate qualified staff and resources.

In the NPRM, the Department sought additional comment on the issue, asking whether it should require medical care facilities, such as hospitals, to disperse their accessible sleeping rooms, and if so, by what method (by specialty area, floor, or other criteria). All of the comments the Department received on this issue supported dispersing accessible sleeping rooms proportionally by specialty area. These comments, from individuals, organizations, and a building code association, argued that it would not be difficult for hospitals to disperse rooms by specialty area, given the high level of regulation to which hospitals are subject and the planning that hospitals do based on utilization trends. Further, commenters suggested that without a requirement, it is unlikely that hospitals would disperse the rooms. In addition, concentrating accessible rooms in one area perpetuates segregation of individuals with disabilities, which is counter to the purpose of the ADA.

The Department has decided to require medical care facilities to disperse their accessible sleeping rooms in a manner that is proportionate by type of medical specialty. This does not require exact mathematical proportionality, which at times would be impossible. However, it does require that medical care facilities disperse their accessible rooms by medical specialty so that persons with disabilities can, to the extent practical, stay in an accessible room within the wing or ward that is appropriate for their medical needs. The language used in this rule (''in a manner that is proportionate by type of medical specialty'') is more specific than that used in the NPRM (''in a manner that enables patients with disabilities to have access to appropriate specialty services'') and adopts the concept of proportionality proposed by the commenters. Accessible rooms should be dispersed throughout all medical specialties, such as obstetrics, orthopedics, pediatrics, and cardiac care.

Section 35.151(i) Curb ramps

Section 35.151(e) on curb ramps in the 1991 rule has been redesignated as § 35.151(i). In the NPRM, the Department proposed making a minor editorial change to this section, deleting the phrase ''other sloped areas'' from the two places in which it appears in the 1991 title II regulation. In the NPRM, the Department stated that the phrase ''other sloped areas'' lacks technical

precision. The Department received no significant public comments on this proposal. Upon further consideration, however, the Department has concluded that the regulation should acknowledge that there are times when there are transitions from sidewalk to road surface that do not technically qualify as ''curb ramps'' (sloped surfaces that have a running slope that exceed 5 percent). Therefore, the Department has decided not to delete the phrase ''other sloped areas.''

Section 35.151(j) Residential housing for sale to individual owners

Although public entities that operate residential housing programs are subject to title II of the ADA, and therefore must provide accessible residential housing, the 1991 Standards did not contain scoping or technical standards that specifically applied to residential housing units. As a result, under the Department's title II regulation, these agencies had the choice of complying with UFAS, which contains specific scoping and technical standards for residential housing units, or applying the ADAAG transient lodging standards to their housing. Neither UFAS nor the 1991 Standards distinguish between residential housing provided for rent and those provided for sale to individual owners. Thus, under the 1991 title II regulation, public entities that construct residential housing units to be sold to individual owners must ensure that some of those units are accessible. This requirement is in addition to any accessibility requirements imposed on housing programs operated by public entities that receive Federal financial assistance from Federal agencies such as HUD.

The 2010 Standards contain scoping and technical standards for residential dwelling units. However, section 233.3.2 of the 2010 Standards specifically defers to the Department and to HUD, the standard-setting agency under the ABA, to decide the appropriate scoping for those residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners. These programs include, for example, HUD's public housing and HOME programs as well as State-funded programs to construct units for sale to individuals. In the NPRM, the Department did not make a specific proposal for this scoping. Instead, the Department stated that after consultation and coordination with HUD, the Department would make a determination in the final rule. The Department also sought public comment on this issue stating that ''[t]he Department would welcome recommendations from individuals with disabilities, public housing authorities, and other interested parties that have experience with these programs. Please comment on the appropriate scoping for residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners.'' 73 FR 34466, 34492 (June 17, 2008).

All of the public comments received by the Department in response to this question were supportive of the Department's ensuring that the residential standards apply to housing built on behalf of public entities with the intent that the finished units would be sold to individual owners. The vast majority of commenters recommended that the Department require that projects consisting of five or more units, whether or not the units are located on one or multiple locations, comply with the 2004 ADAAG requirements for scoping of residential units, which require that 5 percent, and no fewer than one, of the dwelling units provide mobility features, and that 2 percent, and no fewer than one, of the dwelling units provide communication features. *See* 2004 ADAAG Section 233.3. These commenters argued that the Department should not defer to HUD because HUD has not yet adopted the 2004 ADAAG and there is ambiguity on the scope of coverage of pre-built for sale units under HUD's current section 504 regulations. In addition, these commenters expressed concern that HUD's current regulation, 24 CFR 8.29, presumes that

a prospective buyer is identified before design and construction begins so that disability features can be incorporated prior to construction. These commenters stated that State and Federally funded homeownership programs typically do not identify prospective buyers before construction has commenced. One commenter stated that, in its experience, when public entities build accessible for-sale units, they often sell these units through a lottery system that does not make any effort to match persons who need the accessible features with the units that have those features. Thus, accessible units are often sold to persons without disabilities. This commenter encouraged the Department to make sure that accessible for-sale units built or funded by public entities are placed in a separate lottery restricted to income-eligible persons with disabilities.

Two commenters recommended that the Department develop rules for four types of for-sale projects: single family pre-built (where buyer selects the unit after construction), single family post-built (where the buyer chooses the model prior to its construction), multi-family pre-built, and multi-family post-built. These commenters recommended that the Department require pre-built units to comply with the 2004 ADAAG 233.1 scoping requirements. For post-built units, the commenters recommended that the Department require all models to have an alternate design with mobility features and an alternate design with communications features in compliance with 2004 ADAAG. Accessible models should be available at no extra cost to the buyer. One commenter recommended that, in addition to required fully accessible units, all ground floor units should be readily convertible for accessibility or for sensory impairments technology enhancements.

The Department believes that consistent with existing requirements under title II, housing programs operated by public entities that design and construct or alter residential units for sale to individual owners should comply with the 2010 Standards, including the requirements for residential facilities in sections 233 and 809. These requirements will ensure that a minimum of 5 percent of the units, but no fewer than one unit, of the total number of residential dwelling units will be designed and constructed to be accessible for persons with mobility disabilities. At least 2 percent, but no fewer than one unit, of the total number of residential dwelling units shall provide communication features.

The Department recognizes that there are some programs (such as the one identified by the commenter), in which units are not designed and constructed until an individual buyer is identified. In such cases, the public entity is still obligated to comply with the 2010 Standards. In addition, the public entity must ensure that pre-identified buyers with mobility disabilities and visual and hearing disabilities are afforded the opportunity to buy the accessible units. Once the program has identified buyers who need the number of accessible units mandated by the 2010 Standards, it may have to make reasonable modifications to its policies, practices, and procedures in order to provide accessible units to other buyers with disabilities who request such units.

The Department notes that the residential facilities standards allow for construction of units with certain features of adaptability. Public entities that are concerned that fully accessible units are less marketable may choose to build these units to include the allowable adaptable features, and then adapt them at their own expense for buyers with mobility disabilities who need accessible units. For example, features such as grab bars are not required but may be added by the public entity if needed by the buyer at the time of purchase and cabinets under sinks may be designed to be removable to allow access to the required knee space for a forward approach.

The Department agrees with the commenters that covered entities may have to make reasonable modifications to their policies, practices, and procedures in order to ensure that when they offer pre-built accessible residential units for

sale, the units are offered in a manner that gives access to those units to persons with disabilities who need the features of the units and who are otherwise eligible for the housing program. This may be accomplished, for example, by adopting preferences for accessible units for persons who need the features of the units, holding separate lotteries for accessible units, or other suitable methods that result in the sale of accessible units to persons who need the features of such units. In addition, the Department believes that units designed and constructed or altered that comply with the requirements for residential facilities and are offered for sale to individuals must be provided at the same price as units without such features.

Section 35.151(k) Detention and correctional facilities

The 1991 Standards did not contain specific accessibility standards applicable to cells in correctional facilities. However, correctional and detention facilities operated by or on behalf of public entities have always been subject to the nondiscrimination and program accessibility requirements of title II of the ADA. The 2004 ADAAG established specific requirements for the design and construction and alterations of cells in correctional facilities for the first time.

Based on complaints received by the Department, investigations, and compliance reviews of jails, prisons, and other detention and correctional facilities, the Department has determined that many detention and correctional facilities do not have enough accessible cells, toilets, and shower facilities to meet the needs of their inmates with mobility disabilities and some do not have any at all. Inmates are sometimes housed in medical units or infirmaries separate from the general population simply because there are no accessible cells. In addition, some inmates have alleged that they are housed at a more restrictive classification level simply because no accessible housing exists at the appropriate classification level. The Department's compliance reviews and investigations have substantiated certain of these allegations.

The Department believes that the insufficient number of accessible cells is, in part, due to the fact that most jails and prisons were built long before the ADA became law and, since then, have undergone few alterations that would trigger the obligation to provide accessible features in accordance with UFAS or the 1991 Standards. In addition, the Department has found that even some new correctional facilities lack accessible features. The Department believes that the unmet demand for accessible cells is also due to the changing demographics of the inmate population. With thousands of prisoners serving life sentences without eligibility for parole, prisoners are aging, and the prison population of individuals with disabilities and elderly individuals is growing. A Bureau of Justice Statistics study of State and Federal sentenced inmates (those sentenced to more than one year) shows the total estimated count of State and Federal prisoners aged 55 and older grew by 36,000 inmates from 2000 (44,200) to 2006 (80,200). William J. Sabol *et al.*, *Prisoners in 2006*, Bureau of Justice Statistics Bulletin, Dec. 2007, at 23 (app. table 7), available at *http://bjs.ojp.usdoj.gov/ index.cfm?ty=pbdetail&iid=908* (last visited July 16, 2008); Allen J. Beck *et al*., *Prisoners in 2000,* Bureau of Justice Statistics Bulletin, Aug. 2001, at 10 (Aug. 2001) (Table 14), available at *bjs.ojp.usdoj.gov/ index.cfm?ty=pbdetail&iid=927* (last visited July 16, 2008). This jump constitutes an increase of 81 percent in prisoners aged 55 and older during this period.

In the NPRM, the Department proposed a new section, § 35.152, which combined a range of provisions relating to both program accessibility and application of the proposed standards to detention and correctional facilities. In the final rule, the Department is placing those provisions that refer to design, construction, and alteration

of detention and correction facilities in a new paragraph (k) of § 35.151, the section of the rule that addresses new construction and alterations for covered entities. Those portions of the final rule that address other issues, such as placement policies and program accessibility, are placed in the new § 35.152.

In the NPRM, the Department also sought input on how best to meet the needs of inmates with mobility disabilities in the design, construction, and alteration of detention and correctional facilities. The Department received a number of comments in response to this question.

New Construction. The NPRM did not expressly propose that new construction of correctional and detention facilities shall comply with the proposed standards because the Department assumed it would be clear that the requirements of § 35.151 would apply to new construction of correctional and detention facilities in the same manner that they apply to other facilities constructed by covered entities. The Department has decided to create a new section, § 35.151(k)(1), which clarifies that new construction of jails, prisons, and other detention facilities shall comply with the requirements of 2010 Standards. Section 35.151(k)(1) also increases the scoping for accessible cells from the 2 percent specified in the 2004 ADAAG to 3 percent.

Alterations. Although the 2010 Standards contain specifications for alterations in existing detention and correctional facilities, section 232.2 defers to the Attorney General the decision as to the extent these requirements will apply to alterations of cells. The NPRM proposed at § 35.152(c) that ''[a]lterations to jails, prisons, and other detention and correctional facilities will comply with the requirements of § 35.151(b).'' 73 FR 34466, 34507 (June 17, 2008). The final rule retains that requirement at § 35.151(k)(2), but increases the scoping for accessible cells from the 2 percent specified in the 2004 ADAAG to 3 percent.

Substitute cells. In the ANPRM, the Department sought public comment about the most effective means to ensure that existing correctional facilities are made accessible to prisoners with disabilities and presented three options: (1) Require all altered elements to be accessible, which would maintain the current policy that applies to other ADA alteration requirements; (2) permit substitute cells to be made accessible within the same facility, which would permit correctional authorities to meet their obligation by providing the required accessible features in cells within the same facility, other than those specific cells in which alterations are planned; or (3) permit substitute cells to be made accessible within a prison system, which would focus on ensuring that prisoners with disabilities are housed in facilities that best meet their needs, as alterations within a prison environment often result in piecemeal accessibility.

In § 35.152(c) of the NPRM, the Department proposed language based on Option 2, providing that when cells are altered, a covered entity may satisfy its obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (*i.e.*, cells other than those where alterations are originally planned), provided that each substitute cell is located within the same facility, is integrated with other cells to the maximum extent feasible, and has, at a minimum, physical access equal to that of the original cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees.

The Department received few comments on this proposal. The majority who chose to comment supported an approach that allowed substitute cells to be made accessible within the same facility. In their view, such an approach balanced administrators' needs, cost considerations, and the needs of inmates with disabilities. One commenter noted, however, that with older facilities, required

modifications may be inordinately costly and technically infeasible. A large county jail system supported the proposed approach as the most viable option allowing modification or alteration of existing cells based on need and providing a flexible approach to provide program and mobility accessibility. It noted, as an alternative, that permitting substitute cells to be made accessible within a prison system would also be a viable option since such an approach could create a centralized location for accessibility needs and, because that jail system's facilities were in close proximity, it would have little impact on families for visitation or on accessible programming.

A large State department of corrections objected to the Department's proposal. The commenter stated that some very old prison buildings have thick walls of concrete and reinforced steel that are difficult, if not impossible to retrofit, and to do so would be very expensive. This State system approaches accessibility by looking at its system as a whole and providing access to programs for inmates with disabilities at selected prisons. This commenter explained that not all of its facilities offer the same programs or the same levels of medical or mental health services. An inmate, for example, who needs education, substance abuse treatment, and sex offender counseling may be transferred between facilities in order to meet his needs. The inmate population is always in flux and there are not always beds or program availability for every inmate at his security level. This commenter stated that the Department's proposed language would put the State in the position of choosing between adding accessible cells and modifying paths of travel to programs and services at great expense or not altering old facilities, causing them to become in states of disrepair and obsolescent, which would be fiscally irresponsible.

The Department is persuaded by these comments and has modified the alterations requirement in § 35.151(k)(2)(iv) in the final rule to allow that if it is technically infeasible to provide substitute cells in the same facility, cells can be provided elsewhere within the corrections system.

Number of accessible cells. Section 232.2.1 of the 2004 ADAAG requires at least 2 percent, but no fewer than one, of the cells in newly constructed detention and correctional facilities to have accessibility features for individuals with mobility disabilities. Section 232.3 provides that, where special holding cells or special housing cells are provided, at least one cell serving each purpose shall have mobility features. The Department sought input on whether these 2004 ADAAG requirements are sufficient to meet the needs of inmates with mobility disabilities. A major association representing county jails throughout the country stated that the 2004 ADAAG 2 percent requirement for accessible cells is sufficient to meet the needs of county jails. Similarly, a large county sheriff's department advised that the 2 percent requirement far exceeds the need at its detention facility, where the average age of the population is 32. This commenter stressed that the regulations need to address the differences between a local detention facility with low average lengths of stay as opposed to a State prison housing inmates for lengthy periods. This commenter asserted that more stringent requirements will raise construction costs by requiring modifications that are not needed. If more stringent requirements are adopted, the commenter suggested that they apply only to State and Federal prisons that house prisoners sentenced to long terms. The Department notes that a prisoner with a mobility disability needs a cell with mobility features regardless of the length of incarceration. However, the length of incarceration is most relevant in addressing the needs of an aging population.

The overwhelming majority of commenters responded that the 2 percent ADAAG requirement is inadequate to meet the needs of the incarcerated. Many commenters suggested that the requirement be expanded to apply to each

area, type, use, and class of cells in a facility. They asserted that if a facility has separate areas for specific programs, such as a dog training program or a substance abuse unit, each of these areas should also have 2 percent accessible cells but not less than one. These same commenters suggested that 5–7 percent of cells should be accessible to meet the needs of both an aging population and the larger number of inmates with mobility disabilities. One organization recommended that the requirement be increased to 5 percent overall, and that at least 2 percent of each type and use of cell be accessible. Another commenter recommended that 10 percent of cells be accessible. An organization with extensive corrections experience noted that the integration mandate requires a sufficient number and distribution of accessible cells so as to provide distribution of locations relevant to programs to ensure that persons with disabilities have access to the programs.

Through its investigations and compliance reviews, the Department has found that in most detention and correctional facilities, a 2 percent accessible cell requirement is inadequate to meet the needs of the inmate population with disabilities. That finding is supported by the majority of the commenters that recommended a 5–7 percent requirement. Indeed, the Department itself requires more than 2 percent of the cells to be accessible at its own corrections facilities. The Federal Bureau of Prisons is subject to the requirements of the 2004 ADAAG through the General Services Administration's adoption of the 2004 ADAAG as the enforceable accessibility standard for Federal facilities under the Architectural Barriers Act of 1968. 70 FR 67786, 67846–47 (Nov. 8, 2005). However, in order to meet the needs of inmates with mobility disabilities, the Bureau of Prisons has elected to increase that percentage and require that 3 percent of inmate housing at its facilities be accessible. Bureau of Prisons, Design Construction Branch, Design Guidelines, Attachment A: Accessibility Guidelines for Design, Construction, and Alteration of Federal Bureau of Prisons (Oct. 31, 2006).

The Department believes that a 3 percent accessible requirement is reasonable. Moreover, it does not believe it should impose a higher percentage on detention and corrections facilities than it utilizes for its own facilities. Thus, the Department has adopted a 3 percent requirement in § 35.151(k) for both new construction and alterations. The Department notes that the 3 percent requirement is a minimum. As corrections systems plan for new facilities or alterations, the Department urges planners to include numbers of inmates with disabilities in their population projections in order to take the necessary steps to provide a sufficient number of accessible cells to meet inmate needs.

Dispersion of Cells. The NPRM did not contain express language addressing dispersion of cells in a facility. However, Advisory 232.2 of the 2004 ADAAG recommends that ''[a]ccessible cells or rooms should be dispersed among different levels of security, housing categories, and holding classifications (*e.g.*, male/female and adult/juvenile) to facilitate access.'' In explaining the basis for recommending, but not requiring, this type of dispersal, the Access Board stated that ''[m]any detention and correctional facilities are designed so that certain areas (*e.g.*, 'shift' areas) can be adapted to serve as different types of housing according to need'' and that ''[p]lacement of accessible cells or rooms in shift areas may allow additional flexibility in meeting requirements for dispersion of accessible cells or rooms.''

The Department notes that inmates are typically housed in separate areas of detention and correctional facilities based on a number of factors, including their classification level. In many instances, detention and correctional facilities have housed inmates in inaccessible cells, even though accessible cells were available elsewhere in the facility, because there were

no cells in the areas where they needed to be housed, such as in administrative or disciplinary segregation, the women's section of the facility, or in a particular security classification area.

The Department received a number of comments stating that dispersal of accessible cells together with an adequate number of accessible cells is necessary to prevent inmates with disabilities from placement in improper security classification and to ensure integration. Commenters recommended modification of the scoping requirements to require a percentage of accessible cells in each program, classification, use or service area. The Department is persuaded by these comments. Accordingly, § 35.151(k)(1) and (k)(2) of the final rule require accessible cells in each classification area.

Medical facilities. The NPRM also did not propose language addressing the application of the 2004 ADAAG to medical and long-term care facilities in correctional and detention facilities. The provisions of the 2004 ADAAG contain requirements for licensed medical and long-term care facilities, but not those that are unlicensed. A disability advocacy group and a number of other commenters recommended that the Department expand the application of section 232.4 to apply to all such facilities in detention and correctional facilities, regardless of licensure. They recommended that whenever a correctional facility has a program that is addressed specifically in the 2004 ADAAG, such as a long-term care facility, the 2004 ADAAG scoping and design features should apply for those elements. Similarly, a building code organization noted that its percentage requirements for accessible units is based on what occurs in the space, not on the building type.

The Department is persuaded by these comments and has added § 35.151(k)(3), which states that ''[w]ith respect to medical and long-term care facilities in jails, prisons, and other detention and correctional facilities, public entities shall apply the 2010 Standards technical and scoping requirements for those facilities irrespective of whether those facilities are licensed.''

Section 35.152 Detention and correctional facilities—program requirements

As noted in the discussion of § 35.151(k), the Department has determined that inmates with mobility and other disabilities in detention and correctional facilities do not have equal access to prison services. The Department's concerns are based not only on complaints it has received, but the Department's substantial experience in investigations and compliance reviews of jails, prisons, and other detention and correctional facilities. Based on that review, the Department has found that many detention and correctional facilities have too few or no accessible cells, toilets, and shower facilities to meet the needs of their inmates with mobility disabilities. These findings, coupled with statistics regarding the current percentage of inmates with mobility disabilities and the changing demographics of the inmate population reflecting thousands of prisoners serving life sentences and increasingly large numbers of aging inmates who are not eligible for parole, led the Department to conclude that a new regulation was necessary to address these concerns.

In the NPRM, the Department proposed a new section, § 35.152, which combined a range of provisions relating to both program accessibility and application of the proposed standards to detention and correctional facilities. As mentioned above, in the final rule, the Department is placing those provisions that refer to design, construction, and alteration of detention and correction facilities in new paragraph (k) in § 35.151 dealing with new construction and alterations for covered entities. Those portions of the final rule that address other program requirements remain in § 35.152.

The Department received many comments in

response to the program accessibility requirements in proposed § 35.152. These comments are addressed below.

Facilities operated through contractual, licensing, or other arrangements with other public entities or private entities. The Department is aware that some public entities are confused about the applicability of the title II requirements to correctional facilities built or run by other public entities or private entities. It has consistently been the Department's position that title II requirements apply to correctional facilities used by State or local government entities, irrespective of whether the public entity contracts with another public or private entity to build or run the correctional facility. The power to incarcerate citizens rests with the State or local government, not a private entity. As the Department stated in the preamble to the original title II regulation, ''[a]ll governmental activities of public entities are covered, even if they are carried out by contractors.'' 28 CFR part 35, app. A at 558 (2009). If a prison is occupied by State prisoners and is inaccessible, the State is responsible under title II of the ADA. The same is true for a county or city jail. In essence, the private builder or contractor that operates the correctional facility does so at the direction of the government entity. Moreover, even if the State enters into a contractual, licensing, or other arrangement for correctional services with a public entity that has its own title II obligations, the State is still responsible for ensuring that the other public entity complies with title II in providing these services.

Also, through its experience in investigations and compliance reviews, the Department has noted that public entities contract for a number of services to be run by private or other public entities, for example, medical and mental health services, food services, laundry, prison industries, vocational programs, and drug treatment and substance abuse programs, all of which must be operated in accordance with title II requirements.

Proposed § 35.152(a) in the NPRM was designed to make it clear that title II applies to all State and local detention and correctional facilities, regardless of whether the detention or correctional facility is directly operated by the public entity or operated by a private entity through a contractual, licensing, or other arrangement. Commenters specifically supported the language of this section. One commenter cited Department of Justice statistics stating that of the approximately 1.6 million inmates in State and Federal facilities in December 2006, approximately 114,000 of these inmates were held in private prison facilities. *See* William J. Sabol *et al*., *Prisoners in 2006*, Bureau of Justice Statistics Bulletin, Dec. 2007, at 1, 4, available at *http:// bjs.ojp.usdoj.gov/ index.cfm?ty=pbdetail&iid=908*. Some commenters wanted the text ''through contracts or other arrangements'' changed to read ''through contracts or any other arrangements'' to make the intent clear. However, a large number of commenters recommended that the text of the rule make explicit that it applies to correctional facilities operated by private contractors. Many commenters also suggested that the text make clear that the rule applies to adult facilities, juvenile justice facilities, and community correctional facilities. In the final rule, the Department is adopting these latter two suggestions in order to make the section's intent explicit.

Section 35.152(a) of the final rule states specifically that the requirements of the section apply to public entities responsible for the operation or management of correctional facilities, ''either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.'' Additionally, the section explicitly provides that it applies to adult and juvenile justice detention and correctional facilities and community correctional facilities.

Discrimination prohibited. In the NPRM, § 35.152(b)(1) proposed language stating that public entities are prohibited from excluding

qualified detainees and inmates from participation in, or denying, benefits, services, programs, or activities because a facility is inaccessible to persons with disabilities ''unless the public entity can demonstrate that the required actions would result in a fundamental alteration or undue burden.'' 73 FR 34446, 34507 (June 17, 2008). One large State department of corrections objected to the entire section applicable to detention and correctional facilities, stating that it sets a higher standard for correctional and detention facilities because it does not provide a defense for undue administrative burden. The Department has not retained the proposed NPRM language referring to the defenses of fundamental alteration or undue burden because the Department believes that these exceptions are covered by the general language of 35.150(a)(3), which states that a public entity is not required to take ''any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens.'' The Department has revised the language of § 35.152(b)(1) accordingly.

Integration of inmates and detainees with disabilities. In the NPRM, the Department proposed language in § 35.152(b)(2) specifically applying the ADA's general integration mandate to detention and correctional facilities. The proposed language would have required public entities to ensure that individuals with disabilities are housed in the most integrated setting appropriate to the needs of the individual. It further stated that unless the public entity can demonstrate that it is appropriate to make an exception for a specific individual, a public entity:

(1) Should not place inmates or detainees with disabilities in locations that exceed their security classification because there are no accessible cells or beds in the appropriate classification;

(2) should not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(3) should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed; and

(4) should not place inmates or detainees with disabilities in facilities farther away from their families in order to provide accessible cells or beds, thus diminishing their opportunity for visitation based on their disability. 73 FR 34466, 34507 (June 17, 2008).

In the NPRM, the Department recognized that there are a wide range of considerations that affect decisions to house inmates or detainees and that in specific cases there may be compelling reasons why a placement that does not meet the general requirements of § 35.152(b)(2) may, nevertheless, comply with the ADA. However, the Department noted that it is essential that the planning process initially assume that inmates or detainees with disabilities will be assigned within the system under the same criteria that would be applied to inmates who do not have disabilities. Exceptions may be made on a case-by-case basis if the specific situation warrants different treatment. For example, if an inmate is deaf and communicates only using sign language, a prison may consider whether it is more appropriate to give priority to housing the prisoner in a facility close to his family that houses no other deaf inmates, or if it would be preferable to house the prisoner in a setting where there are sign language interpreters and other sign language users with whom he can communicate.

In general, commenters strongly supported the NPRM's clarification that the title II integration mandate applies to State and local corrections agencies and the facilities in which they house inmates. Commenters pointed out that inmates with disabilities continue to be segregated based on their disabilities and also excluded from participation in programs. An organization actively involved in addressing the needs of prisoners cited a number of recent lawsuits in which prisoners allege such discrimination.

The majority of commenters objected to

the language in proposed § 35.152(b)(2) that creates an exception to the integration mandate when the ''public entity can demonstrate that it is appropriate to make an exception for a specific individual.'' 73 FR 34466, 34507 (June 17, 2008). The vast majority of commenters asserted that, given the practice of many public entities to segregate and cluster inmates with disabilities, the exception will be used to justify the status quo. The commenters acknowledged that the intent of the section is to ensure that an individual with a disability who can be better served in a less integrated setting can legally be placed in that setting. They were concerned, however, that the proposed language would allow certain objectionable practices to continue, *e.g.*, automatically placing persons with disabilities in administrative segregation. An advocacy organization with extensive experience working with inmates recommended that the inmate have ''input'' in the placement decision.

Others commented that the exception does not provide sufficient guidance on when a government entity may make an exception, citing the need for objective standards. Some commenters posited that a prison administration may want to house a deaf inmate at a facility designated and equipped for deaf inmates that is several hundred miles from the inmate's home. Although under the exception language, such a placement may be appropriate, these commenters argued that this outcome appears to contradict the regulation's intent to eliminate or reduce the segregation of inmates with disabilities and prevent them from being placed far from their families. The Department notes that in some jurisdictions, the likelihood of such outcomes is diminished because corrections facilities with different programs and levels of accessibility are clustered in close proximity to one another, so that being far from family is not an issue. The Department also takes note of advancements in technology that will ease the visitation dilemma, such as family visitation through the use of videoconferencing.

Only one commenter, a large State department of corrections, objected to the integration requirement. This commenter stated it houses all maximum security inmates in maximum security facilities. Inmates with lower security levels may or may not be housed in lower security facilities depending on a number of factors, such as availability of a bed, staffing, program availability, medical and mental health needs, and enemy separation. The commenter also objected to the proposal to prohibit housing inmates with disabilities in medical areas unless they are receiving medical care. This commenter stated that such housing may be necessary for several days, for example, at a stopover facility for an inmate with a disability who is being transferred from one facility to another. Also, this commenter stated that inmates with disabilities in disciplinary status may be housed in the infirmary because not every facility has accessible cells in disciplinary housing. Similarly the commenter objected to the prohibition on placing inmates in facilities without the same programs as facilities where they normally would be housed. Finally, the commenter objected to the prohibition on placing an inmate at a facility distant from where the inmate would normally be housed. The commenter stressed that in its system, there are few facilities near most inmates' homes. The commenter noted that most inmates are housed at facilities far from their homes, a fact shared by all inmates, not just inmates with disabilities. Another commenter noted that in some jurisdictions, inmates who need assistance in activities of daily living cannot obtain that assistance in the general population, but only in medical facilities where they must be housed.

The Department has considered the concerns raised by the commenters with respect to this section and recognizes that corrections systems may move inmates routinely and for a variety of reasons, such as crowding, safety, security, classification change, need for specialized programs, or to provide medical care. Sometimes

these moves are within the same facility or prison system. On other occasions, inmates may be transferred to facilities in other cities, counties, and States. Given the nature of the prison environment, inmates have little say in their placement and administrators must have flexibility to meet the needs of the inmates and the system. The Department has revised the language of the exception contained in renumbered § 35.152(b)(2) to better accommodate corrections administrators' need for flexibility in making placement decisions based on legitimate, specific reasons. Moreover, the Department believes that temporary, short-term moves that are necessary for security or administrative purposes (*e.g.,* placing an inmate with a disability in a medical area at a stopover facility during a transfer from one facility to another) do not violate the requirements of § 35.152(b)(2).

The Department notes that § 35.150(a)(3) states that a public entity is not required to take ''any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.'' Thus, corrections systems would not have to comply with the requirements of § 35.152(b)(1) in any specific circumstance where these defenses are met.

Several commenters recommended that the word ''should'' be changed to ''shall'' in the subparts to § 35.152(b)(2). The Department agrees that because the rule contains a specific exception and because the integration requirement is subject to the defenses provided in paragraph (a) of that section, it is more appropriate to use the word ''shall'' and the Department accordingly is making that change in the final rule.

Program requirements. In a unanimous decision, the Supreme Court, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), stated explicitly that the ADA covers the operations of State prisons; accordingly, title II's program accessibility requirements apply to State and local correctional and detention facilities. In the NPRM, in addressing the accessibility of existing correctional and detention facilities, the Department considered the challenges of applying the title II program access requirement for existing facilities under § 31.150(a) in light of the realities of many inaccessible correctional facilities and strained budgets.

Correctional and detention facilities commonly provide a variety of different programs for education, training, counseling, or other purposes related to rehabilitation. Some examples of programs generally available to inmates include programs to obtain GEDs, computer training, job skill training and on-the-job training, religious instruction and guidance, alcohol and substance abuse groups, anger management, work assignments, work release, halfway houses, and other programs. Historically, individuals with disabilities have been excluded from such programs because they are not located in accessible locations, or inmates with disabilities have been segregated in units without equivalent programs. In light of the Supreme Court's decision in *Yeskey* and the requirements of title II, however, it is critical that public entities provide these opportunities to inmates with disabilities. In proposed § 35.152, the Department sought to clarify that title II required equal access for inmates with disabilities to participate in programs offered to inmates without disabilities.

The Department wishes to emphasize that detention and correctional facilities are unique facilities under title II. Inmates cannot leave the facilities and must have their needs met by the corrections system, including needs relating to a disability. If the detention and correctional facilities fail to accommodate prisoners with disabilities, these individuals have little recourse, particularly when the need is great (*e.g.*, an accessible toilet; adequate catheters; or a shower chair). It is essential that corrections systems fulfill their nondiscrimination and program access obligations by adequately addressing the needs of prisoners with disabilities, which include, but

are not limited to, proper medication and medical treatment, accessible toilet and shower facilities, devices such as a bed transfer or a shower chair, and assistance with hygiene methods for prisoners with physical disabilities.

In the NPRM, the Department also sought input on whether it should establish a program accessibility requirement that public entities modify additional cells at a detention or correctional facility to incorporate the accessibility features needed by specific inmates with mobility disabilities when the number of cells required by sections 232.2 and 232.3 of the 2004 ADAAG are inadequate to meet the needs of their inmate population.

Commenters supported a program accessibility requirement, viewing it as a flexible and practical means of allowing facilities to meet the needs of inmates in a cost effective and expedient manner. One organization supported a requirement to modify additional cells when the existing number of accessible cells is inadequate. It cited the example of a detainee who was held in a hospital because the local jail had no accessible cells. Similarly, a State agency recommended that the number of accessible cells should be sufficient to accommodate the population in need. One group of commenters voiced concern about accessibility being provided in a timely manner and recommended that the rule specify that the program accessibility requirement applies while waiting for the accessibility modifications. A group with experience addressing inmate needs recommended the inmate's input should be required to prevent inappropriate segregation or placement in an inaccessible or inappropriate area.

The Department is persuaded by these comments. Accordingly, § 35.152(b)(3) requires public entities to ''implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.''

Communication. Several large disability advocacy organizations commented on the 2004 ADAAG section 232.2.2 requirement that at least 2 percent of the general holding cells and housing cells must be equipped with audible emergency alarm systems. Permanently installed telephones within these cells must have volume control. Commenters said that the communication features in the 2004 ADAAG do not address the most common barriers that deaf and hard-of-hearing inmates face. They asserted that few cells have telephones and the requirements to make them accessible is limited to volume control, and that emergency alarm systems are only a small part of the amplified information that inmates need. One large association commented that it receives many inmate complaints that announcements are made over loudspeakers or public address systems, and that inmates who do not hear announcements for inmate count or other instructions face disciplinary action for failure to comply. They asserted that inmates who miss announcements miss meals, exercise, showers, and recreation. They argued that systems that deliver audible announcements, signals, and emergency alarms must be made accessible and that TTYs must be made available. Commenters also recommended that correctional facilities should provide access to advanced forms of telecommunications. Additional commenters noted that few persons now use TTYs, preferring instead to communicate by email, texting, and videophones.

The Department agrees with the commenters that correctional facilities and jails must ensure that inmates who are deaf or hard of hearing actually receive the same information provided to other inmates. The Department believes, however, that the reasonable modifications, program access, and effective communications requirements of title II are sufficient to address the needs of individual deaf and hard of hearing inmates, and as a result, declines to add specific requirements for communications features in cells

for deaf and hard of hearing inmates at this time. The Department notes that as part of its ongoing enforcement of the reasonable modifications, program access, and effective communications requirements of title II, the Department has required correctional facilities and jails to provide communication features in cells serving deaf and hard of hearing inmates.

Subpart E—Communications

Section 35.160 Communications.

Section 35.160 of the 1991 title II regulation requires a public entity to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. 28 CFR 35.160(a). In addition, a public entity must ''furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.'' 28 CFR 35.160(b)(1). Moreover, the public entity must give ''primary consideration to the requests of the individual with disabilities'' in determining what type of auxiliary aid and service is necessary. 28 CFR 35.160(b)(2).

Since promulgation of the 1991 title II regulation, the Department has investigated hundreds of complaints alleging failures by public entities to provide effective communication, and many of these investigations resulted in settlement agreements and consent decrees. From these investigations, the Department has concluded that public entities sometimes misunderstand the scope of their obligations under the statute and the regulation. Section 35.160 in the final rule codifies the Department's longstanding policies in this area and includes provisions that reflect technological advances in the area of auxiliary aids and services.

In the NPRM, the Department proposed adding ''companion'' to the scope of coverage under § 35.160 to codify the Department's longstanding position that a public entity's obligation to ensure effective communication extends not just to applicants, participants, and members of the public with disabilities, but to companions as well, if any of them are individuals with disabilities. The NPRM defined companion as a person who is a family member, friend, or associate of a program participant, who, along with the program participant, is ''an appropriate person with whom the public entity should communicate.'' 73 FR 34466, 34507 (June 17, 2008).

Many commenters supported inclusion of ''companions'' in the rule, and urged even more specific language about public entities' obligations. Some commenters asked the Department to clarify that a companion with a disability may be entitled to effective communication from a public entity even though the applicants, participants, or members of the general public seeking access to, or participating in, the public entity's services, programs, or activities are not individuals with disabilities. Others requested that the Department explain the circumstances under which auxiliary aids and services should be provided to companions. Still others requested explicit clarification that where the individual seeking access to or participating in the public entity's program, services, or activities requires auxiliary aids and services, but the companion does not, the public entity may not seek out, or limit its communications to, the companion instead of communicating directly with the individual with a disability when it would be appropriate to do so.

Some in the medical community objected to the inclusion of any regulatory language regarding companions, asserting that such language is overbroad, seeks services for individuals whose presence is not required by the public entity, is not necessary for the delivery of the services or participation in the program, and places additional burdens on the medical community.

These commenters asked that the Department limit the public entity's obligation to communicate effectively with a companion to situations where such communications are necessary to serve the interests of the person who is receiving the public entity's services.

After consideration of the many comments on this issue, the Department believes that explicit inclusion of ''companions'' in the final rule is appropriate to ensure that public entities understand the scope of their effective communication obligations. There are many situations in which the interests of program participants without disabilities require that their companions with disabilities be provided effective communication. In addition, the program participant need not be physically present to trigger the public entity's obligations to a companion. The controlling principle is that auxiliary aids and services must be provided if the companion is an appropriate person with whom the public entity should or would communicate.

Examples of such situations include back-to-school nights or parent-teacher conferences at a public school. If the faculty writes on the board or otherwise displays information in a visual context during a back-to-school night, this information must be communicated effectively to parents or guardians who are blind or have low vision. At a parent-teacher conference, deaf parents or guardians must be provided with appropriate auxiliary aids and services to communicate effectively with the teacher and administrators. It makes no difference that the child who attends the school does not have a disability. Likewise, when a deaf spouse attempts to communicate with public social service agencies about the services necessary for the hearing spouse, appropriate auxiliary aids and services to the deaf spouse must be provided by the public entity to ensure effective communication. Parents or guardians, including foster parents, who are individuals with disabilities, may need to interact with child services agencies on behalf of their children; in such a circumstance, the child services agencies would need to provide appropriate auxiliary aids and services to those parents or guardians.

Effective communication with companions is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion is necessary in a variety of circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. A companion may be the patient's next-of-kin or health care surrogate with whom hospital personnel must communicate about the patient's medical condition. A companion could be designated by the patient to communicate with hospital personnel about the patient's symptoms, needs, condition, or medical history. Or the companion could be a family member with whom hospital personnel normally would communicate.

Accordingly, § 35.160(a)(1) in the final rule now reads, ''[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.'' Section 35.160(a)(2) further defines ''companion'' as ''a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with the individual, is an appropriate person with whom the public entity should communicate.'' Section 35.160(b)(1) clarifies that the obligation to furnish auxiliary aids and services extends to companions who are individuals with disabilities, whether or not the individual accompanied also is an individual with a disability. The provision now states that ''[a] public entity shall furnish

appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.''

These provisions make clear that if the companion is someone with whom the public entity normally would or should communicate, then the public entity must provide appropriate auxiliary aids and services to that companion to ensure effective communication with the companion. This common-sense rule provides the guidance necessary to enable public entities to properly implement the nondiscrimination requirements of the ADA.

As set out in the final rule, § 35.160(b)(2) states, in pertinent part, that ''[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.''

The second sentence of § 35.160(b)(2) of the final rule restores the ''primary consideration'' obligation set out at § 35.160(b)(2) in the 1991 title II regulation. This provision was inadvertently omitted from the NPRM, and the Department agrees with the many commenters on this issue that this provision should be retained. As noted in the preamble to the 1991 title II regulation, and reaffirmed here: ''The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164. Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.'' 28 CFR part 35, app. A at 580 (2009).

The first sentence in § 35.160(b)(2) codifies the axiom that the type of auxiliary aid or service necessary to ensure effective communication will vary with the situation, and provides factors for consideration in making the determination, including the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. Inclusion of this language under title II is consistent with longstanding policy in this area. *See, e.g., The Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services,* section II–7.1000, available at *www.ada.gov/taman2.html* (''The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved. * * * Sign language or oral interpreters, for example, may be required when the information being communicated in a transaction with a deaf individual is complex, or is exchanged for a lengthy period of time. Factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.''); *see also* 28 CFR part 35, app. A at 580 (2009). As explained in the NPRM, an individual who is deaf or hard of hearing may need a qualified interpreter to communicate with municipal hospital personnel about diagnoses, procedures, tests, treatment options, surgery, or prescribed medication (*e.g.*, dosage, side effects, drug interactions, etc.), or to explain follow-up treatments, therapies, test results, or recovery. In comparison, in a simpler, shorter interaction, the method to achieve effective communication can be more basic. An individual who is seeking local tax forms may only need an exchange of written notes to achieve effective

communication.

Section 35.160(c)(1) has been added to the final rule to make clear that a public entity shall not require an individual with a disability to bring another individual to interpret for him or her. The Department receives many complaints from individuals who are deaf or hard of hearing alleging that public entities expect them to provide their own sign language interpreters. Proposed § 35.160(c)(1) was intended to clarify that when a public entity is interacting with a person with a disability, it is the public entity's responsibility to provide an interpreter to ensure effective communication. It is not appropriate to require the person with a disability to bring another individual to provide such services.

Section 35.160(c)(2) of the NPRM proposed codifying the Department's position that there are certain limited instances when a public entity may rely on an accompanying individual to interpret or facilitate communication: (1) In an emergency involving a threat to the public safety or welfare; or (2) if the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

Many commenters supported this provision, but sought more specific language to address what they see as a particularly entrenched problem. Some commenters requested that the Department explicitly require the public entity first to notify the individual with a disability that the individual has a right to request and receive appropriate auxiliary aids and services without charge from the public entity before using that person's accompanying individual as a communication facilitator. Advocates stated that an individual who is unaware of his or her rights may decide to use a third party simply because he or she believes that is the only way to communicate with the public entity.

The Department has determined that inclusion of specific language requiring notification is unnecessary. Section 35.160(b)(1) already states that is the responsibility of the public entity to provide auxiliary aids and services. Moreover, § 35.130(f) already prohibits the public entity from imposing a surcharge on a particular individual with a disability or on any group of individuals with disabilities to cover the costs of auxiliary aids. However, the Department strongly advises public entities that they should first inform the individual with a disability that the public entity can and will provide auxiliary aids and services, and that there would be no cost for such aids or services.

Many commenters requested that the Department make clear that the public entity cannot request, rely upon, or coerce an adult accompanying an individual with a disability to provide effective communication for that individual with a disability—that only a voluntary offer is acceptable. The Department states unequivocally that consent of, and for, the adult accompanying the individual with a disability to facilitate communication must be provided freely and voluntarily both by the individual with a disability and the accompanying third party—absent an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available. The public entity may not coerce or attempt to persuade another adult to provide effective communication for the individual with a disability. Some commenters expressed concern that the regulation could be read by public entities, including medical providers, to prevent parents, guardians, or caregivers from providing effective communication for children or that a child, regardless of age, would have to specifically request that his or her caregiver act as interpreter. The Department does not intend § 35.160(c)(2) to prohibit parents, guardians, or caregivers from providing effective communication for children where so doing would be appropriate. Rather, the rule prohibits public entities, including medical

providers, from requiring, relying on, or forcing adults accompanying individuals with disabilities, including parents, guardians, or caregivers, to facilitate communication.

Several commenters asked that the Department make absolutely clear that children are not to be used to provide effective communication for family members and friends, and that it is the public entity's responsibility to provide effective communication, stating that often interpreters are needed in settings where it would not be appropriate for children to be interpreting, such as those involving medical issues, domestic violence, or other situations involving the exchange of confidential or adult-related material. Commenters observed that children are often hesitant to turn down requests to provide communication services, and that such requests put them in a very difficult position vis-a-vis family members and friends. The Department agrees. It is the Department's position that a public entity shall not rely on a minor child to facilitate communication with a family member, friend, or other individual, except in an emergency involving imminent threat to the safety or welfare of an individual or the public where there is no interpreter available. Accordingly, the Department has revised the rule to state: ''A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.'' § 35.160(c)(3). Sections 35.160(c)(2) and (3) have no application in circumstances where an interpreter would not otherwise be required in order to provide effective communication (*e.g.*, in simple transactions such as purchasing movie tickets at a theater). The Department stresses that privacy and confidentiality must be maintained but notes that covered entities, such as hospitals, that are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, Privacy Rules are permitted to disclose to a patient's relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. *See* 45 CFR parts 160 and 164. The agreement need not be in writing. Covered entities should consult the HIPAA Privacy Rules regarding other ways disclosures might be able to be made to such persons.

With regard to emergency situations, the NPRM proposed permitting reliance on an individual accompanying an individual with a disability to interpret or facilitate communication in an emergency involving a threat to the public safety or welfare. Commenters requested that the Department make clear that often a public entity can obtain appropriate auxiliary aids and services in advance of an emergency by making necessary advance arrangements, particularly in anticipated emergencies such as predicted dangerous weather or certain medical situations such as childbirth. These commenters did not want public entities to be relieved of their responsibilities to provide effective communication in emergency situations, noting that the obligation to provide effective communication may be more critical in such situations. Several commenters requested a separate rule that requires public entities to provide timely and effective communication in the event of an emergency, noting that the need for effective communication escalates in an emergency.

Commenters also expressed concern that public entities, particularly law enforcement authorities and medical personnel, would apply the ''emergency situation'' provision in inappropriate circumstances and would rely on accompanying individuals without making any effort to seek appropriate auxiliary aids and services. Other commenters asked that the Department narrow this provision so that it would not be available to entities that are responsible for emergency preparedness and response. Some commenters noted that certain exigent circumstances, such as those that exist during and perhaps immediately

after, a major hurricane, temporarily may excuse public entities of their responsibilities to provide effective communication. However, they asked that the Department clarify that these obligations are ongoing and that, as soon as such situations begin to abate or stabilize, the public entity must provide effective communication.

The Department recognizes that the need for effective communication is critical in emergency situations. After due consideration of all of these concerns raised by commenters, the Department has revised § 35.160(c) to narrow the exception permitting reliance on individuals accompanying the individual with a disability during an emergency to make it clear that it only applies to emergencies involving an ''imminent threat to the safety or welfare of an individual or the public.'' *See* § 35.160(c)(2)–(3). Arguably, all visits to an emergency room or situations to which emergency workers respond are by definition emergencies. Likewise, an argument can be made that most situations that law enforcement personnel respond to involve, in one way or another, a threat to the safety or welfare of an individual or the public. The imminent threat exception in § 35.160(c)(2)– (3) is not intended to apply to the typical and foreseeable emergency situations that are part of the normal operations of these institutions. As such, a public entity may rely on an accompanying individual to interpret or facilitate communication under the § 35.160(c)(2)–(3) imminent threat exception only where in truly exigent circumstances, *i.e.*, where any delay in providing immediate services to the individual could have life-altering or life-ending consequences.

Many commenters urged the Department to stress the obligation of State and local courts to provide effective communication. The Department has received many complaints that State and local courts often do not provide needed qualified sign language interpreters to witnesses, litigants, jurors, potential jurors, and companions and associates of persons participating in the legal process. The Department cautions public entities that without appropriate auxiliary aids and services, such individuals are denied an opportunity to participate fully in the judicial process, and denied benefits of the judicial system that are available to others.

Another common complaint about access to State and local court systems is the failure to provide effective communication in deferral programs that are intended as an alternative to incarceration, or for other court-ordered treatment programs. These programs must provide effective communication, and courts referring individuals with disabilities to such programs should only refer individuals with disabilities to programs or treatment centers that provide effective communication. No person with a disability should be denied access to the benefits conferred through participation in a court-ordered referral program on the ground that the program purports to be unable to provide effective communication.

The general nondiscrimination provision in § 35.130(a) provides that no individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. The Department consistently interprets this provision and § 35.160 to require effective communication in courts, jails, prisons, and with law enforcement officers. Persons with disabilities who are participating in the judicial process as witnesses, jurors, prospective jurors, parties before the court, or companions of persons with business in the court, should be provided auxiliary aids and services as needed for effective communication. The Department has developed a variety of technical assistance and guidance documents on the requirements for title II entities to provide effective communication; those materials are available on the Department Web site at: *http:// www.ada.gov.*

Many advocacy groups urged the Department to add language in the final rule that would require public entities to provide accessible material in a

manner that is timely, accurate, and private. The Department has included language in § 35.160(b)(2) stating that ''[i]n order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way so as to protect the privacy and independence of the individual with a disability.''

Because the appropriateness of particular auxiliary aids and services may vary as a situation changes, the Department strongly encourages public entities to do a communication assessment of the individual with a disability when the need for auxiliary aids and services is first identified, and to reassess communication effectiveness regularly throughout the communication. For example, a deaf individual may go to an emergency department of a public community health center with what is at first believed to be a minor medical emergency, such as a sore knee, and the individual with a disability and the public community health center both believe that exchanging written notes will be effective. However, during that individual's visit, it is determined that the individual is, in fact, suffering from an anterior cruciate ligament tear and must have surgery to repair the torn ligament. As the situation develops and the diagnosis and recommended course of action evolve into surgery, an interpreter most likely will be necessary. A public entity has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess what measures are required to ensure effective communication. Public entities are further advised to keep individuals with disabilities apprised of the status of the expected arrival of an interpreter or the delivery of other requested or anticipated auxiliary aids and services.

Video remote interpreting (VRI) services. In § 35.160(d) of the NPRM, the Department proposed the inclusion of four performance standards for VRI (which the NPRM termed video interpreting services (VIS)), for effective communication: (1) High-quality, clear, real-time, full-motion video and audio over a dedicated high-speed Internet connection; (2) a clear, sufficiently large, and sharply delineated picture of the participating individual's head, arms, hands, and fingers, regardless of his body position; (3) clear transmission of voices; and (4) persons who are trained to set up and operate the VRI quickly. Commenters generally approved of those performance standards, but recommended that some additional standards be included in the final rule. Some State agencies and advocates for persons with disabilities requested that the Department add more detail in the description of the first standard, including modifying the term ''dedicated high-speed Internet connection'' to read ''dedicated high-speed, wide-bandwidth video connection.'' These commenters argued that this change was necessary to ensure a high-quality video image that will not produce lags, choppy images, or irregular pauses in communication. The Department agrees with those comments and has amended the provision in the final rule accordingly.

For persons who are deaf with limited vision, commenters requested that the Department include an explicit requirement that interpreters wear high-contrast clothing with no patterns that might distract from their hands as they are interpreting, so that a person with limited vision can see the signs made by the interpreter. While the Department reiterates the importance of such practices in the delivery of effective VRI, as well as in-person interpreting, the Department declines to adopt such performance standards as part of this rule. In general, professional interpreters already follow such practices—the Code of Professional Conduct for interpreters developed by the Registry of Interpreters for the Deaf, Inc. and the National Association of the Deaf incorporates attire considerations into their standards of professionalism and conduct. (This code is available at *http:// www.vid.org/userfiles/file/pdfs/codeofethics. pdf* (Last visited July 18, 2010).

Moreover, as a result of this code, many VRI agencies have adopted detailed dress standards that interpreters hired by the agency must follow. In addition, commenters urged that a clear image of the face and eyes of the interpreter and others be explicitly required. Because the face includes the eyes, the Department has amended § 35.160(d)(2) of the final rule to include a requirement that the interpreter's face be displayed.

In response to comments seeking more training for users and non-technicians responsible for VRI in title II facilities, the Department is extending the requirement in § 35.160(d)(4) to require training for ''users of the technology'' so that staff who would have reason to use the equipment in an emergency room, State or local court, or elsewhere are properly trained. Providing for such training will enhance the success of VRI as means of providing effective communication.

Captioning at sporting venues. In the NPRM at § 35.160(e), the Department proposed that sports stadiums that have a capacity of 25,000 or more shall provide captioning for safety and emergency information on scoreboards and video monitors. In addition, the Department posed four questions about captioning of information, especially safety and emergency information announcements, provided over public address (PA) systems. The Department received many extremely detailed and divergent responses to each of the four questions and the proposed regulatory text. Because comments submitted on the Department's title II and title III proposals were intertwined, because of the similarity of issues involved for title II entities and title III entities, and in recognition of the fact that many large sports stadiums are covered by both title II and title III as joint operations of State or local governments and one or more public accommodations, the Department presents here a single consolidated review and summary of the issues raised in comments.

The Department asked whether requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 would create an undue burden for smaller entities, whether it would be feasible for small stadiums, or whether a larger threshold, such as sports stadiums with a capacity of 50,000 or more, would be appropriate.

There was a consensus among the commenters, including disability advocates as well as venue owners and stadium designers and operators, that using the stadium size or seating capacity as the exclusive deciding factor for any obligation to provide captioning for safety and emergency information broadcast over the PA system is not preferred. Most disability advocacy organizations and individuals with disabilities complained that using size or seating capacity as a threshold for captioning safety and emergency information would undermine the ''undue burden'' defense found in both titles II and III. Many commenters provided examples of facilities like professional hockey arenas that seat less than 25,000 fans but which, commenters argued, should be able to provide real-time captioning. Other commenters suggested that some high school or college stadiums, for example, may hold 25,000 fans or more and yet lack the resources to provide real-time captioning. Many commenters noted that real-time captioning would require trained stenographers and that most high school and college sports facilities rely upon volunteers to operate scoreboards and PA systems, and they would not be qualified stenographers, especially in case of an emergency. One national association noted that the typical stenographer expense for a professional football game in Washington, DC is about $550 per game. Similarly, one trade association representing venues estimated that the cost for a professional stenographer at a sporting event runs between $500 and $1,000 per game or event, the cost of which, they argued, would be unduly burdensome in many cases. Some commenters posited that schools that do not sell tickets to athletic events would find it difficult to meet such expenses, in contrast to major college athletic programs and professional sports teams,

which would be less likely to prevail using an ''undue burden'' defense.

Some venue owners and operators and other covered entities argued that stadium size should not be the key consideration when requiring scoreboard captioning. Instead, these entities suggested that equipment already installed in the stadium, including necessary electrical equipment and backup power supply, should be the determining factor for whether captioning is mandated. Many commenters argued that the requirement to provide captioning should only apply to stadiums with scoreboards that meet the National Fire Protection Association (NFPA) National Fire Alarm Code (NFPA 72). Commenters reported that NFPA 72 requires at least two independent and reliable power supplies for emergency information systems, including one source that is a generator or battery sufficient to run the system in the event the primary power fails. Alternatively, some stadium designers and title II entities commented that the requirement should apply when the facility has at least one elevator providing firefighter emergency operation, along with approval of authorities with responsibility for fire safety. Other commenters argued for flexibility in the requirements for providing captioning and that any requirement should only apply to stadiums constructed after the effective date of the regulation.

In the NPRM, the Department also asked whether the rule should address the specific means of captioning equipment, whether it should be provided through any effective means (scoreboards, line boards, handheld devices, or other means), or whether some means, such as handheld devices, should be eliminated as options. This question elicited many comments from advocates for persons with disabilities as well as from covered entities. Advocacy organizations and individuals with experience using handheld devices argue that such devices do not provide effective communication. These commenters noted that information is often delayed in the transmission to such devices, making them hard to use when following action on the playing field or in the event of an emergency when the crowd is already reacting to aural information provided over the PA system well before it is received on the handheld device.

Several venue owners and operators and others commented that handheld technology offers advantages of flexibility and portability so that it may be used successfully regardless of where in the facility the user is located, even when not in the line of sight of a scoreboard or other captioning system. Still other commenters urged the Department not to regulate in such a way as to limit innovation and use of such technology now and in the future. Cost considerations were included in some comments from some stadium designers and venue owners and operators, who reported that the cost of providing handheld systems is far less than the cost of real-time captioning on scoreboards, especially in facilities that do not currently have the capacity to provide real-time captions on existing equipment. Others noted that handheld technology is not covered by fire and safety model codes, including the NFPA, and thus would be more easily adapted into existing facilities if captioning were required by the Department.

The Department also asked about providing open captioning of all public address announcements, and not limiting captioning to safety and emergency information. A variety of advocates and persons with disabilities argued that all information broadcast over a PA system should be captioned in real time at all facilities in order to provide effective communication and that a requirement only to provide emergency and safety information would not be sufficient. A few organizations for persons with disabilities commented that installation of new systems should not be required, but that all systems within existing facilities that are capable of providing captioning must be utilized to the maximum extent possible to provide captioning of as much

information as possible. Several organizations representing persons with disabilities commented that all facilities must include in safety planning the requirement to caption all aurally-provided information for patrons with communication disabilities. Some advocates suggested that demand for captions will only increase as the number of deaf and hard of hearing persons grows with the aging of the general population and with increasing numbers of veterans returning from war with disabilities. Multiple comments noted that the captioning would benefit others as well as those with communication disabilities.

By contrast, venue owners and operators and others commented that the action on the sports field is self-explanatory and does not require captioning and they objected to an explicit requirement to provide real-time captioning for all information broadcast on the PA system at a sporting event. Other commenters objected to requiring captioning even for emergency and safety information over the scoreboard rather than through some other means. By contrast, venue operators, State government agencies, and some model code groups, including NFPA, commented that emergency and safety information must be provided in an accessible format and that public safety is a paramount concern. Other commenters argued that the best method to deliver safety and emergency information would be television monitors showing local TV broadcasts with captions already mandated by the FCC. Some commenters posited that the most reliable information about a major emergency would be provided on the television news broadcasts. Several commenters argued that television monitors may be located throughout the facility, improving line of sight for patrons, some of whom might not be able to see the scoreboard from their seats or elsewhere in the facility. Some stadium designers, venue operators, and model code groups pointed out that video monitors are not regulated by the NFPA or other agencies, so that such monitors could be more easily provided. Video monitors may receive transmissions from within the facility and could provide real-time captions if there is the necessary software and equipment to feed the captioning signal to a closed video network within the facility. Several comments suggested that using monitors would be preferable to requiring captions on the scoreboard if the regulation mandates realtime captioning. Some venue owners and operators argued that retrofitting existing stadiums with new systems could easily cost hundreds of thousands of dollars per scoreboard or system. Some stadium designers and others argued that captioning should only be required in stadiums built after the effective date of the regulation. For stadiums with existing systems that allow for real-time captioning, one commenter posited that dedicating the system exclusively to real-time captioning would lead to an annual loss of between $2 and $3 million per stadium in revenue from advertising currently running in that space.

After carefully considering the wide range of public comments on this issue, the Department has concluded that the final rule will not provide additional requirements for effective communication or emergency information provided at sports stadiums at this time. The 1991 title II and title III regulations and statutory requirements are not in any way affected by this decision. The decision to postpone rulemaking on this complex issue is based on a number of factors, including the multiple layers of existing regulation by various agencies and levels of government, and the wide array of information, requests, and recommendations related to developing technology offered by the public. In addition, there is a huge variety of covered entities, information and communication systems, and differing characteristics among sports stadiums. The Department has concluded that further consideration and review would be prudent before it issues specific regulatory requirements.

Section 35.161 Telecommunications.

The Department proposed to retitle this section ''Telecommunications'' to reflect situations in which the public entity must provide an effective means to communicate by telephone for individuals with disabilities. First, the NPRM proposed redesignating § 35.161 as § 35.161(a) and replacing the term ''Telecommunications devices for the deaf (TDD)'' with ''Text telephones (TTY).'' Public comment was universally supportive of this change in nomenclature to TTY.

In the NPRM, at § 35.161(b), the Department addressed automated-attendant systems that handle telephone calls electronically. Often individuals with disabilities, including persons who are deaf or hard of hearing, are unable to use such automated systems. Some systems are not compatible with TTYs or the telecommunications relay service. Automated systems can and often do disconnect calls from TTYs or relay calls, making it impossible for persons using a TTY or relay system to do business with title II entities in the same manner as others. The Department proposed language that would require a telecommunications service to permit persons using relay or TTYs or other assistive technology to use the automated-attendant system provided by the public entity. The FCC raised this concern with the Department after the 1991 title II regulation went into effect, and the Department acted upon that request in the NPRM. Comments from disability advocates and persons with disabilities consistently requested the provision be amended to cover ''voice mail, messaging, auto-attendant, and interactive voice response systems.'' The Department recognizes that those are important features of widely used telecommunications technology that should be as accessible to persons who are deaf or hard of hearing as they are to others, and has amended the section in the final rule to include the additional features.

Many commenters, including advocates and persons with disabilities, as well as State agencies and national organizations, asked that all automated systems have an option for the caller to bypass the automated system and speak to a live person who could communicate using relay services. The Department understands that automated telecommunications systems typically do not offer the opportunity to avoid or bypass the automated system and speak to a live person. The Department believes that at this time it is inappropriate to add a requirement that all such systems provide an override capacity that permits a TTY or relay caller to speak with a live clerk on a telecommunications relay system. However, if a system already provides an option to speak to a person, that system must accept TTY and relay calls and must not disconnect or refuse to accept such calls.

Other comments from advocacy organizations and individuals urged the Department to require specifications for the operation of such systems that would involve issuing technical requirements for encoding and storage of automated text, as well as controls for speed, pause, rewind, and repeat, and prompts without any background noise. The same comments urged that these requirements should be consistent with a pending advisory committee report to the Access Board, submitted in April 2008. *See* Telecommunications and Electronic Information Technology Advisory Committee, Report to the Access Board Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology (Apr. 2008) available at *http://www.access-board. gov/sec508/refresh/report/.* The Department is declining at this time to preempt ongoing consideration of these issues by the Board. Instead, the Department will monitor activity by the Board. The Department is convinced that the general requirement to make such automated systems usable by persons with disabilities is appropriate at this time and title II entities should evaluate their automated systems in light of concerns about providing systems that

offer effective communication to persons with disabilities.

Finally, the Department has adopted in § 35.161(c) of the final rule the requirement that all such systems must not disconnect or refuse to take calls from all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems. (Internet-based relay systems refer to the mechanism by which the message is relayed). They do not require a public entity to have specialized computer equipment. Commenters from some State agencies, many advocacy organizations, and individuals strongly urged the Department to mandate such action because of the high proportion of TTY calls and relay service calls that are not completed because the title II entity's phone system or employees do not take the calls. This presents a serious obstacle for persons doing business with State and local government and denies persons with disabilities access to use the telephone for business that is typically handled over the phone for others.

In addition, commenters requested that the Department include ''real-time'' before any mention of ''computer-aided'' technology to highlight the value of simultaneous translation of any communication. The Department has added ''real-time'' before ''computer-aided transcription services'' in the definition of ''auxiliary aids in § 35.104 and before ''communication'' in § 35.161(b).

Subpart F—Compliance Procedures

Section 35.171 Acceptance of complaints.

In the NPRM, the Department proposed changing the current language in § 35.171(a)(2)(i) regarding misdirected complaints to make it clear that if an agency receives a complaint for which it lacks jurisdiction either under section 504 or as a designated agency under the ADA, the agency may refer the complaint to the appropriate agency with title II or section 504 jurisdiction or to the Department of Justice. The language of the 1991 title II regulation only requires the agency to refer such a complaint to the Department, which in turn refers the complaint to the appropriate designated agency. The proposed revisions to § 35.171 made it clear that an agency can refer a misdirected complaint either directly to the appropriate agency or to the Department. This amendment was intended to protect against the unnecessary backlogging of complaints and to prevent undue delay in an agency taking action on a complaint.

Several commenters supported this amendment as a more efficient means of directing title II complaints to the appropriate enforcing agency. One commenter requested that the Department emphasize the need for timeliness in referring a complaint. The Department does not believe it is appropriate to adopt a specific time frame but will continue to encourage designated agencies to make timely referrals. The final rule retains, with minor modifications, the language in proposed § 35.171(a)(2)(i). The Department has also amended § 35.171(a)(2)(ii) to be consistent with the changes in the rule at § 35.190(e), as discussed below.

Section 35.172 Investigations and compliance reviews.

In the NPRM, the Department proposed a number of changes to language in § 35.172 relating to the resolution of complaints. Subtitle A of title II of the ADA defines the remedies, procedures, and rights provided for qualified individuals with disabilities who are discriminated against on the basis of disability in the services, programs, or activities of State and local governments. 42 U.S.C. 12131–12134. Subpart F of the current regulation establishes administrative procedures for the enforcement of title II of the ADA. 28 CFR 35.170–35.178. Subpart G identifies eight ''designated agencies,'' including the Department, that have responsibility for investigating complaints under title II. *See* 28

CFR 35.190(b).

The Department's 1991 title II regulation is based on the enforcement procedures established in regulations implementing section 504. Thus, the Department's 1991 title II regulation provides that the designated agency ''shall investigate each complete complaint'' alleging a violation of title II and shall ''attempt informal resolution'' of such complaint. 28 CFR 35.172(a). The full range of remedies (including compensatory damages) that are available to the Department when it resolves a complaint or resolves issues raised in a compliance review are available to designated agencies when they are engaged in informal complaint resolution or resolution of issues raised in a compliance review under title II.

In the years since the 1991 title II regulation went into effect, the Department has received many more complaints alleging violations of title II than its resources permit it to resolve. The Department has reviewed each complaint that the Department has received and directed its resources to resolving the most critical matters. In the NPRM, the Department proposed deleting the word ''each'' as it appears before ''complaint'' in § 35.172(a) of the 1991 title II regulation as a means of clarifying that designated agencies may exercise discretion in selecting title II complaints for resolution.

Many commenters opposed the removal of the term ''each,'' requesting that all title II complaints be investigated. The commenters explained that complaints against title II entities implicate the fundamental right of access to government facilities and programs, making an administrative enforcement mechanism critical. Rather than aligning enforcement discretion of title II complaints with the discretion under the enforcement procedures of title III, the commenters favored obtaining additional resources to address more complaints. The commenters highlighted the advantage afforded by Federal involvement in complaint investigations in securing favorable voluntary resolutions. When Federal involvement results in settlement agreements, commenters believed those agreements are more persuasive to other public entities than private settlements. Private litigation as a viable alternative was rejected by the commenters because of the financial limitations of many complainants, and because in some scenarios legal barriers foreclose private litigation as an option.

Several of those opposing this amendment argued that designated agencies are required to investigate each complaint under section 504, and a departure for title II complaints would be an inconsistency. The Department believes that § 35.171(a) of the final rule is consistent with the obligation to evaluate all complaints. However, there is no statutory requirement that every title II complaint receive a full investigation. Section 203 of the ADA, 42 U.S.C. 12133, adopts the ''remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973'' (29 U.S.C. 794a). Section 505 of the Rehabilitation Act, in turn, incorporates the remedies available under title VI of the Civil Rights Act of 1964 into section 504. Under these statutes, agencies may engage in conscientious enforcement without fully investigating each citizen complaint. An agency's decision to conduct a full investigation requires a complicated balancing of a number of factors that are particularly within its expertise. Thus, the agency must not only assess whether a violation may have occurred, but also whether agency resources are best spent on this complaint or another, whether the agency is likely to succeed if it acts, and whether the particular enforcement action requested best fits the agency's overall policies. Availability of resources will always be a factor, and the Department believes discretion to maximize these limited resources will result in the most effective enforcement program. If agencies are bound to investigate each complaint fully, regardless of merit, such a requirement could have a deleterious effect on their overall enforcement efforts. The Department continues to expect that

each designated agency will review the complaints the agency receives to determine whether further investigation is appropriate.

The Department also proposed revising § 35.172 to add a new paragraph (b) that provided explicit authority for compliance reviews consistent with the Department's longstanding position that such authority exists. The proposed section stated, ''[t]he designated agency may conduct compliance reviews of public entities based on information indicating a possible failure to comply with the nondiscrimination requirements of this part.'' Several commenters supported this amendment, identifying title III compliance reviews as having been a successful means for the Department and designated agencies to improve accessibility. The Department has retained this section. However, the Department has modified the language of the section to make the authority to conduct compliance reviews consistent with that available under section 504 and title VI. *See, e.g.,* 28 CFR 42.107(a). The new provision reads as follows: ''(b) The designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part.'' The Department has also added a provision to § 35.172(c)(2) clarifying the Department's longstanding view that agencies may obtain compensatory damages on behalf of complainants as the result of a finding of discrimination pursuant to a compliance review or in informal resolution of a complaint.

Finally, in the NPRM, the Department proposed revising the requirements for letters of findings for clarification and to reflect current practice. Section 35.172(a) of the 1991 title II regulation required designated agencies to issue a letter of findings at the conclusion of an investigation if the complaint was not resolved informally, and to attempt to negotiate a voluntary compliance agreement if a violation was found. The Department's proposed changes to the 1991 title II regulation moved the discussion of letters of findings to a new paragraph (c) in the NPRM, and clarified that letters of findings are only required when a violation is found.

One commenter opposed the proposal to eliminate the obligation of the Department and designated agencies to issue letters of finding at the conclusion of every investigation. The commenter argued that it is beneficial for public entities, as well as complainants, for the Department to provide a reasonable explanation of both compliance and noncompliance findings.

The Department has considered this comment but continues to believe that this change will promote the overall effectiveness of its enforcement program. The final rule retains the proposed language.

Subpart G—Designated Agencies

Section 35.190 Designated agencies.

Subpart G of the 1991 title II regulation designates specific Federal agencies to investigate certain title II complaints. Paragraph 35.190(b) specifies these agency designations. Paragraphs 35.190(c) and (d), respectively, grant the Department discretion to designate further oversight responsibilities for matters not specifically assigned or where there are apparent conflicts of jurisdiction. The NPRM proposed adding a new § 35.190(e) further refining procedures for complaints filed with the Department of Justice. Proposed § 35.190(e) provides that when the Department receives a complaint alleging a violation of title II that is directed to the Attorney General but may fall within the jurisdiction of a designated agency or another Federal agency with jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part. The Department would, of course, consult with the designated agency when the Department plans to retain a complaint.

In appropriate circumstances, the Department and the designated agency may conduct a joint investigation.

Several commenters supported this amendment as a more efficient means of processing title II complaints. The commenters supported the Department using its discretion to conduct timely investigations of such complaints. The language of the proposed § 35.190(e) remains unchanged in the final rule.

Other Issues

Questions Posed in the NPRM Regarding Costs and Benefits of Complying With the 2010 Standards

In the NPRM, the Department requested comment on various cost and benefit issues related to eight requirements in the Department's Initial Regulatory Impact Analysis (Initial RIA), available at *ada.gov/ NPRM2008/ria.htm)*, that were projected to have incremental costs exceeding monetized benefits by more than $100 million when using the 1991 Standards as the comparative baseline, *i.e.*, side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses. 73 FR 34466, 34469 (June 17, 2008). The Department noted that pursuant to the ADA, the Department does not have statutory authority to modify the 2004 ADAAG and is required instead to issue regulations implementing the ADA that are consistent with the Board's guidelines. In that regard, the Department also requested comment about whether any of these eight elements in the 2010 Standards should be returned to the Access Board for further consideration, in particular as applied to alterations. Many of the comments received by the Department in response to these questions addressed both titles II and III. As a result, the Department's discussion of these comments and its response are collectively presented for both titles.

Side reach. The 1991 Standards at section 4.2.6 establish a maximum side-reach height of 54 inches. The 2010 Standards at section 308.3 reduce that maximum height to 48 inches. The 2010 Standards also add exceptions for certain elements to the scoping requirement for operable parts.

The vast majority of comments the Department received were in support of the lower side-reach maximum of 48 inches in the 2010 Standards. Most of these comments, but not all, were received from individuals of short stature, relatives of individuals of short stature, or organizations representing the interests of persons with disabilities, including individuals of short stature. Comments from individuals with disabilities and disability advocacy groups stated that the 48-inch side reach would permit independence in performing many activities of daily living for individuals with disabilities, including individuals of short stature, persons who use wheelchairs, and persons who have limited upper body strength. In this regard, one commenter who is a business owner pointed out that as a person of short stature there were many occasions when he was unable to exit a public restroom independently because he could not reach the door handle. The commenter said that often elevator control buttons are out of his reach and, if he is alone, he often must wait for someone else to enter the elevator so that he can ask that person to press a floor button for him. Another commenter, who is also a person of short stature, said that he has on several occasions pulled into a gas station only to find that he was unable to reach the credit card reader on the gas pump. Unlike other customers who can reach the card reader, swipe their credit or debit cards, pump their gas and leave the station, he must use another method to pay for his gas. Another comment from

a person of short stature pointed out that as more businesses take steps to reduce labor costs—a trend expected to continue—staffed booths are being replaced with automatic machines for the sale, for example, of parking tickets and other products. He observed that the ''ability to access and operate these machines becomes ever more critical to function in society,'' and, on that basis, urged the Department to adopt the 48-inch side-reach requirement. Another individual commented that persons of short stature should not have to carry with them adaptive tools in order to access building or facility elements that are out of their reach, any more than persons in wheelchairs should have to carry ramps with them in order to gain access to facilities.

Many of the commenters who supported the revised side-reach requirement pointed out that lowering the side-reach requirement to 48 inches would avoid a problem sometimes encountered in the built environment when an element was mounted for a parallel approach at 54 inches only to find afterwards that a parallel approach was not possible. Some commenters also suggested that lowering the maximum unobstructed side reach to 48 inches would reduce confusion among design professionals by making the unobstructed forward and side-reach maximums the same (the unobstructed forward reach in both the 1991 and 2010 Standards is 48 inches maximum). These commenters also pointed out that the ICC/ANSI A117.1 Standard, which is a private sector model accessibility standard, has included a 48-inch maximum high side-reach requirement since 1998. Many jurisdictions have already incorporated this requirement into their building codes, which these commenters believed would reduce the cost of compliance with the 2010 Standards. Because numerous jurisdictions have already adopted the 48-inch side-reach requirement, the Department's failure to adopt the 48-inch side-reach requirement in the 2010 Standards, in the view of many commenters, would result in a significant reduction in accessibility, and would frustrate efforts that have been made to harmonize private sector model construction and accessibility codes with Federal accessibility requirements. Given these concerns, they overwhelmingly opposed the idea of returning the revised side-reach requirement to the Access Board for further consideration.

The Department also received comments in support of the 48-inch side-reach requirement from an association of professional commercial property managers and operators and from State governmental entities. The association of property managers pointed out that the revised side-reach requirement provided a reasonable approach to ''regulating elevator controls and all other operable parts'' in existing facilities in light of the manner in which the safe harbor, barrier removal, and alterations obligations will operate in the 2010 Standards. One governmental entity, while fully supporting the 48-inch side-reach requirement, encouraged the Department to adopt an exception to the lower reach range for existing facilities similar to the exception permitted in the ICC/ANSI A117.1 Standard. In response to this latter concern, the Department notes that under the safe harbor, existing facilities that are in compliance with the 1991 Standards, which require a 54-inch side-reach maximum, would not be required to comply with the lower side-reach requirement, unless there is an alteration. *See* § 35.150(b)(2).

A number of commenters expressed either concern with, or opposition to, the 48-inch side-reach requirement and suggested that it be returned to the Access Board for further consideration. These commenters included trade and business associations, associations of retail stores, associations of restaurant owners, retail and convenience store chains, and a model code organization. Several businesses expressed the view that the lower side-reach requirement would discourage the use of their products and equipment by most of the general public. In particular, concerns were expressed by a national association of pay phone service providers

regarding the possibility that pay telephones mounted at the lower height would not be used as frequently by the public to place calls, which would result in an economic burden on the pay phone industry. The commenter described the lower height required for side reach as creating a new ''barrier'' to pay phone use, which would reduce revenues collected from pay phones and, consequently, further discourage the installation of new pay telephones. In addition, the commenter expressed concern that phone service providers would simply decide to remove existing pay phones rather than incur the costs of relocating them at the lower height. With regard to this latter concern, the commenter misunderstood the manner in which the safe harbor obligation will operate in the revised title II regulation for elements that comply with the 1991 Standards. If the pay phones comply with the 1991 Standards or UFAS, the adoption of the 2010 Standards does not require retrofitting of these elements to reflect incremental changes in the 2010 Standards (*see* § 35.150(b)(2)). However, pay telephones that were required to meet the 1991 Standards as part of new construction or alterations, but do not in fact comply with those standards, will need to be brought into compliance with the 2010 Standards as of 18 months from the publication date of this final rule. *See* § 35.151(c)(5)(ii).

The Department does not agree with the concerns expressed by the commenter about reduced revenues from pay phones mounted at lower heights. The Department believes that, while given the choice some individuals may prefer to use a pay phone that is at a higher height, the availability of some phones at a lower height will not deter individuals from making needed calls.

The 2010 Standards will not require every pay phone to be installed or moved to a lowered height. The table accompanying section 217.2 of the 2010 Standards makes clear that, where one or more telephones are provided on a floor, level, or an exterior site, only one phone per floor, level, or exterior site must be placed at an accessible height. Similarly, where there is one bank of phones per floor, level, or exterior site, only one phone per floor, level, or exterior site must be accessible. And if there are two or more banks of phones per floor, level, or exterior site, only one phone per bank must be placed at an accessible height.

Another comment in opposition to the lower reach range requirement was submitted on behalf of a chain of convenience stores with fuel stops. The commenter expressed the concern that the 48-inch side reach ''will make it uncomfortable for the majority of the public,'' including persons of taller stature who would need to stoop to use equipment such as fuel dispensers mounted at the lower height. The commenter offered no objective support for the observation that a majority of the public would be rendered uncomfortable if, as required in the 2010 Standards, at least one of each type of fuel dispenser at a facility was made accessible in compliance with the lower reach range. Indeed, the Department received no comments from any individuals of tall stature expressing concern about accessible elements or equipment being mounted at the 48-inch height.

Several convenience store, restaurant, and amusement park commenters expressed concern about the burden the lower side-reach requirement would place on their businesses in terms of self-service food stations and vending areas if the 48-inch requirement were applied retroactively. The cost of lowering counter height, in combination with the lack of control businesses exercise over certain prefabricated service or vending fixtures, outweighed, they argued, any benefits to persons with disabilities. For this reason, they suggested the lower side-reach requirement be referred back to the Access Board.

These commenters misunderstood the safe harbor and barrier removal obligations that will be in effect under the 2010 Standards. Those existing

self-service food stations and vending areas that already are in compliance with the 1991 Standards will not be required to satisfy the 2010 Standards unless they engage in alterations. With regard to prefabricated vending machines and food service components that will be purchased and installed in businesses after the 2010 Standards become effective, the Department expects that companies will design these machines and fixtures to comply with the 2010 Standards in the future, as many have already done in the 10 years since the 48-inch side-reach requirement has been a part of the model codes and standards used by many jurisdictions as the basis for their construction codes.

A model code organization commented that the lower side-reach requirement would create a significant burden if it required entities to lower the mounting height for light switches, environmental controls, and outlets when an alteration did not include the walls where these elements were located, such as when ''an area is altered or as a path of travel obligation.'' The Department believes that the final rule adequately addresses those situations about which the commenter expressed concern by not requiring the relocation of existing elements, such as light switches, environmental controls, and outlets, unless they are altered. Moreover, under § 35.151(b)(4)(iii) of the final rule, costs for altering the path of travel to an altered area of primary function that exceed 20 percent of the overall costs of the alteration will be deemed disproportionate.

The Department has determined that the revised side-reach requirement should not be returned to the Access Board for further consideration, based in large part on the views expressed by a majority of the commenters regarding the need for, and importance of, the lower side-reach requirement to ensure access for persons with disabilities.

Alterations and Water Closet Clearances in Single-User Toilet Rooms With In-Swinging Doors

The 1991 Standards allow a lavatory to be placed a minimum of 18 inches from the water closet centerline and a minimum of 36 inches from the side wall adjacent to the water closet, which precludes side transfers. The 1991 Standards do not allow an in-swinging door in a toilet or bathing room to overlap the required clear floor space at any accessible fixture. To allow greater transfer options, section 604.3.2 of the 2010 Standards prohibits lavatories from overlapping the clear floor space at water closets, except in residential dwelling units. Section 603.2.3 of the 2010 Standards maintains the prohibition on doors swinging into the clear floor space or clearance required for any fixture, except that they permit the doors of toilet or bathing rooms to swing into the required turning space, provided that there is sufficient clearance space for the wheelchair outside the door swing. In addition, in single-user toilet or bathing rooms, exception 2 of section 603.2.3 of the 2010 Standards permits the door to swing into the clear floor space of an accessible fixture if a clear floor space that measures at least 30 inches by 48 inches is available outside the arc of the door swing.

The majority of commenters believed that this requirement would increase the number of toilet rooms accessible to individuals with disabilities who use wheelchairs or mobility scooters, and will make it easier for them to transfer. A number of commenters stated that there was no reason to return this provision to the Access Board. Numerous commenters noted that this requirement is already included in other model accessibility standards and many State and local building codes and that the adoption of the 2010 Standards is an important part of harmonization efforts.

Other commenters, mostly trade associations, opposed this requirement, arguing that the added cost to the industry outweighs any increase in accessibility. Two commenters stated that these proposed requirements would add two feet to the width of an accessible single-user toilet room; however, another commenter said the drawings in the proposed regulation demonstrated that

there would be no substantial increase in the size of the toilet room. Several commenters stated that this requirement would require moving plumbing fixtures, walls, or doors at significant additional expense. Two commenters wanted the permissible overlap between the door swing and clearance around any fixture eliminated. One commenter stated that these new requirements will result in fewer alterations to toilet rooms to avoid triggering the requirement for increased clearances, and suggested that the Department specify that repairs, maintenance, or minor alterations would not trigger the need to provide increased clearances. Another commenter requested that the Department exempt existing guest room bathrooms and single-user toilet rooms that comply with the 1991 Standards from complying with the increased clearances in alterations.

After careful consideration of these comments, the Department believes that the revised clearances for single-user toilet rooms will allow safer and easier transfers for individuals with disabilities, and will enable a caregiver, aide, or other person to accompany an individual with a disability into the toilet room to provide assistance. The illustrations in Appendix B to the final title III rule, ''Analysis and Commentary on the 2010 ADA Standards for Accessible Design,'' published elsewhere in this volume and codified as Appendix B to 28 CFR part 36, describe several ways for public entities and public accommodations to make alterations while minimizing additional costs or loss of space. Further, in any isolated instances where existing structural limitations may entail loss of space, the public entity and public accommodation may have a technical infeasibility defense for that alteration. The Department also recognizes that in attempting to create the required clear floor space pursuant to section 604.3.2, there may be certain specific circumstances where it would be technically infeasible for a covered entity to comply with the clear floor space requirement, such as where an entity must move a plumbing wall in a multistory building where the mechanical chase for plumbing is an integral part of a building's structure or where the relocation of a wall or fixture would violate applicable plumbing codes. In such circumstances, the required clear floor space would not have to be provided although the covered entity would have to provide accessibility to the maximum extent feasible. The Department has, therefore, decided not to return this requirement to the Access Board.

Alterations to stairs. The 1991 Standards only require interior and exterior stairs to be accessible when they provide access to levels that are not connected by an elevator, ramp, or other accessible means of vertical access. In contrast, section 210.1 of the 2010 Standards requires all newly constructed stairs that are part of a means of egress to be accessible. However, exception 2 of section 210.1 of the 2010 Standards provides that in alterations, stairs between levels connected by an accessible route need not be accessible, except that handrails shall be provided. Most commenters were in favor of this requirement for handrails in alterations, and stated that adding handrails to stairs during alterations was not only feasible and not cost-prohibitive, but also provided important safety benefits. One commenter stated that making all points of egress accessible increased the number of people who could use the stairs in an emergency. A majority of the commenters did not want this requirement returned to the Access Board for further consideration.

The International Building Code (IBC), which is a private sector model construction code, contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, thereby minimizing the impact of this provision on public entities and public accommodations. The Department believes that by requiring only the addition of handrails to altered stairs where levels are connected by an accessible route, the costs of compliance for public entities and public accommodations are minimized, while

safe egress for individuals with disabilities is increased. Therefore, the Department has decided not to return this requirement to the Access Board.

Alterations to elevators. Under the 1991 Standards, if an existing elevator is altered, only that altered elevator must comply with the new construction requirements for accessible elevators to the maximum extent feasible. It is therefore possible that a bank of elevators controlled by a single call system may contain just one accessible elevator, leaving an individual with a disability with no way to call an accessible elevator and thus having to wait indefinitely until an accessible elevator happens to respond to the call system. In the 2010 Standards, when an element in one elevator is altered, section 206.6.1 will require the same element to be altered in all elevators that are programmed to respond to the same call button as the altered elevator.

Most commenters favored the proposed requirement. This requirement, according to these commenters, is necessary so a person with a disability need not wait until an accessible elevator responds to his or her call. One commenter suggested that elevator owners could also comply by modifying the call system so the accessible elevator could be summoned independently. One commenter suggested that this requirement would be difficult for small businesses located in older buildings, and one commenter suggested that this requirement be sent back to the Access Board.

After considering the comments, the Department agrees that this requirement is necessary to ensure that when an individual with a disability presses a call button, an accessible elevator will arrive in a timely manner. The IBC contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, minimizing the impact of this provision on public entities and public accommodations. Public entities and businesses located in older buildings need not comply with this requirement where it is technically infeasible to do so. Further, as pointed out by one commenter, modifying the call system so the accessible elevator can be summoned independently is another means of complying with this requirement in lieu of altering all other elevators programmed to respond to the same call button. Therefore, the Department has decided not to return this requirement to the Access Board.

Location of accessible routes to stages. The 1991 Standards at section 4.33.5 require an accessible route to connect the accessible seating and the stage, as well as other ancillary spaces used by performers. The 2010 Standards at section 206.2.6 provide in addition that where a circulation path directly connects the seating area and the stage, the accessible route must directly connect the accessible seating and the stage, and, like the 1991 Standards, an accessible route must connect the stage with the ancillary spaces used by performers.

In the NPRM, the Department asked operators of auditoria about the extent to which auditoria already provide direct access to stages and whether there were planned alterations over the next 15 years that included accessible direct routes to stages. The Department also asked how to quantify the benefits of this requirement for persons with disabilities, and invited commenters to provide illustrative anecdotal experiences about the requirement's benefits. The Department received many comments regarding the costs and benefits of this requirement. Although little detail was provided, many industry and governmental entity commenters anticipated that the costs of this requirement would be great and that it would be difficult to implement. They noted that premium seats may have to be removed and that load-bearing walls may have to be relocated. These commenters suggested that the significant costs would deter alterations to the stage area for a great many auditoria. Some commenters suggested that ramps to the front of the stage may interfere with means of egress and emergency exits. Several commenters requested that the requirement

apply to new construction only, and one industry commenter requested an exemption for stages used in arenas or amusement parks where there is no audience participation or where the stage is a work area for performers only. One commenter requested that the requirement not apply to temporary stages.

The final rule does not require a direct accessible route to be constructed where a direct circulation path from the seating area to the stage does not exist. Consequently, those commenters who expressed concern about the burden imposed by the revised requirement (*i.e.*, where the stage is constructed with no direct circulation path connecting the general seating and performing area) should note that the final rule will not require the provision of a direct accessible route under these circumstances. The final rule applies to permanent stages, as well as ''temporary stages,'' if there is a direct circulation path from the seating area to the stage. However, the Department does recognize that in some circumstances, such as an alteration to a primary function area, the ability to provide a direct accessible route to a stage may be costly or technically infeasible, the auditorium owner is not precluded by the revised requirement from asserting defenses available under the regulation. In addition, the Department notes that since section 4.33.5 of the 1991 Standards requires an accessible route to a stage, the safe harbor will apply to existing facilities whose stages comply with the 1991 Standards.

Several governmental entities supported accessible auditoria and the revised requirement. One governmental entity noted that its State building code already required direct access, that it was possible to provide direct access, and that creative solutions had been found to do so.

Many advocacy groups and individual commenters strongly supported the revised requirement, discussing the acute need for direct access to stages as it impacts a great number of people at important life events such as graduations and awards ceremonies, at collegiate and competitive performances and other school events, and at entertainment events that include audience participation. Many commenters expressed the belief that direct access is essential for integration mandates to be satisfied and that separate routes are stigmatizing and unequal. The Department agrees with these concerns.

Commenters described the impact felt by persons in wheelchairs who are unable to access the stage at all when others are able to do so. Some of these commenters also discussed the need for performers and production staff who use wheelchairs to have direct access to the stage and provided a number of examples that illustrated the importance of the rule proposed in the NPRM. Personal anecdotes were provided in comments and at the Department's public hearing on the NPRM. One mother spoke passionately and eloquently about the unequal treatment experienced by her daughter, who uses a wheelchair, at awards ceremonies and band concerts. Her daughter was embarrassed and ashamed to be carried by her father onto a stage at one band concert. When the venue had to be changed for another concert to an accessible auditorium, the band director made sure to comment that he was unhappy with the switch. Rather than endure the embarrassment and indignities, her child dropped out of band the following year. Another father commented about how he was unable to speak from the stage at a PTA meeting at his child's school. Speaking from the floor limited his line of sight and his participation. Several examples were provided of children who could not participate on stage during graduation, awards programs, or special school events, such as plays and festivities. One student did not attend his college graduation because he would not be able to get on stage. Another student was unable to participate in the class Christmas programs or end-of-year parties unless her father could attend and lift her onto the stage. These commenters did not provide a method to quantify

the benefits that would accrue by having direct access to stages. One commenter stated, however, that ''the cost of dignity and respect is without measure.''

Many industry commenters and governmental entities suggested that the requirement be sent back to the Access Board for further consideration. One industry commenter mistakenly noted that some international building codes do not incorporate the requirement and that therefore there is a need for further consideration. However, the Department notes that both the 2003 and 2006 editions of the IBC include scoping provisions that are almost identical to this requirement and that these editions of the model code are the most frequently used. Many individuals and advocacy group commenters requested that the requirement be adopted without further delay. These commenters spoke of the acute need for direct access to stages and the amount of time it would take to resubmit the requirement to the Access Board. Several commenters noted that the 2004 ADAAG tracks recent model codes and thus there is no need for further consideration. The Department agrees that no further delay is necessary and therefore has decided not to return the requirement to the Access Board for further consideration.

Attorney areas and witness stands. The 1991 Standards do not require that public entities meet specific architectural standards with regard to the construction and alteration of courtrooms and judicial facilities. Because it is apparent that the judicial facilities of State and local governments have often been inaccessible to individuals with disabilities, as part of the NPRM, the Department proposed the adoption of sections 206.2.4, 231.2, 808, 304, 305, and 902 of the 2004 ADAAG concerning judicial facilities and courtrooms, including requirements for accessible courtroom stations and accessible jury boxes and witness stands.

Those who commented on access to judicial facilities and courtrooms uniformly favored the adoption of the 2010 Standards. Virtually all of the commenters stated that accessible judicial facilities are crucial to ensuring that individuals with disabilities are afforded due process under law and have an equal opportunity to participate in the judicial process. None of the commenters favored returning this requirement to the Access Board for further consideration.

The majority of commenters, including many disability rights and advocacy organizations, stated that it is crucial for individuals with disabilities to have effective and meaningful access to our judicial system so as to afford them due process under law. They objected to asking the Access Board to reconsider this requirement. In addition to criticizing the initial RIA for virtually ignoring the intangible and non-monetary benefits associated with accessible courtrooms, these commenters frequently cited the Supreme Court's decision in *Tennessee v. Lane,* 541 U.S. 509, 531 (2004),[4] as ample justification for the requirement, noting the Court's finding that ''[t]he unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination.'' *Id.* at 531. These commenters also made a number of observations, including the following: providing effective access to individuals with mobility impairments is not possible when architectural barriers impede their path of travel and negatively emphasize an individual's disability; the perception generated by makeshift accommodations discredits witnesses and attorneys with disabilities, who should not be stigmatized or treated like second-class citizens; the cost of accessibility modifications to existing courthouses can often be significantly decreased

[4] The Supreme Court in *Tennessee v. Lane*, 541 U.S. 509, 5330534 (2004), held that title II of the ADA constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment in cases implicating the fundamental access to the courts.

by planning ahead, by focusing on low-cost options that provide effective access, and by addressing existing barriers when reasonable modifications to the courtroom can be made; by planning ahead and by following best practices, jurisdictions can avoid those situations where it is apparent that someone's disability is the reason why ad hoc arrangements have to be made prior to the beginning of court proceedings; and accessibility should be a key concern during the planning and construction process so as to ensure that both courtroom grandeur and accessibility are achieved. One commenter stated that, in order for attorneys with disabilities to perform their professional duties to their clients and the court, it is essential that accessible courtrooms, conference rooms, law libraries, judicial chambers, and other areas of a courthouse be made barrier-free by taking accessible design into account prior to construction.

Numerous commenters identified a variety of benefits that would accrue as a result of requiring judicial facilities to be accessible. These included the following: maintaining the decorum of the courtroom and eliminating the disruption of court proceedings when individuals confront physical barriers; providing an accessible route to the witness stand and attorney area and clear floor space to accommodate a wheelchair within the witness area; establishing crucial lines of sight between the judge, jury, witnesses, and attorneys—which commenters described as crucial; ensuring that the judge and the jury will not miss key visual indicators of a witness; maintaining a witness's or attorney's dignity and credibility; shifting the focus from a witness's disability to the substance of that person's testimony; fostering the independence of an individual with disability; allowing persons with mobility impairments to testify as witnesses, including as expert witnesses; ensuring the safety of various participants in a courtroom proceeding; and avoiding unlawful discrimination. One commenter stated that equal access to the well of the courtroom for both attorney and client is important for equal participation and representation in our court system. Other commenters indicated that accessible judicial facilities benefit a wide range of people, including many persons without disabilities, senior citizens, parents using strollers with small children, and attorneys and court personnel wheeling documents into the courtroom. One commenter urged the adoption of the work area provisions because they would result in better workplace accessibility and increased productivity. Several commenters urged the adoption of the rule because it harmonizes the ADAAG with the model IBC, the standards developed by the American National Standards Institute (ANSI), and model codes that have been widely adopted by State and local building departments, thus increasing the prospects for better understanding and compliance with the ADAAG by architects, designers, and builders.

Several commenters mentioned the report ''Justice for All: Designing Accessible Courthouses'' (Nov. 15, 2006), available at *http://www.access-board.gov/caac/ report.htm* (Nov. 24, 2009) (last visited June 24, 2010). The report, prepared by the Courthouse Access Advisory Committee for the Access Board, contained recommendations for the Board's use in developing and disseminating guidance on accessible courthouse design under the ADA and the ABA. These commenters identified some of the report's best practices concerning courtroom accessibility for witness stands, jury boxes, and attorney areas; addressed the costs and benefits arising from the use of accessible courtrooms; and recommended that the report be incorporated into the Department's final rule. With respect to existing courtrooms, one commenter in this group suggested that consideration be given to ensuring that there are barrier-free emergency evacuation routes for all persons in the courtroom, including different evacuation routes for different classes of individuals given the unique nature of judicial facilities and courtrooms.

The Department declines to incorporate the report into the regulation. However, the Department encourages State and local governments to consult the Committee report as a useful guide on ways to facilitate and increase accessibility of their judicial facilities. The report includes many excellent examples of accessible courtroom design.

One commenter proposed that the regulation also require a sufficient number of accessible benches for judges with disabilities. Under section 206.2.4 of the 2004 ADAAG, raised courtroom stations used by judges and other judicial staff are not required to provide full vertical access when first constructed or altered, as long as the required clear floor space, maneuvering space, and any necessary electrical service for future installation of a means of vertical access, is provided at the time of new construction or can be achieved without substantial reconstruction during alterations. The Department believes that this standard easily allows a courtroom station to be adapted to provide vertical access in the event a judge requires an accessible judge's bench.

The Department received several anecdotal accounts of courtroom experiences of individuals with disabilities. One commenter recalled numerous difficulties that her law partner faced as the result of inaccessible courtrooms, and their concerns that the attention of judge and jury was directed away from the merits of case to the lawyer and his disability. Among other things, the lawyer had to ask the judges on an appellate panel to wait while he maneuvered through insufficient space to the counsel table; ask judges to relocate bench conferences to accessible areas; and make last-minute preparations and rearrangements that his peers without disabilities did not have to make. Another commenter with extensive experience as a lawyer, witness, juror, and consultant observed that it is common practice for a witness who uses mobility devices to sit in front of the witness stand. He described how disconcerting and unsettling it has been for him to testify in front of the witness stand, which allowed individuals in the courtroom to see his hands or legs shaking because of spasticity, making him feel like a second-class citizen.

Two other commenters with mobility disabilities described their experiences testifying in court. One accessibility consultant stated that she was able to represent her clients successfully when she had access to an accessible witness stand because it gave her the ability ''to look the judge in the eye, speak comfortably and be heard, hold up visual aids that could be seen by the judge, and perform without an architectural stigma.'' She did not believe that she was able to achieve a comparable outcome or have meaningful access to the justice system when she testified from an inaccessible location. Similarly, a licensed clinical social worker indicated that she has testified in several cases in accessible courtrooms, and that having full access to the witness stand in the presence of the judge and the jury was important to her effectiveness as an expert witness. She noted that accessible courtrooms often are not available, and that she was aware of instances in which victims, witnesses, and attorneys with disabilities have not been able to obtain needed disability accommodations in order to fulfill their roles at trial.

Two other commenters indicated that they had been chosen for jury duty but that they were effectively denied their right to participate as jurors because the courtrooms were not accessible. Another commenter indicated that he has had to sit apart from the other jurors because the jury box was inaccessible.

A number of commenters expressed approval of actions taken by States to facilitate access in judicial facilities. A member of a State commission on disability noted that the State had been working toward full accessibility since 1997 when the Uniform Building Code required interior accessible routes. This commenter stated that the State's district courts had been renovated to the maximum extent feasible to provide

greater access. This commenter also noted that a combination of Community Development Block Grant money and State funds are often awarded for renovations of courtroom areas. One advocacy group that has dealt with court access issues stated that members of the State legal community and disability advocates have long been promoting efforts to ensure that the State courts are accessible to individuals with disabilities. The comment cited a publication distributed to the Washington State courts by the State bar association entitled, ''Ensuring Equal Access to the Courts for Persons with Disabilities.'' (Aug. 2006), available at *http:// www.wsba.org/ ensuringaccessguidebook.pdf* (last visited July 20, 2010). In addition, the commenter also indicated that the State supreme court had promulgated a new rule governing how the courts should respond to requests of accommodation based upon disability; the State legislature had created the position of Disability Access Coordinator for Courts to facilitate accessibility in the court system; and the State legislature had passed a law requiring that all planned improvements and alterations to historic courthouses be approved by the ADA State facilities program manager and committee in order to ensure that the alterations will enhance accessibility.

The Department has decided to adopt the requirements in the 2004 ADAAG with respect to judicial facilities and courtrooms and will not ask the Access Board to review these requirements. The final rule is wholly consistent with the objectives of the ADA. It addresses a well-documented history of discrimination with respect to judicial administration and significantly increases accessibility for individuals with disabilities. It helps ensure that they will have an opportunity to participate equally in the judicial process. As stated, the final rule is consistent with a number of model and local building codes that have been widely adopted by State and local building departments and provides greater uniformity for planners, architects, and builders.

Assistive listening systems. The 1991 Standards at sections 4.33.6 and 4.33.7 require assistive listening systems (ALS) in assembly areas and prescribe general performance standards for ALS systems. In the NPRM, the Department proposed adopting the technical specifications in the 2004 ADAAG for ALS that are intended to ensure better quality and effective delivery of sound and information for persons with hearing impairments, especially those using hearing aids. The Department noted in the NPRM that since 1991, advancements in ALS and the advent of digital technology have made these systems more amenable to uniform standards, which, among other things, should ensure that a certain percentage of required ALS systems are hearing-aid compatible. 73 FR 34466, 34471 (June 17, 2008). The 2010 Standards at section 219 provide scoping requirements and at section 706 address receiver jacks, hearing aid compatibility, sound pressure level, signal-to-noise ratio, and peak clipping level. The Department requested comments specifically from arena and assembly area administrators on the cost and maintenance issues associated with ALS, asked generally about the costs and benefits of ALS, and asked whether, based upon the expected costs of ALS, the issue should be returned to the Access Board for further consideration.

Comments from advocacy organizations noted that persons who develop significant hearing loss often discontinue their normal routines and activities, including meetings, entertainment, and large group events, due to a sense of isolation caused by the hearing loss or embarrassment. Individuals with longstanding hearing loss may never have participated in group activities for many of the same reasons. Requiring ALS may allow individuals with disabilities to contribute to the community by joining in government and public events, and increasing economic activity associated with community activities and entertainment. Making public events and entertainment accessible to persons

with hearing loss also brings families and other groups that include persons with hearing loss into more community events and activities, thus exponentially increasing the benefit from ALS.

Many commenters noted that when a person has significant hearing loss, that person may be able to hear and understand information in a quiet situation with the use of hearing aids or cochlear implants; however, as background noise increases and the distance between the source of the sound and the listener grows, and especially where there is distortion in the sound, an ALS becomes essential for basic comprehension and understanding. Commenters noted that among the 31 million Americans with hearing loss, and with a projected increase to over 78 million Americans with hearing loss by 2030, the benefit from ALS is huge and growing. Advocates for persons with disabilities and individuals commented that they appreciated the improvements in the 2004 ADAAG standards for ALS, including specifications for the ALS systems and performance standards. They noted that neckloops that translate the signal from the ALS transmitter to a frequency that can be heard on a hearing aid or cochlear implant are much more effective than separate ALS system headsets, which sometimes create feedback, often malfunction, and may create distractions for others seated nearby. Comments from advocates and users of ALS systems consistently noted that the Department's regulation should, at a minimum, be consistent with the 2004 ADAAG. Although there were requests for adjustments in the scoping requirements from advocates seeking increased scoping requirements, and from large venue operators seeking fewer requirements, there was no significant concern expressed by commenters about the technical specifications for ALS in the 2004 ADAAG.

Some commenters from trade associations and large venue owners criticized the scoping requirements as too onerous and one commenter asked for a remand to the Access Board for new scoping rules. However, one State agency commented that the 2004 ADAAG largely duplicates the requirements in the 2006 IBC and the 2003 ANSI codes, which means that entities that comply with those standards would not incur additional costs associated with ADA compliance.

According to one State office of the courts, the cost to install either an infrared system or an FM system at average-sized facilities, including most courtrooms covered by title II, would be between $500 and $2,000, which the agency viewed as a small price in comparison to the benefits of inclusion. Advocacy organizations estimated wholesale costs of ALS systems at about $250 each and individual neckloops to link the signal from the ALS transmitter to hearing aids or cochlear implants at less than $50 per unit. Many commenters pointed out that if a facility already is using induction neckloops, it would already be in compliance and would not have any additional installation costs. One major city commented that annual maintenance is about $2,000 for the entire system of performance venues in the city. A trade association representing very large venues estimated annual maintenance and upkeep expenses, including labor and replacement parts, to be at most about $25,000 for a very large professional sports stadium.

One commenter suggested that the scoping requirements for ALS in the 2004 ADAAG were too stringent and that the Department should return them to the Access Board for further review and consideration. Others commented that the requirement for new ALS systems should mandate multichannel receivers capable of receiving audio description for persons who are blind, in addition to a channel for amplification for persons who are hard of hearing. Some comments suggested that the Department should require a set schedule and protocol of mandatory maintenance. Department regulations already require maintenance of accessible features at § 35.133(a) of the title II regulation, which obligates a title II entity

to maintain ALS in good working order. The Department recognizes that maintenance of ALS is key to its usability. Necessary maintenance will vary dramatically from venue to venue based upon a variety of factors including frequency of use, number of units, quality of equipment, and others items. Accordingly, the Department has determined that it is not appropriate to mandate details of maintenance, but notes that failure to maintain ALS would violate § 35.133(a) of this rule.

The NPRM asked whether the Department should return the issue of ALS requirements to the Access Board. The Department has received substantial feedback on the technical and scoping requirements for ALS and is convinced that these requirements are reasonable and that the benefits justify the requirements. In addition, the Department believes that the new specifications will make ALS work more effectively for more persons with disabilities, which, together with a growing population of new users, will increase demand for ALS, thus mooting criticism from some large venue operators about insufficient demand. Thus, the Department has determined that it is unnecessary to refer this issue back to the Access Board for reconsideration.

Accessible teeing grounds, putting greens, and weather shelters. In the NPRM, the Department sought public input on the proposed requirements for accessible golf courses. These requirements specifically relate to accessible routes within the boundaries of courses, as well as the accessibility of golfing elements (*e.g.*, teeing grounds, putting greens, weather shelters).

In the NPRM, the Department sought information from the owners and operators of golf courses, both public and private, on the extent to which their courses already have golf car passages, and, if so, whether they intended to avail themselves of the proposed accessible route exception for golf car passages. 73 FR 34466, 34471 (June 17, 2008).

Most commenters expressed support for the adoption of an accessible route requirement that includes an exception permitting golf car passage as all or part of an accessible route. Comments in favor of the proposed standard came from golf course owners and operators, individuals, organizations, and disability rights groups, while comments opposing adoption of the golf course requirements generally came from golf courses and organizations representing the golf course industry.

The majority of commenters expressed the general viewpoint that nearly all golf courses provide golf cars and have either well-defined paths or permit golf cars to drive on the course where paths are not present, thus meeting the accessible route requirement. Several commenters disagreed with the assumption in the initial RIA, that virtually every tee and putting green on an existing course would need to be regraded in order to provide compliant accessible routes. According to one commenter, many golf courses are relatively flat with little slope, especially those heavily used by recreational golfers. This commenter concurred with the Department that it is likely that most existing golf courses have a golf car passage to tees and greens, thereby substantially minimizing the cost of bringing an existing golf course into compliance with the proposed standards. One commenter reported that golf course access audits found that the vast majority of public golf courses would have little difficulty in meeting the proposed golf course requirements. In the view of some commenters, providing access to golf courses would increase golf participation by individuals with disabilities.

The Department also received many comments requesting clarification of the term ''golf car passage.'' For example, one commenter requesting clarification of the term ''golf car passage'' argued that golf courses typically do not provide golf car paths or pedestrian paths onto the actual teeing grounds or greens, many of which are higher or lower than the car path. This commenter argued that if golf car passages were required to extend

onto teeing grounds and greens in order to qualify for an exception, then some golf courses would have to substantially regrade teeing grounds and greens at a high cost.

After careful consideration of the comments, the Department has decided to adopt the 2010 Standards specific to golf facilities. The Department believes that in order for individuals with mobility disabilities to have an opportunity to play golf that is equal to golfers without disabilities, it is essential that golf courses provide an accessible route or accessible golf car passage to connect accessible elements and spaces within the boundary of the golf course, including teeing grounds, putting greens, and weather shelters.

Public Comments on Other NPRM Issues

Equipment and furniture. In the 1991 title II regulation, there are no specific provisions addressing equipment and furniture, although § 35.150(b) states that one means by which a public entity can make its program accessible to individuals with disabilities is ''redesign of equipment.'' In the NPRM, the Department announced its intention not to regulate equipment, proposing instead to continue with the current approach, under which equipment and furniture are covered by other provisions, including those requiring reasonable modifications of policies, practices, or procedures, program accessibility, and effective communication. The Department suggested that entities apply the accessibility standards for fixed equipment in the 2004 ADAAG to analogous free-standing equipment in order to ensure that such equipment is accessible, and that entities consult relevant portions of the 2004 ADAAG and standards from other Federal agencies to make equipment accessible to individuals who are blind or have low vision (*e.g.*, the communication-related standards for ATMs in the 2004 ADAAG).

The Department received numerous comments objecting to this decision and urging the Department to issue equipment and furniture regulations. Based on these comments, the Department has decided that it needs to revisit the issuance of equipment and furniture regulations and it intends to do so in future rulemaking.

Among the commenters' key concerns, many from the disability community and some public entities, were objections to the Department's earlier decision not to issue equipment regulations, especially for medical equipment. These groups recommended that the Department list by name certain types of medical equipment that must be accessible, including exam tables (that lower to 15 inches above floor or lower), scales, medical and dental chairs, and radiologic equipment (including mammography equipment). These commenters emphasized that the provision of medically related equipment and furniture should also be specifically regulated since they are not included in the 2004 ADAAG (while depositories, change machines, fuel dispensers, and ATMs were) and because of their crucial role in the provision of healthcare. Commenters described how the lack of accessible medical equipment negatively affects the health of individuals with disabilities. For example, some individuals with mobility disabilities do not get thorough medical care because their health providers do not have accessible examination tables or scales.

Commenters also said that the Department's stated plan to assess the financial impact of free-standing equipment on businesses was not necessary, as any regulations could include a financial balancing test. Other commenters representing persons who are blind or have low vision urged the Department to mandate accessibility for a wide range of equipment—including household appliances (stoves, washers, microwaves, and coffee makers), audiovisual equipment (stereos and DVD players), exercise machines, vending equipment, ATMs, computers at Internet cafes or hotel business centers, reservations kiosks at hotels, and point-of-sale

devices— through speech output and tactile labels and controls. They argued that modern technology allows such equipment to be made accessible at minimal cost. According to these commenters, the lack of such accessibility in point-of-sale devices is particularly problematic because it forces blind individuals to provide personal or sensitive information (such as personal identification numbers) to third parties, which exposes them to identity fraud. Because the ADA does not apply directly to the manufacture of products, the Department lacks the authority to issue design requirements for equipment designed exclusively for use in private homes. *See* Department of Justice, Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities,* III–4.4200, available at *http://www.ada.gov/ taman3*.

Some commenters urged the Department to require swimming pool operators to provide aquatic wheelchairs for the use of persons with disabilities when the swimming pool has a sloped entry. If there is a sloped entry, a person who uses a wheelchair would require a wheelchair designed for use in the water in order to gain access to the pool because taking a personal wheelchair into water would rust and corrode the metal on the chair and damage any electrical components of a power wheelchair. Providing an aquatic wheelchair made of non-corrosive materials and designed for access into the water will protect the water from contamination and avoid damage to personal wheelchairs or other mobility aids.

Additionally, many commenters urged the Department to regulate the height of beds in accessible hotel guest rooms and to ensure that such beds have clearance at the floor to accommodate a mechanical lift. These commenters noted that in recent years, hotel beds have become higher as hotels use thicker mattresses, thereby making it difficult or impossible for many individuals who use wheelchairs to transfer onto hotel beds. In addition, many hotel beds use a solid-sided platform base with no clearance at the floor, which prevents the use of a portable lift to transfer an individual onto the bed. Consequently, individuals who bring their own lift to transfer onto the bed cannot independently get themselves onto the bed. Some commenters suggested various design options that might avoid these situations.

The Department intends to provide specific guidance relating to both hotel beds and aquatic wheelchairs in a future rulemaking. For the present, the Department reminds covered entities that they have an obligation to undertake reasonable modifications to their current policies and to make their programs accessible to persons with disabilities. In many cases, providing aquatic wheelchairs or adjusting hotel bed heights may be necessary to comply with those requirements.

The Department has decided not to add specific scoping or technical requirements for equipment and furniture in this final rule. Other provisions of the regulation, including those requiring reasonable modifications of policies, practices, or procedures, program accessibility, and effective communication may require the provision of accessible equipment in individual circumstances. The 1991 title II regulation at § 35.150(a) requires that entities operate each service, program, or activity so that, when viewed in its entirety, each is readily accessible to, and usable by, individuals with disabilities, subject to a defense of fundamental alteration or undue financial and administrative burdens. Section 35.150(b) specifies that such entities may meet their program accessibility obligation through the ''redesign of equipment.'' The Department expects to undertake a rulemaking to address these issues in the near future.

Accessible golf cars. An accessible golf car means a device that is designed and manufactured to be driven on all areas of a golf course, is independently usable by individuals with mobility disabilities, has a hand-operated brake and accelerator, carries golf clubs in an accessible

location, and has a seat that both swivels and raises to put the golfer in a standing or semi-standing position.

The 1991 title II regulation contained no language specifically referencing accessible golf cars. After considering the comments addressing the ANPRM's proposed requirement that golf courses make at least one specialized golf car available for the use of individuals with disabilities, and the safety of accessible golf cars and their use on golf course greens, the Department stated in the NPRM that it would not issue regulations specific to golf cars.

The Department received many comments in response to its decision to propose no new regulation specific to accessible golf cars. The majority of commenters urged the Department to require golf courses to provide accessible golf cars. These comments came from individuals, disability advocacy and recreation groups, a manufacturer of accessible golf cars, and representatives of local government. Comments supporting the Department's decision not to propose a new regulation came from golf course owners, associations, and individuals.

Many commenters argued that while the existing title II regulation covered the issue, the Department should nonetheless adopt specific regulatory language requiring golf courses to provide accessible golf cars. Some commenters noted that many local governments and park authorities that operate public golf courses have already provided accessible golf cars. Experience indicates that such golf cars may be used without damaging courses. Some argued that having accessible golf cars would increase golf course revenue by enabling more golfers with disabilities to play the game. Several commenters requested that the Department adopt a regulation specifically requiring each golf course to provide one or more accessible golf cars. Other commenters recommended allowing golf courses to make ''pooling'' arrangements to meet demands for such cars. A few commenters expressed support for using accessible golf cars to accommodate golfers with and without disabilities. Commenters also pointed out that the Departments of the Interior and Defense have already mandated that golf courses under their jurisdictional control must make accessible golf cars available unless it can be demonstrated that doing so would change the fundamental nature of the game.

While an industry association argued that at least two models of accessible golf cars meet the specifications recognized in the field, and that accessible golf cars cause no more damage to greens or other parts of golf courses than players standing or walking across the course, other commenters expressed concerns about the potential for damage associated with the use of accessible golf cars. Citing safety concerns, golf organizations recommended that an industry safety standard be developed.

Although the Department declines to add specific scoping or technical requirements for golf cars to this final rule, the Department expects to address requirements for accessible golf cars in future rulemaking. In the meantime, the Department believes that golfers with disabilities who need accessible golf cars are protected by other existing provisions in the title II regulation, including those requiring reasonable modifications of policies, practices, or procedures, and program accessibility.

Web site accessibility. Many commenters expressed disappointment that the NPRM did not require title II entities to make their Web sites, through which they offer programs and services, accessible to individuals with disabilities, including those who are blind or have low vision. Commenters argued that the cost of making Web sites accessible, through Web site design, is minimal, yet critical to enabling individuals with disabilities to benefit from the entity's programs and services. Internet Web sites, when accessible, provide individuals with disabilities great independence, and have become an essential tool for many Americans. Commenters recommended

that the Department require covered entities, at a minimum, to meet the section 508 Standard for Electronic and Information Technology for Internet accessibility. Under section 508 of the Rehabilitation Act of 1973, Federal agencies are required to make their Web sites accessible. 29 U.S.C. 794(d); 36 CFR 1194.

The Department agrees that the ability to access, on an equal basis, the programs and activities offered by public entities through Internet-based Web sites is of great importance to individuals with disabilities, particularly those who are blind or who have low vision. When the ADA was enacted in 1990, the Internet was unknown to most Americans. Today, the Internet plays a critical role in daily life for personal, civic, commercial, and business purposes. In a period of shrinking resources, public entities increasingly rely on the web as an efficient and comprehensive way to deliver services and to inform and communicate with their citizens and the general public. In light of the growing importance Web sites play in providing access to public services and to disseminating the information citizens need to participate fully in civic life, accessing the Web sites of public entities can play a significant role in fulfilling the goals of the ADA.

Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title II covers Internet Web site access. Public entities that choose to provide services through web-based applications (*e.g.*, renewing library books or driver's licenses) or that communicate with their constituents or provide information through the Internet must ensure that individuals with disabilities have equal access to such services or information, unless doing so would result in an undue financial and administrative burden or a fundamental alteration in the nature of the programs, services, or activities being offered. The Department has issued guidance on the ADA as applied to the Web sites of public entities in a 2003 publication entitled, *Accessibility of State and Local Government Web sites to People with Disabilities*, (June 2003) available at *http:// www.ada.gov/websites2.htm*. As the Department stated in that publication, an agency with an inaccessible Web site may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line. However, such an alternative must provide an equal degree of access in terms of hours of operation and the range of options and programs available. For example, if job announcements and application forms are posted on an inaccessible Web site that is available 24 hours a day, seven days a week to individuals without disabilities, then the alternative accessible method must also be available 24 hours a day, 7 days a week. Additional guidance is available in the Web Content Accessibility Guidelines (WCAG), (May 5, 1999) available at *http:// www.w3.org/ TR/WAI–WEBCONTENT* (last visited June 24, 2010) which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).

The Department expects to engage in rulemaking relating to website accessibility under the ADA in the near future. The Department has enforced the ADA in the area of website accessibility on a case-by-case basis under existing rules consistent with the guidance noted above, and will continue to do so until the issue is addressed in a final regulation.

Multiple chemical sensitivities. The Department received comments from a number of individuals asking the Department to add specific language to the final rule addressing the needs of individuals with chemical sensitivities. These commenters expressed concern that the presence of chemicals interferes with their ability to participate in a wide range of activities. These commenters also urged the Department to add multiple chemical sensitivities to the definition of a disability.

The Department has determined not to include

specific provisions addressing multiple chemical sensitivities in the final rule. In order to be viewed as a disability under the ADA, an impairment must substantially limit one or more major life activities. An individual's major life activities of respiratory or neurological functioning may be substantially limited by allergies or sensitivity to a degree that he or she is a person with a disability. When a person has this type of disability, a covered entity may have to make reasonable modifications in its policies and practices for that person. However, this determination is an individual assessment and must be made on a case-by-case basis.

Examinations and Courses. The Department received one comment requesting that it specifically include language regarding examinations and courses in the title II regulation. Because section 309 of the ADA 42 U.S.C. 12189, reaches ''[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post secondary education, professional, or trade purposes,'' public entities also are covered by this section of the ADA. Indeed, the requirements contained in title II (including the general prohibitions against discrimination, the program access requirements, the reasonable modifications requirements, and the communications requirements) apply to courses and examinations administered by public entities that meet the requirements of section 309. While the Department considers these requirements to be sufficient to ensure that examinations and courses administered by public entities meet the section 309 requirements, the Department acknowledges that the title III regulation, because it addresses examinations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations. *See* 28 CFR 36.309.

Hotel Reservations. In the NPRM, at § 36.302(e), the Department proposed adding specific language to title III addressing the requirements that hotels, timeshare resorts, and other places of lodging make reasonable modifications to their policies, practices, or procedures, when necessary to ensure that individuals with disabilities are able to reserve accessible hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. The NPRM did not propose adding comparable language to the title II regulation as the Department believes that the general nondiscrimination, program access, effective communication, and reasonable modifications requirements of title II provide sufficient guidance to public entities that operate places of lodging (*i.e.*, lodges in State parks, hotels on public college campuses). The Department received no public comments suggesting that it add language on hotel reservations comparable to that proposed for the title III regulation. Although the Department continues to believe that it is unnecessary to add specific language to the title II regulation on this issue, the Department acknowledges that the title III regulation, because it addresses hotel reservations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity that operates a reservation system serving a place of lodging. *See* 28 CFR 36.302(e).

•18. Revise the heading to Appendix B to read as follows:

Appendix B to Part 35—Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991

Dated: July 23, 2010.
Eric H. Holder, Jr., Attorney General.

Title II Regulations

1991 Section-by-Section Analysis

Department of Justice

Appendix B to the title II rule incorporates the guidance, i.e., the 1991 Section-by-Section Analysis, to the title II rule published July 26, 1991. The 1991 analysis remains relevant to the extent it is not contradicted by the amendments to the rules or it provides guidance on provisions of the rules unchanged by the revised 2010 ADA regulations.

APPENDIX B TO PART 35 — GUIDANCE ON ADA REGULATION ON NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES ORIGINALLY PUBLISHED JULY 26, 1991

SECTION-BY-SECTION ANALYSIS

Subpart A—General

Section 35.101 Purpose

Section 35.101 states the purpose of the rule, which is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to matters within the scope of the authority of the Secretary of Transportation under subtitle B of title II of the Act.

Section 35.102 Application

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in §35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in §35.134, this part does not apply to private entities.

The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities ''conducted by'' Federal Executive agencies, in that title II applies to anything a public entity does. Title II coverage, however, is not limited to ''Executive'' agencies, but includes activities of the legislative and judicial branches of State and local governments. All governmental activities of public

entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations at 28 CFR part 36.

Aside from employment, which is also covered by title I of the Act, there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the entity's facilities. Activities in the second category include programs that provide State or local government services or benefits.

Paragraph (b) of §35.102 explains that to the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the Act, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR part 37, and are not covered by this part. The Department of Transportation's ADA regulation establishes specific requirements for construction of transportation facilities and acquisition of vehicles. Matters not covered by subtitle B, such as the provision of auxiliary aids, are covered by this rule. For example, activities that are covered by the Department of Transportation's regulation implementing subtitle B are not required to be included in the self-evaluation required by §35.105. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of Federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Although airports operated by public entities are not subject to DOT's ADA regulation, they are subject to subpart A of title II and to this rule.

Some commenters asked for clarification about the responsibilities of public school systems under section 504 and the ADA with respect to programs, services, and activities that are not covered by the Individuals with Disabilities Education Act (IDEA), including, for example, programs open to parents or to the public, graduation ceremonies, parent-teacher organization meetings, plays and other events open to the public, and adult education classes. Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or to the public. For instance, public school systems must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services, and appropriate auxiliary aids and services whenever necessary to ensure effective communication, as long as the provision of the auxiliary aids results neither in an undue burden or in a fundamental alteration of the program.

Section 35.103 Relationship to Other Laws

Section 35.103 is derived from sections 501 (a) and (b) of the ADA. Paragraph (a) of this section provides that, except as otherwise specifically provided by this part, title II of the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790–94), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than title V. Because title II of the ADA essentially extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under section 504 for federally assisted programs. Title II, however, also incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504. Judiciary Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 51 (1990) (hereinafter ''Judiciary report'') ; Education and Labor Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990) (hereinafter ''Education and Labor report''). Therefore, this part also includes appropriate provisions derived from the regulations implementing those titles. The inclusion of specific language in this part, however, should not be interpreted as an indication that a requirement is not included under a regulation implementing section 504.

Paragraph (b) makes clear that Congress did not intend to displace any of the rights or remedies provided by other Federal laws (including section 504) or other State laws (including State common law) that provide greater or equal protection to individuals with disabilities. As discussed above, the standards adopted by title II of the ADA for State and local government services are generally the same as those required under section 504 for federally assisted programs and activities. Subpart F of the regulation establishes compliance procedures for processing complaints covered by both this part and section 504.

With respect to State law, a plaintiff may choose to pursue claims under a State law that does not confer greater substantive rights, or even confers fewer substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, a person with a physical disability could seek damages under a State law that allows compensatory and punitive damages for discrimination on the basis of physical disability, but not on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

Section 35.104 Definitions

''Act.'' The word ''Act'' is used in this part to refer to the Americans with Disabilities Act of 1990, Public Law 101–336, which is also referred to as the ''ADA.''

''Assistant Attorney General.'' The term ''Assistant Attorney General'' refers to the Assistant Attorney General of the Civil Rights Division of the Department of Justice.

''Auxiliary aids and services.'' Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. The proposed definition in §35.104 provided a list of examples of auxiliary aids and services that were taken from the definition of auxiliary aids and services in section 3(1) of the ADA and were supplemented by examples from regulations implementing section 504 in federally conducted programs (see 28 CFR 39.103).

A substantial number of commenters suggested that additional examples be added to this list. The Department has added several items to this list but wishes to clarify that the list is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology.

Subparagraph (1) lists several examples, which would be considered auxiliary aids and services to make aurally delivered materials available to individuals with hearing impairments. The Department has changed the phrase used in the proposed rules, ''orally delivered materials,'' to the statutory phrase, ''aurally delivered materials,'' to track section 3 of the ADA and to include non-verbal sounds and alarms, and computer generated speech.

The Department has added videotext displays, transcription services, and closed and open captioning to the list of examples. Videotext displays have become an important means of accessing auditory communications through a public address system. Transcription services are used to relay aurally delivered material almost simultaneously in written form to persons who are deaf or hearing-impaired. This technology is often used at conferences, conventions, and hearings. While the proposed rule expressly included television decoder equipment as an auxiliary aid or service, it did not mention captioning itself. The final rule rectifies this omission by mentioning both closed and open captioning.

Several persons and organizations requested that the Department replace the term ''telecommunications devices for deaf persons'' or ''TDD's'' with the term ''text telephone.'' The Department has declined to do so. The Department is aware that the Architectural and Transportation Barriers Compliance Board (ATBCB) has used the phrase ''text telephone'' in lieu of the statutory term ''TDD'' in its final accessibility guidelines. Title IV of the ADA, however, uses the term ''Telecommunications Device for the Deaf'' and the Department believes it would be inappropriate to abandon this statutory term at this time.

Several commenters urged the Department to include in the definition of ''auxiliary aids and services'' devices that are now available or that may become available with emerging technology. The Department declines to do so in the rule. The Department, however, emphasizes that, although the definition would include ''state of the art'' devices, public entities are not required to use the newest or most advanced technologies as long as the auxiliary aid or service that is selected affords effective communication.

Subparagraph (2) lists examples of aids and services for making visually delivered materials accessible to persons with visual impairments. Many commenters proposed additional examples, such as signage or mapping, audio description services, secondary auditory programs, telebraillers, and reading machines. While the Department declines to add these items to the list, they are auxiliary aids and services and may be appropriate depending on the circumstances.

Subparagraph (3) refers to acquisition or modification of equipment or devices. Several commenters suggested the addition of current technological innovations in microelectronics and computerized control systems (e.g., voice recognition systems, automatic dialing telephones, and infrared elevator and light control systems) to the list of auxiliary aids. The Department interprets auxiliary aids and services as those aids and

services designed to provide effective communications, i.e., making aurally and visually delivered information available to persons with hearing, speech, and vision impairments. Methods of making services, programs, or activities accessible to, or usable by, individuals with mobility or manual dexterity impairments are addressed by other sections of this part, including the provision for modifications in policies, practices, or procedures (§35.130 (b)(7)).

Paragraph (b)(4) deals with other similar services and actions. Several commenters asked for clarification that ''similar services and actions'' include retrieving items from shelves, assistance in reaching a marginally accessible seat, pushing a barrier aside in order to provide an accessible route, or assistance in removing a sweater or coat. While retrieving an item from a shelf might be an ''auxiliary aid or service'' for a blind person who could not locate the item without assistance, it might be a method of providing program access for a person using a wheelchair who could not reach the shelf, or a reasonable modification to a self-service policy for an individual who lacked the ability to grasp the item. As explained above, auxiliary aids and services are those aids and services required to provide effective communications. Other forms of assistance are more appropriately addressed by other provisions of the final rule.

''Complete complaint.'' ''Complete complaint'' is defined to include all the information necessary to enable the Federal agency designated under subpart G as responsible for investigation of a complaint to initiate its investigation.

''Current illegal use of drugs.'' The phrase ''current illegal use of drugs'' is used in §35.131. Its meaning is discussed in the preamble for that section.

''Designated agency.'' The term ''designated agency'' is used to refer to the Federal agency designated under subpart G of this rule as responsible for carrying out the administrative enforcement responsibilities established by subpart F of the rule.

''Disability.'' The definition of the term ''disability'' is the same as the definition in the title III regulation codified at 28 CFR part 36. It is comparable to the definition of the term ''individual with handicaps'' in section 7(8) of the Rehabilitation Act and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term ''individual with handicaps'' by the Department of Health, Education, and Welfare (HEW) in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban Development in its regulation implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply fully to the term ''disability'' (Education and Labor report at 50).

The use of the term ''disability'' instead of ''handicap'' and the term ''individual with a disability'' instead of ''individual with handicaps'' represents an effort by Congress to make use of up-to-date, currently accepted terminology. As with racial and ethnic epithets, the choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as ''handicapped person'' or ''the handicapped.'' In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability (Pub. L. 100–630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should one be attributed to this change in phraseology.

The term ''disability'' means, with respect to an individual—

(A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) A record of such an impairment; or

(C) Being regarded as having such an impairment. If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of ''disability,'' first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. First, it has worked well since it was adopted in 1974. Second, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

TEST A—A PHYSICAL OR MENTAL IMPAIRMENT THAT SUBSTANTIALLY LIMITS ONE OR MORE OF THE MAJOR LIFE ACTIVITIES OF SUCH INDIVIDUAL

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1)(i) of the definition, ''impairment'' means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would

include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, *e.g.*, 45 CFR 84.3(j)(2)(i)).

Many commenters asked that ''traumatic brain injury'' be added to the list in paragraph (1)(i). Traumatic brain injury is already included because it is a physiological condition affecting one of the listed body systems, i.e., ''neurological.'' Therefore, it was unnecessary to add the term to the regulation, which only provides representative examples of physiological disorders.

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future. However, the list of examples in paragraph (1)(ii) of the definition includes: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. The phrase ''symptomatic or asymptomatic'' was inserted in the final rule after ''HIV disease'' in response to commenters who suggested the clarification was necessary.

The examples of ''physical or mental impairments'' in paragraph (1)(ii) are the same as those contained in many section 504 regulations, except for the addition of the phrase ''contagious and noncontagious'' to describe the types of diseases and conditions included, and the addition of ''HIV disease (symptomatic or asymptomatic)'' and ''tuberculosis'' to the list of examples. These additions are based on the committee reports, caselaw, and official legal opinions interpreting section 504. In *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the *Arline* decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st. Cong., 1st Sess. 346 (1989).

Paragraph (1)(iii) states that the phrase ''physical or mental impairment'' does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

Substantial Limitation of a Major Life Activity. Under Test A, the impairment must be one that ''substantially limits a major life activity.'' Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under

which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

The Department received many comments on the proposed rule's inclusion of the word ''temporary'' in the definition of ''disability.'' The preamble indicated that impairments are not necessarily excluded from the definition of ''disability'' simply because they are temporary, but that the duration, or expected duration, of an impairment is one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. The preamble recognized, however, that temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial. Nevertheless, many commenters objected to inclusion of the word ''temporary'' both because it is not in the statute and because it is not contained in the definition of ''disability'' set forth in the title I regulations of the Equal Employment Opportunity Commission (EEOC). The word ''temporary'' has been deleted from the final rule to conform with the statutory language.

The question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect).

Sometimes respiratory or neurological functioning is so severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all of the protections afforded by the Act and this part. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life activity of breathing may be somewhat, but not substantially, impaired. In such circumstances, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents.

In sum, the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized by the commenters as environmental illness are disabilities covered by the regulation must be made using the same case-by-case analysis that is applied to all other physical or mental impairments. Moreover, the addition of specific regulatory provisions relating to environmental illness in the final rule would be inappropriate at this time pending future consideration of the issue by the Architectural and Transportation Barriers Compliance Board, the Environmental Protection Agency, and the Occupational Safety and Health Administration of the Department of Labor.

TEST B—A RECORD OF SUCH AN IMPAIRMENT

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

TEST C—BEING REGARDED AS HAVING SUCH AN IMPAIRMENT

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a public entity as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same ''regarded as'' test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

(iv) ''Is regarded as having an impairment'' means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The perception of the covered entity is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test.

A person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as ''impaired.''

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *Arline,* 480 U.S. 273 (1987). The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. ''Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.'' *Id.* at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, ''Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.'' *Id.* at 284.

Thus, a person who is denied services or benefits by a public entity because of myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public entity can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the ''regarded as'' test. A person who is covered because of being regarded as having an impairment is not required to show that the public entity's perception is inaccurate (e.g., that he will be accepted by others) in order to receive benefits from the public entity.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of ''disability.'' The excluded conditions are: Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either section 504 or the Americans with Disabilities Act (see the definition of ''disability,'' paragraph (1)(iv)), the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments under section 504. (Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Amendments Act of 1988, Pub. L. 100–430, section 6(b)).

''Drug.'' The definition of the term ''drug'' is taken from section 510(d)(2) of the ADA.

''Facility.'' ''Facility'' means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

Commenters raised questions about the applicability of this part to activities operated in mobile facilities, such as bookmobiles or mobile health screening units. Such activities would be covered by the requirement for program accessibility in §35.150, and would be included in the definition of ''facility'' as

''other real or personal property,'' although standards for new construction and alterations of such facilities are not yet included in the accessibility standards adopted by §35.151. Sections 35.150 and 35.151 specifically address the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

''Historic preservation programs'' and ''Historic properties'' are defined in order to aid in the interpretation of §§35.150 (a)(2) and (b)(2), which relate to accessibility of historic preservation programs, and §35.151(d), which relates to the alteration of historic properties.

''Illegal use of drugs.'' The definition of ''illegal use of drugs'' is taken from section 510(d)(1) of the Act and clarifies that the term includes the illegal use of one or more drugs.

''Individual with a disability'' means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public entity acts on the basis of such use. The phrase ''current illegal use of drugs'' is explained in §35.131.

''Public entity.'' The term ''public entity'' is defined in accordance with section 201(1) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; or the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

''Qualified individual with a disability.'' The definition of ''qualified individual with a disability'' is taken from section 201(2) of the Act, which is derived from the definition of ''qualified handicapped person'' in the Department of Health and Human Services' regulation implementing section 504 (45 CFR §84.3(k)). It combines the definition at 45 CFR 84.3(k)(1) for employment (''a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question'') with the definition for other services at 45 CFR 84.3(k)(4) (''a handicapped person who meets the essential eligibility requirements for the receipt of such services'').

Some commenters requested clarification of the term ''essential eligibility requirements.'' Because of the variety of situations in which an individual's qualifications will be at issue, it is not possible to include more specific criteria in the definition. The ''essential eligibility requirements'' for participation in some activities covered under this part may be minimal. For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only ''eligibility requirement'' for receipt of such information would be the request for it. Where such information is provided by telephone, even the ability to use a voice telephone is not an ''essential eligibility requirement,'' because §35.161 requires a public entity to provide equally effective telecommunication systems for individuals with impaired hearing or speech.

For other activities, identification of the ''essential eligibility requirements'' may be more complex. Where questions of safety are involved, the principles established in §36.208 of the Department's regulation implementing title III of the ADA, to be codified at 28 CFR, part 36, will be applicable. That section implements section 302(b)(3) of the Act, which provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others.

A ''direct threat'' is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be ''qualified,'' if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline*. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

''Qualified interpreter.'' The Department received substantial comment regarding the

lack of a definition of ''qualified interpreter.'' The proposed rule defined auxiliary aids and services to include the statutory term, ''qualified interpreters'' (§35.104), but did not define it. Section 35.160 requires the use of auxiliary aids including qualified interpreters and commenters stated that a lack of guidance on what the term means would create confusion among those trying to secure interpreting services and often result in less than effective communication.

Many commenters were concerned that, without clear guidance on the issue of ''qualified'' interpreter, the rule would be interpreted to mean ''available, rather than qualified'' interpreters. Some claimed that few public entities would understand the difference between a qualified interpreter and a person who simply knows a few signs or how to fingerspell.

In order to clarify what is meant by ''qualified interpreter'' the Department has added a definition of the term to the final rule. A qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. This definition focuses on the actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public entity and the individual with disabilities.

Public comment also revealed that public entities have at times asked persons who are deaf to provide family members or friends to interpret. In certain circumstances, notwithstanding that the family member of friend is able to interpret or is a certified interpreter, the family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret''effectively, accurately, and impartially.''

The definition of ''qualified interpreter'' in this rule does not invalidate or limit standards for interpreting services of any State or local law that are equal to or more stringent than those imposed by this definition. For instance, the definition would not supersede any requirement of State law for use of a certified interpreter in court proceedings.

''Section 504.'' The Department added a definition of ''section 504'' because the term is used extensively in subpart F of this part.

''State.'' The definition of ''State'' is identical to the statutory definition in section 3(3) of the ADA.

Section 35.105 Self-evaluation

Section 35.105 establishes a requirement, based on the section 504 regulations for federally assisted and federally conducted programs, that a public entity evaluate its current policies and practices to identify and correct any that are not consistent with the requirements of this part. As noted in the discussion of §35.102, activities covered by the Department of Transportation's regulation implementing subtitle B of title II are not required to be included in the self-evaluation required by this section.

Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with disabilities, which has promoted both effective and efficient implementation of section 504. The Department expects that it will likewise be useful to public entities newly covered by the ADA.

All public entities are required to do a self-evaluation. However, only those that employ 50 or more persons are required to maintain the self-evaluation on file and make it available for public inspection for three years. The number 50 was derived from the Department of Justice's section 504 regulations for federally assisted programs, 28 CFR 42.505(c). The Department received comments critical of this limitation, some suggesting the requirement apply to all public entities and others suggesting that the number be changed from 50 to 15. The final rule has not been changed. Although many regulations implementing section 504 for federally assisted programs do use 15 employees as the cut-off for this record-keeping requirement, the Department believes that it would be inappropriate to extend it to those smaller public entities covered by this regulation that do not receive Federal financial assistance. This approach has the benefit of minimizing paperwork burdens on small entities.

Paragraph (d) provides that the self-evaluation required by this section shall apply only to programs not subject to section 504 or those policies and practices, such as those involving communications access, that have not already been included in a self-evaluation required under an existing regulation implementing section 504. Because most self-evaluations were done from five to twelve years ago, however, the Department expects that a great many public entities will be re-examining all of their policies and programs. Programs and functions may have changed, and actions that were supposed to have been taken to comply with section 504 may not have been fully implemented or may no longer be effective. In addition, there have been statutory amendments to section 504 which have changed the coverage of section 504, particularly the Civil Rights Restoration Act of 1987, Public Law No. 100–259, 102 Stat. 28 (1988), which broadened the definition of a covered ''program or activity.''

Several commenters suggested that the Department clarify public entities' liability during the one-year period for compliance with the self-evaluation requirement. The self-evaluation requirement does not stay the effective date of the statute nor of this part. Public entities are, therefore, not

shielded from discrimination claims during that time.

Other commenters suggested that the rule require that every self-evaluation include an examination of training efforts to assure that individuals with disabilities are not subjected to discrimination because of insensitivity, particularly in the law enforcement area. Although the Department has not added such a specific requirement to the rule, it would be appropriate for public entities to evaluate training efforts because, in many cases, lack of training leads to discriminatory practices, even when the policies in place are nondiscriminatory.

Section 35.106 Notice

Section 35.106 requires a public entity to disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections afforded by the ADA and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio. In providing the notice, a public entity must comply with the requirements for effective communication in §35.160. The preamble to that section gives guidance on how to effectively communicate with individuals with disabilities.

Section 35.107 Designation of Responsible Employee and Adoption of Grievance Procedures

Consistent with §35.105, self-evaluation, the final rule requires that public entities with 50 or more employees designate a responsible employee and adopt grievance procedures. Most of the commenters who suggested that the requirement that self-evaluation be maintained on file for three years not be limited to those employing 50 or more persons made a similar suggestion concerning §35.107. Commenters recommended either that all public entities be subject to §35.107, or that ''50 or more persons'' be changed to ''15 or more persons.'' As explained in the discussion of §35.105, the Department has not adopted this suggestion.

The requirement for designation of an employee responsible for coordination of efforts to carry out responsibilities under this part is derived from the HEW regulation implementing section 504 in federally assisted programs. The requirement for designation of a particular employee and dissemination of information about how to locate that employee helps to ensure that individuals dealing with large agencies are able to easily find a responsible person who is familiar with the requirements of the Act and this part and can communicate those requirements to other individuals in the agency who may be unaware of their responsibilities. This paragraph in no way limits a public entity's obligation to ensure that all of its employees comply with the requirements of this part, but it ensures that any failure by individual employees can be promptly corrected by the designated employee.

Section 35.107(b) requires public entities with 50 or more employees to establish grievance procedures for resolving complaints of violations of this part. Similar requirements are found in the section 504 regulations for federally assisted programs (see, e.g., 45 CFR 84.7(b)). The rule, like the regulations for federally assisted programs, provides for investigation and resolution of complaints by a Federal enforcement agency. It is the view of the Department that public entities subject to this part should be required to establish a mechanism for resolution of complaints at the local level without requiring the complainant to resort to the Federal complaint procedures established under subpart F. Complainants would not, however, be required to exhaust the public entity's grievance procedures before filing a complaint under subpart F. Delay in filing the complaint at the Federal level caused by pursuit of the remedies available under the grievance procedure would generally be considered good cause for extending the time allowed for filing under §35.170(b).

Subpart B—General Requirements

Section 35.130 General Prohibitions Against Discrimination

The general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar to State and local entities covered by section 504. In addition, §35.130 includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504.

Several commenters suggested that this part should include the section of the proposed title III regulation that implemented section 309 of the Act, which requires that courses and examinations related to applications, licensing, certification, or credentialing be provided in an accessible place and manner or that alternative accessible arrangements be made. The Department has not adopted this suggestion. The requirements of this part, including the general prohibitions of discrimination in this section, the program access requirements of subpart D, and the communications requirements of subpart E, apply to courses and examinations provided by public entities. The Department considers these requirements to

be sufficient to ensure that courses and examinations administered by public entities meet the requirements of section 309. For example, a public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate. The analysis of §35.130(d) is relevant to this determination.

A number of commenters asked that the regulation be amended to require training of law enforcement personnel to recognize the difference between criminal activity and the effects of seizures or other disabilities such as mental retardation, cerebral palsy, traumatic brain injury, mental illness, or deafness. Several disabled commenters gave personal statements about the abuse they had received at the hands of law enforcement personnel. Two organizations that commented cited the Judiciary report at 50 as authority to require law enforcement training.

The Department has not added such a training requirement to the regulation. Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities. Under this section law enforcement personnel would be required to make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability. The Department notes that a number of States have attempted to address the problem of arresting disabled persons for noncriminal conduct resulting from their disability through adoption of the Uniform Duties to Disabled Persons Act, and encourages other jurisdictions to consider that approach.

Paragraph (a) restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in §35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(1)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. Paragraph (b)(1)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and paragraph (b)(1)(iii) requires that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and simply restate principles long established under section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Many commenters objected to proposed paragraphs (b)(1)(iv) and (d) as allowing continued segregation of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in §35.130(b)(1)(iv), and section 302(b)(1)(B) includes the same requirement for ''the most integrated setting appropriate'' as in §35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public entity's obligations within the integrated program when it offers a separate program but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

Paragraph (b)(1)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity, if both public entities are subject to common administrative control or are agencies of the same State. The phrase ''criteria or methods of administration'' refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary

policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander* v. *Choate*, 469 U.S. 287 (1985). The Court in *Choate* explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: ''These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.'' *Id.* at 297 (footnote omitted).

Paragraph (b)(4) specifically applies the prohibition enunciated in §35.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the public entity. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the public entity, in the selection of procurement contractors, from using criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a ''qualified individual with a disability'' with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see §35.104).

A number of commenters were troubled by the phrase ''essential eligibility requirements'' as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of ''qualified individual with a disability'' applies, it is not possible to use more specific language in the definition. The phrase ''essential eligibility requirements,'' however, is taken from the definitions in the regulations implementing section 504, so caselaw under section 504 will be applicable to its interpretation. In *Southeastern Community College* v. *Davis*, 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to ''lower or effect substantial modifications of standards to accommodate a handicapped person,'' 442 U.S. at 413, and that the school had established that the plaintiff was not ''qualified'' because she was not able to ''serve the nursing profession in all customary ways,'' *id.* Whether a particular requirement is ''essential'' will, of course, depend on the facts of the particular case.

In addition, the public entity may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. For example, the public entity must comply with this requirement when establishing safety standards for the operations of licensees. In that case the public entity must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with disabilities in an impermissible manner.

Paragraph (b)(6) does not extend the requirements of the Act or this part directly to the programs or activities of licensees or certified entities themselves. The programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. Judiciary report at 52.

Paragraph (b)(8), a new paragraph not contained in the proposed rule, prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. This prohibition is also a specific application of the general prohibitions of discrimination and is based on section 302(b)(2)(A)(i) of the ADA. It prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to

individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

In addition, paragraph (b)(8) prohibits the imposition of criteria that ''tend to'' screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (*see, e.g.,* 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those individuals with disabilities. Section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, *i.e.,* in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

Some commenters expressed concern that §35.130(e), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 35.130(e) has been revised to make it clear that paragraph (e) is inapplicable to the concern of the commenters. A new paragraph (e)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (e) clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, *e.g.,* Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C. 794); the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 35.130(e) (1) and (2) are based on section 501(d) of the ADA. Section 501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them:

The Committee added this section [501(d)] to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

Judiciary report at 71–72. The Act is not to be construed to mean that an individual with

disabilities must accept special accommodations and services for individuals with disabilities when that individual can participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Paragraph (f) provides that a public entity may not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover any costs of measures required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part. Such measures may include the provision of auxiliary aids or of modifications required to provide program accessibility.

Several commenters asked for clarification that the costs of interpreter services may not be assessed as an element of ''court costs.'' The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. The preamble to the Department's section 504 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, ''it has the corresponding responsibility to pay for the services of the interpreters.'' (45 FR 37630 (June 3, 1980)). Accordingly, recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.

Paragraph (g), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) and 302(b)(1)(E) of the ADA. This paragraph was not contained in the proposed rule. The individuals covered under this paragraph are any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this paragraph for a local government to refuse to allow a theater company to use a school auditorium on the grounds that the company had recently performed for an audience of individuals with HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term ''entity'' was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

Section 35.131 Illegal Use of Drugs

Section 35.131 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are ''controlled substances,'' as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Section 35.131 does not affect use of controlled substances pursuant to a valid prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by §35.131 (although alcoholics are individuals with disabilities, subject to the protections of the statute).

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of ''current illegal use of drugs'' in §35.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 64 (1990) (hereinafter ''Conference report''), is ''illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.''

Paragraph (a)(2)(i) specifies that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. A health care facility, such as a hospital or clinic, may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.

Some commenters pointed out that abstention from the use of drugs is an essential condition of participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings. The Department believes that this comment is well-founded. Congress clearly intended to prohibit exclusion from drug treatment programs of the very individuals who need such programs because of their use of drugs, but, once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or treatment program may prohibit illegal use of drugs by individuals while they are participating in the program.

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to testing for illegal use of drugs. This paragraph implements the provision in section 510(b) of the Act that allows entities ''to adopt or administer reasonable policies or procedures, including but not limited to drug testing,'' that ensure that an individual who is participating in a supervised rehabilitation program, or who has completed such a program or otherwise been rehabilitated successfully is no longer engaging in the illegal use of drugs. The section is not to be ''construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.''

Paragraph 35.131(c) clarifies that it is not a violation of this part to adopt or administer reasonable policies or procedures to ensure that an individual who formerly engaged in the illegal use of drugs is not currently engaging in illegal use of drugs. Any such policies or procedures must, of course, be reasonable, and must be designed to identify accurately the illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of ''illegal use of drugs.'' A commenter argued that the rule should permit testing for lawful use of prescription drugs, but most commenters preferred that tests must be limited to unlawful use in order to avoid revealing the lawful use of prescription medicine used to treat disabilities.

Section 35.132 Smoking

Section 35.132 restates the clarification in section 501(b) of the Act that the Act does not preclude the prohibition of, or imposition of restrictions on, smoking in transportation covered by title II. Some commenters argued that this section is too limited in scope, and that the regulation should prohibit smoking in all facilities used by public entities. The reference to smoking in section 501, however, merely clarifies that the Act does not require public entities to accommodate smokers by permitting them to smoke in transportation facilities.

Section 35.133 Maintenance of Accessible Features

Section 35.133 provides that a public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by, individuals with disabilities. This section recognizes that it is not sufficient to provide

features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or ''accessible'' routes that are obstructed by furniture, filing cabinets, or potted plants are neither ''accessible to'' nor ''usable by'' individuals with disabilities.

Some commenters objected that this section appeared to establish an absolute requirement and suggested that language from the preamble be included in the text of the regulation. It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Paragraph (b) of the final regulation provides that this section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the Act or this part. However, allowing obstructions or ''out of service'' equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance. Failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

Other commenters requested that this section be expanded to include specific requirements for inspection and maintenance of equipment, for training staff in the proper operation of equipment, and for maintenance of specific items. The Department believes that this section properly establishes the general requirement for maintaining access and that further details are not necessary.

Section 35.134 Retaliation or Coercion

Section 35.134 implements section 503 of the ADA, which prohibits retaliation against any individual who exercises his or her rights under the Act. This section is unchanged from the proposed rule. Paragraph (a) of §35.134 provides that no private or public entity shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

This section protects not only individuals who allege a violation of the Act or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under the Act or this part without regard to the ultimate resolution of the underlying allegations. Because this section prohibits any act of retaliation or coercion in response to an individual's effort to exercise rights established by the Act and this part (or to support the efforts of another individual), the section applies not only to public entities subject to this part, but also to persons acting in an individual capacity or to private entities. For example, it would be a violation of the Act and this part for a private individual to harass or intimidate an individual with a disability in an effort to prevent that individual from attending a concert in a State-owned park. It would, likewise, be a violation of the Act and this part for a private entity to take adverse action against an employee who appeared as a witness on behalf of an individual who sought to enforce the Act.

Section 35.135 Personal Devices and Services

The final rule includes a new §35.135, entitles ''Personal devices and services,'' which states that the provision of personal devices and services is not required by title II. This new section, which serves as a limitation on all of the requirements of the regulation, replaces §35.160(b)(2) of the proposed rule, which addressed the issue of personal devices and services explicitly only in the context of communications. The personal devices and services limitation was intended to have general application in the proposed rule in all contexts where it was relevant. The final rule, therefore, clarifies this point by including a general provision that will explicitly apply not only to auxiliary aids and services but across-the-board to include other relevant areas such as, for example, modifications in policies, practices, and procedures (§35.130(b)(7)). The language of §35.135 parallels an analogous provision in the Department's title III regulations (28 CFR 36.306) but preserves the explicit reference to ''readers for personal use or study'' in §35.160(b)(2) of the proposed rule. This section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

Subpart C—Employment

Section 35.140 Employment Discrimination Prohibited

Title II of the ADA applies to all activities of public entities, including their employment practices. The proposed rule cross-referenced the definitions, requirements, and

procedures of title I of the ADA, as established by the Equal Employment Opportunity Commission in 29 CFR part 1630. This proposal would have resulted in use, under §35.140, of the title I definition of ''employer,'' so that a public entity with 25 or more employees would have become subject to the requirements of §35.140 on July 26, 1992, one with 15 to 24 employees on July 26, 1994, and one with fewer than 15 employees would have been excluded completely.

The Department received comments objecting to this approach. The commenters asserted that Congress intended to establish nondiscrimination requirements for employment by all public entities, including those that employ fewer than 15 employees; and that Congress intended the employment requirements of title II to become effective at the same time that the other requirements of this regulation become effective, January 26, 1992. The Department has reexamined the statutory language and legislative history of the ADA on this issue and has concluded that Congress intended to cover the employment practices of all public entities and that the applicable effective date is that of title II.

The statutory language of section 204(b) of the ADA requires the Department to issue a regulation that is consistent with the ADA and the Department's coordination regulation under section 504, 28 CFR part 41. The coordination regulation specifically requires nondiscrimination in employment, 28 CFR 41.52–41.55, and does not limit coverage based on size of employer. Moreover, under all section 504 implementing regulations issued in accordance with the Department's coordination regulation, employment coverage under section 504 extends to all employers with federally assisted programs or activities, regardless of size, and the effective date for those employment requirements has always been the same as the effective date for nonemployment requirements established in the same regulations. The Department therefore concludes that §35.140 must apply to all public entities upon the effective date of this regulation.

In the proposed regulation the Department cross-referenced the regulations implementing title I of the ADA, issued by the Equal Employment Opportunity Commission at 29 CFR part 1630, as a compliance standard for §35.140 because, as proposed, the scope of coverage and effective date of coverage under title II would have been coextensive with title I. In the final regulation this language is modified slightly. Subparagraph (1) of new paragraph (b) makes it clear that the standards established by the Equal Employment Opportunity Commission in 29 CFR part 1630 will be the applicable compliance standards if the public entity is subject to title I. If the public entity is not covered by title I, or until it is covered by title I, subparagraph (b)(2) cross-references section 504 standards for what constitutes employment discrimination, as established by the Department of Justice in 28 CFR part 41. Standards for title I of the ADA and section 504 of the Rehabilitation Act are for the most part identical because title I of the ADA was based on requirements set forth in regulations implementing section 504.

The Department, together with the other Federal agencies responsible for the enforcement of Federal laws prohibiting employment discrimination on the basis of disability, recognizes the potential for jurisdictional overlap that exists with respect to coverage of public entities and the need to avoid problems related to overlapping coverage. The other Federal agencies include the Equal Employment Opportunity Commission, which is the agency primarily responsible for enforcement of title I of the ADA, the Department of Labor, which is the agency responsible for enforcement of section 503 of the Rehabilitation Act of 1973, and 26 Federal agencies with programs of Federal financial assistance, which are responsible for enforcing section 504 in those programs. Section 107 of the ADA requires that coordination mechanisms be developed in connection with the administrative enforcement of complaints alleging discrimination under title I and complaints alleging discrimination in employment in violation of the Rehabilitation Act. Although the ADA does not specifically require inclusion of employment complaints under title II in the coordinating mechanisms required by title I, Federal investigations of title II employment complaints will be coordinated on a government-wide basis also. The Department is currently working with the EEOC and other affected Federal agencies to develop effective coordinating mechanisms, and final regulations on this issue will be issued on or before January 26, 1992.

Subpart D—Program Accessibility

Section 35.149 Discrimination Prohibited

Section 35.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§35.150 and 35.151.

Section 35.150 Existing Facilities

Consistent with section 204(b) of the Act, this regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities (e.g., 28 CFR part 39). The concept of ''program accessibility'' was first used in the section 504 regulation adopted by the Department of Health, Education, and Welfare for its federally assisted programs and activities in 1977. It allowed recipients to make

their federally assisted programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities, by offering those programs through alternative methods. Program accessibility has proven to be a useful approach and was adopted in the regulations issued for programs and activities conducted by Federal Executive agencies. The Act provides that the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.

Section 35.150 requires that each service, program, or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. The regulation makes clear, however, that a public entity is not required to make each of its existing facilities accessible (§35.150(a)(1)). Unlike title III of the Act, which requires public accommodations to remove architectural barriers where such removal is ''readily achievable,'' or to provide goods and services through alternative methods, where those methods are ''readily achievable,'' title II requires a public entity to make its programs accessible in all cases, except where to do so would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens. Congress intended the ''undue burden'' standard in title II to be significantly higher than the ''readily achievable'' standard in title III. Thus, although title II may not require removal of barriers in some cases where removal would be required under title III, the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.

Paragraph (a)(2), which establishes a special limitation on the obligation to ensure program accessibility in historic preservation programs, is discussed below in connection with paragraph (b).

Paragraph (a)(3), which is taken from the section 504 regulations for federally conducted programs, generally codifies case law that defines the scope of the public entity's obligation to ensure program accessibility. This paragraph provides that, in meeting the program accessibility requirement, a public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens. A similar limitation is provided in §35.164.

This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

It is the Department's view that compliance with §35.150(a), like compliance with the corresponding provisions of the section 504 regulations for federally conducted programs, would in most cases not result in undue financial and administrative burdens on a public entity. In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with paragraph (a) of §35.150 would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity.

The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The Department recognizes the difficulty of identifying the official responsible for this determination, given the variety of organizational forms that may be taken by public entities and their components. The intention of this paragraph is that the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.

Any person who believes that he or she or any specific class of persons has been injured by the public entity head's decision or failure to make a decision may file a complaint under the compliance procedures established in subpart F.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides.

The Department wishes to clarify that, consistent with longstanding interpretation of section 504, carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. Department of Health, Education, and Welfare, Office of Civil Rights, Policy Interpretation No. 4, 43 FR 36035 (August 14, 1978). Carrying will be permitted only in manifestly exceptional cases, and only if all personnel who are permitted to participate in carrying an individual with a disability are formally instructed on the safest and least humiliating means of carrying. ''Manifestly exceptional'' cases in which carrying would be permitted

might include, for example, programs conducted in unique facilities, such as an oceanographic vessel, for which structural changes and devices necessary to adapt the facility for use by individuals with mobility impairments are unavailable or prohibitively expensive. Carrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.

In choosing among methods, the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities. Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. (It should be noted that ''structural changes'' include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.) The requirements of §35.151 for alterations apply to structural changes undertaken to comply with this section. The public entity may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Historic Preservation Programs

In order to avoid possible conflict between the congressional mandates to preserve historic properties, on the one hand, and to eliminate discrimination against individuals with disabilities on the other, paragraph (a)(2) provides that a public entity is not required to take any action that would threaten or destroy the historic significance of an historic property. The special limitation on program accessibility set forth in paragraph (a)(2) is applicable only to historic preservation programs, as defined in §35.104, that is, programs that have preservation of historic properties as a primary purpose. Narrow application of the special limitation is justified because of the inherent flexibility of the program accessibility requirement. Where historic preservation is not a primary purpose of the program, the public entity is not required to use a particular facility. It can relocate all or part of its program to an accessible facility, make home visits, or use other standard methods of achieving program accessibility without making structural alterations that might threaten or destroy significant historic features of the historic property. Thus, government programs located in historic properties, such as an historic State capitol, are not excused from the requirement for program access.

Paragraph (a)(2), therefore, will apply only to those programs that uniquely concern the preservation and experience of the historic property itself. Because the primary benefit of an historic preservation program is the experience of the historic property, paragraph (b)(2) requires the public entity to give priority to methods of providing program accessibility that permit individuals with disabilities to have physical access to the historic property. This priority on physical access may also be viewed as a specific application of the general requirement that the public entity administer programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities (§35.130(d)). Only when providing physical access would threaten or destroy the historic significance of an historic property, or would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens, may the public entity adopt alternative methods for providing program accessibility that do not ensure physical access. Examples of some alternative methods are provided in paragraph (b)(2).

Time Periods

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. Like the regulations for federally assisted programs (e.g., 28 CFR 41.57(b)), paragraph (c) requires the public entity to make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation.

The proposed rule provided that, aside from structural changes, all other necessary steps to achieve compliance with this part must be taken within sixty days. The sixty day period was taken from regulations implementing section 504, which generally were effective no more than thirty days after publication. Because this regulation will not be effective until January 26, 1992, the Department has concluded that no additional transition period for non-structural changes is necessary, so the sixty day period has been omitted in the final rule. Of course, this section does not reduce or eliminate any obligations that are already applicable to a public entity under section 504.

Where structural modifications are required, paragraph (d) requires that a transition plan be developed by an entity that employs 50 or more persons, within six months of the effective date of this regulation. The legislative history of title II of the ADA makes it clear that, under title II, ''local and state governments are required to provide curb cuts on public streets.'' Education and Labor report at 84. As the rationale for the provision of curb cuts, the House report explains, ''The employment, transportation, and public accommodation sections of * * * (the ADA) would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the

streets.'' Id. Section 35.151(e), which establishes accessibility requirements for new construction and alterations, requires that all newly constructed or altered streets, roads, or highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, and all newly constructed or altered street level pedestrian walkways must have curb ramps or other sloped areas at intersections to streets, roads, or highways. A new paragraph (d)(2) has been added to the final rule to clarify the application of the general requirement for program accessibility to the provision of curb cuts at existing crosswalks. This paragraph requires that the transition plan include a schedule for providing curb ramps or other sloped areas at existing pedestrian walkways, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, public accommodations, and employers, followed by walkways serving other areas. Pedestrian ''walkways'' include locations where access is required for use of public transportation, such as bus stops that are not located at intersections or crosswalks.

Similarly, a public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction.

Paragraph (d)(3) provides that, if a public entity has already completed a transition plan required by a regulation implementing section 504, the transition plan required by this part will apply only to those policies and practices that were not covered by the previous transition plan. Some commenters suggested that the transition plan should include all aspects of the public entity's operations, including those that may have been covered by a previous transition plan under section 504. The Department believes that such a duplicative requirement would be inappropriate. Many public entities may find, however, that it will be simpler to include all of their operations in the transition plan than to attempt to identify and exclude specifically those that were addressed in a previous plan. Of course, entities covered under section 504 are not shielded from their obligations under that statute merely because they are included under the transition plan developed under this section.

Section 35.151 New Construction and Alterations

Section 35.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities if the construction was commenced after the effective date of this part. Facilities under design on that date will be governed by this section if the date that bids were invited falls after the effective date. This interpretation is consistent with Federal practice under section 504.

Section 35.151(c) establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (hereinafter ADAAG) shall be deemed to comply with the requirements of this section with respect to those facilities except that, if ADAAG is chosen, the elevator exemption contained at §§36.401(d) and 36.404 does not apply. ADAAG is the standard for private buildings and was issued as guidelines by the Architectural and Transportation Barriers Compliance Board (ATBCB) under title III of the ADA. It has been adopted by the Department of Justice and is published as appendix A to the Department's title III rule in today's FEDERAL REGISTER. Departures from particular requirements of these standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. Use of two standards is a departure from the proposed rule.

The proposed rule adopted UFAS as the only interim accessibility standard because that standard was referenced by the regulations implementing section 504 of the Rehabilitation Act promulgated by most Federal funding agencies. It is, therefore, familiar to many State and local government entities subject to this rule. The Department, however, received many comments objecting to the adoption of UFAS. Commenters pointed out that, except for the elevator exemption, UFAS is not as stringent as ADAAG. Others suggested that the standard should be the same to lessen confusion.

Section 204(b) of the Act states that title II regulations must be consistent not only with section 504 regulations but also with ''this Act.'' Based on this provision, the Department has determined that a public entity should be entitled to choose to comply either with ADAAG or UFAS.

Public entities who choose to follow ADAAG, however, are not entitled to the elevator exemption contained in title III of the Act and implemented in the title III regulation at §36.401(d) for new construction and §36.404 for alterations. Section 303(b) of title III states that, with some exceptions, elevators are not required in facilities that are less than three stories or have less than 3000 square feet per story. The section 504 standard, UFAS, contains no such exemption. Section 501 of the ADA makes clear that nothing in the Act may be construed to apply a lesser

standard to public entities than the standards applied under section 504. Because permitting the elevator exemption would clearly result in application of a lesser standard than that applied under section 504, paragraph (c) states that the elevator exemption does not apply when public entities choose to follow ADAAG. Thus, a two-story courthouse, whether built according to UFAS or ADAAG, must be constructed with an elevator. It should be noted that Congress did not include an elevator exemption for public transit facilities covered by subtitle B of title II, which covers public transportation provided by public entities, providing further evidence that Congress intended that public buildings have elevators.

Section 504 of the ADA requires the ATBCB to issue supplemental Minimum Guidelines and Requirements for Accessible Design of buildings and facilities subject to the Act, including title II. Section 204(c) of the ADA provides that the Attorney General shall promulgate regulations implementing title II that are consistent with the ATBCB's ADA guidelines. The ATBCB has announced its intention to issue title II guidelines in the future. The Department anticipates that, after the ATBCB's title II guidelines have been published, this rule will be amended to adopt new accessibility standards consistent with the ATBCB's rulemaking. Until that time, however, public entities will have a choice of following UFAS or ADAAG, without the elevator exemption.

Existing buildings leased by the public entity after the effective date of this part are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in §35.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of §35.151.

The Department received many comments urging that the Department require that public entities lease only accessible buildings. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Section 204(b) of the Act states that, in the area of ''program accessibility, existing facilities,'' the title II regulations must be consistent with section 504 regulations. Thus, the Department has adopted the section 504 principles for these types of leased buildings. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the same program accessibility standard should apply to both owned and leased existing buildings. Similarly, requiring that public entities only lease accessible space would significantly restrict the options of State and local governments in seeking leased space, which would be particularly burdensome in rural or sparsely populated areas.

On the other hand, the more accessible the leased space is, the fewer structural modifications will be required in the future for particular employees whose disabilities may necessitate barrier removal as a reasonable accommodation. Pursuant to the requirements for leased buildings contained in the Minimum Guidelines and Requirements for Accessible Design published under the Architectural Barriers Act by the ATBCB, 36 CFR 1190.34, the Federal Government may not lease a building unless it contains (1) One accessible route from an accessible entrance to those areas in which the principal activities for which the building is leased are conducted, (2) accessible toilet facilities, and (3) accessible parking facilities, if a parking area is included within the lease (36 CFR 1190.34). Although these requirements are not applicable to buildings leased by public entities covered by this regulation, such entities are encouraged to look for the most accessible space available to lease and to attempt to find space complying at least with these minimum Federal requirements.

Section 35.151(d) gives effect to the intent of Congress, expressed in section 504(c) of the Act, that this part recognize the national interest in preserving significant historic structures. Commenters criticized the Department's use of descriptive terms in the proposed rule that are different from those used in the ADA to describe eligible historic properties. In addition, some commenters criticized the Department's decision to use the concept of ''substantially impairing'' the historic features of a property, which is a concept employed in regulations implementing section 504 of the Rehabilitation Act of 1973. Those commenters recommended that the Department adopt the criteria of ''adverse effect'' published by the Advisory Council on Historic Preservation under the National Historic Preservation Act, 36 CFR 800.9, as the standard for determining whether an historic property may be altered.

The Department agrees with these comments to the extent that they suggest that the language of the rule should conform to the language employed by Congress in the ADA. A definition of ''historic property,'' drawn from section 504 of the ADA, has been added to §35.104 to clarify that the term applies to those properties listed or eligible for listing in the National Register of Historic Places, or properties designated as historic under State or local law.

The Department intends that the exception created by this section be applied only in those very rare situations in which it is not possible to provide access to an historic

property using the special access provisions established by UFAS and ADAAG. Therefore, paragraph (d)(1) of §35.151 has been revised to clearly state that alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG. Paragraph (d)(2) has been revised to provide that, if it has been determined under the procedures established in UFAS and ADAAG that it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the property, alternative methods of access shall be provided pursuant to the requirements of §35.150.

In response to comments, the Department has added to the final rule a new paragraph (e) setting out the requirements of §36.151 as applied to curb ramps. Paragraph (e) is taken from the statement contained in the preamble to the proposed rule that all newly constructed or altered streets, roads, and highways must contain curb ramps at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, and that all newly constructed or altered street level pedestrian walkways must have curb ramps at intersections to streets, roads, or highways.

Subpart E—Communications

Section 35.160 General

Section 35.160 requires the public entity to take such steps as may be necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

Paragraph (b)(1) requires the public entity to furnish appropriate auxiliary aids and services when necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, the public entity's service, program, or activity. The public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This expressed choice shall be given primary consideration by the public entity (§35.160(b)(2)). The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under §35.164.

Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication. For instance, some courtrooms are now equipped for ''computer-assisted transcripts,'' which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays. Such a system might be an effective auxiliary aid or service for a person who is deaf or has a hearing loss who uses speech to communicate, but may be useless for someone who uses sign language.

Although in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

Several commenters asked that the rule clarify that the provision of readers is sometimes necessary to ensure access to a public entity's services, programs or activities. Reading devices or readers should be provided when necessary for equal participation and opportunity to benefit from any governmental service, program, or activity, such as reviewing public documents, examining demonstrative evidence, and filling out voter registration forms or forms needed to receive public benefits. The importance of providing qualified readers for examinations administered by public entities is discussed under §35.130. Reading devices and readers are appropriate auxiliary aids and services where necessary to permit an individual with a disability to participate in or benefit from a service, program, or activity.

Section 35.160(b)(2) of the proposed rule, which provided that a public entity need not furnish individually prescribed devices, readers for personal use or study, or other devices of a personal nature, has been deleted in favor of a new section in the final rule on personal devices and services (see §35.135).

In response to comments, the term ''auxiliary aids and services'' is used in place of ''auxiliary aids'' in the final rule. This phrase better reflects the range of aids and services that may be required under this section.

A number of comments raised questions about the extent of a public entity's obligation to provide access to television programming for persons with hearing impairments. Television and videotape programming produced by public entities are covered by this section. Access to audio portions of such programming may be provided by closed captioning.

Section 35.161 Telecommunication Devices for the Deaf (TDD's)

Section 35.161 requires that, where a public entity communicates with applicants and beneficiaries by telephone, TDD's or equally effective telecommunication systems be used to communicate with individuals with impaired speech or hearing.

Problems arise when a public entity which does not have a TDD needs to communicate with an individual who uses a TDD or vice versa. Title IV of the ADA addresses this problem by requiring establishment of telephone relay services to permit communications between individuals who communicate by TDD and individuals who communicate by the telephone alone. The relay services required by title IV would involve a relay operator using both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user.

Section 204(b) of the ADA requires that the regulation implementing title II with respect to communications be consistent with the Department's regulation implementing section 504 for its federally conducted programs and activities at 28 CFR part 39. Section 35.161, which is taken from §39.160(a)(2) of that regulation, requires the use of TDD's or equally effective telecommunication systems for communication with people who use TDD's. Of course, where relay services, such as those required by title IV of the ADA are available, a public entity may use those services to meet the requirements of this section.

Many commenters were concerned that public entities should not rely heavily on the establishment of relay services. The commenters explained that while relay services would be of vast benefit to both public entities and individuals who use TDD's, the services are not sufficient to provide access to all telephone services. First, relay systems do not provide effective access to the increasingly popular automated systems that require the caller to respond by pushing a button on a touch tone phone. Second, relay systems cannot operate fast enough to convey messages on answering machines, or to permit a TDD user to leave a recorded message. Third, communication through relay systems may not be appropriate in cases of crisis lines pertaining to rape, domestic violence, child abuse, and drugs. The Department believes that it is more appropriate for the Federal Communications Commission to address these issues in its rulemaking under title IV.

Some commenters requested that those entities with frequent contacts with clients who use TDD's have on-site TDD's to provide for direct communication between the entity and the individual. The Department encourages those entities that have extensive telephone contact with the public such as city halls, public libraries, and public aid offices, to have TDD's to insure more immediate access. Where the provision of telephone service is a major function of the entity, TDD's should be available.

Section 35.162 Telephone Emergency Services

Many public entities provide telephone emergency services by which individuals can seek immediate assistance from police, fire, ambulance, and other emergency services. These telephone emergency services—including ''911'' services—are clearly an important public service whose reliability can be a matter of life or death. The legislative history of title II specifically reflects congressional intent that public entities must ensure that telephone emergency services, including 911 services, be accessible to persons with impaired hearing and speech through telecommunication technology (Conference report at 67; Education and Labor report at 84–85).

Proposed §35.162 mandated that public entities provide emergency telephone services to persons with disabilities that are ''functionally equivalent'' to voice services provided to others. Many commenters urged the Department to revise the section to make clear that direct access to telephone emergency services is required by title II of the ADA as indicated by the legislative history (Conference report at 67–68; Education and Labor report at 85). In response, the final rule mandates ''direct access,'' instead of ''access that is functionally equivalent'' to that provided to all other telephone users. Telephone emergency access through a third party or through a relay service would not satisfy the requirement for direct access.

Several commenters asked about a separate seven-digit emergency call number for the 911 services. The requirement for direct access disallows the use of a separate seven-digit number where 911 service is available. Separate seven-digit emergency call numbers would be unfamiliar to many individuals and also more burdensome to use. A standard emergency 911 number is easier to remember and would save valuable time spent in searching in telephone books for a local seven-digit emergency number.

Many commenters requested the establishment of minimum standards of service (e.g., the quantity and location of TDD's and computer modems needed in a given emergency center). Instead of establishing these scoping requirements, the Department has established a performance standard through the mandate for direct access.

Section 35.162 requires public entities to take appropriate steps, including equipping their emergency systems with modern technology, as may be necessary to promptly receive and respond to a call from users of TDD's and computer modems. Entities are allowed the flexibility to determine what is the appropriate technology for their particular needs. In order to avoid mandating

use of particular technologies that may become outdated, the Department has eliminated the references to the Baudot and ASCII formats in the proposed rule.

Some commenters requested that the section require the installation of a voice amplification device on the handset of the dispatcher's telephone to amplify the dispatcher's voice. In an emergency, a person who has a hearing loss may be using a telephone that does not have an amplification device. Installation of speech amplification devices on the handsets of the dispatchers' telephones would respond to that situation. The Department encourages their use.

Several commenters emphasized the need for proper maintenance of TDD's used in telephone emergency services. Section 35.133, which mandates maintenance of accessible features, requires public entities to maintain in operable working condition TDD's and other devices that provide direct access to the emergency system.

Section 35.163 Information and Signage

Section 35.163(a) requires the public entity to provide information to individuals with disabilities concerning accessible services, activities, and facilities. Paragraph (b) requires the public entity to provide signage at all inaccessible entrances to each of its facilities that directs users to an accessible entrance or to a location with information about accessible facilities.

Several commenters requested that, where TDD-equipped pay phones or portable TDD's exist, clear signage should be posted indicating the location of the TDD. The Department believes that this is required by paragraph (a). In addition, the Department recommends that, in large buildings that house TDD's, directional signage indicating the location of available TDD's should be placed adjacent to banks of telephones that do not contain a TDD.

Section 35.164 Duties

Section 35.164, like paragraph (a)(3) of §35.150, is taken from the section 504 regulations for federally conducted programs. Like paragraph (a)(3), it limits the obligation of the public entity to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it. It also includes specific requirements for determining the existence of undue financial and administrative burdens. The preamble discussion of §35.150(a) regarding that determination is applicable to this section and further explains the public entity's obligation to comply with §§35.160–35.164. Because of the essential nature of the services provided by telephone emergency systems, the Department assumes that §35.164 will rarely be applied to §35.162.

Subpart F—Compliance Procedures

Subpart F sets out the procedures for administrative enforcement of this part. Section 203 of the Act provides that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) for enforcement of section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap in programs and activities that receive Federal financial assistance, shall be the remedies, procedures, and rights for enforcement of title II. Section 505, in turn, incorporates by reference the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d to 2000d–4a). Title VI, which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs, is enforced by the Federal agencies that provide the Federal financial assistance to the covered programs and activities in question. If voluntary compliance cannot be achieved, Federal agencies enforce title VI either by the termination of Federal funds to a program that is found to discriminate, following an administrative hearing, or by a referral to this Department for judicial enforcement.

Title II of the ADA extended the requirements of section 504 to all services, programs, and activities of State and local governments, not only those that receive Federal financial assistance. The House Committee on Education and Labor explained the enforcement provisions as follows:

It is the Committee's intent that administrative enforcement of section 202 of the legislation should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act of 1973. The Attorney General should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area.

The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local governments. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, * * * the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice.

The Department of Justice may then proceed to file suits in Federal district court. As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies. Again, consistent with section 504, it is not the

Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action.

Education & Labor report at 98. See also S. Rep. No. 116, 101st Cong., 1st Sess., at 57–58 (1989).

Subpart F effectuates the congressional intent by deferring to section 504 procedures where those procedures are applicable, that is, where a Federal agency has jurisdiction under section 504 by virtue of its provision of Federal financial assistance to the program or activity in which the discrimination is alleged to have occurred. Deferral to the 504 procedures also makes the sanction of fund termination available where necessary to achieve compliance. Because the Civil Rights Restoration Act (Pub. L. 100–259) extended the application of section 504 to all of the operations of the public entity receiving the Federal financial assistance, many activities of State and local governments are already covered by section 504. The procedures in subpart F apply to complaints concerning services, programs, and activities of public entities that are covered by the ADA.

Subpart G designates the Federal agencies responsible for enforcing the ADA with respect to specific components of State and local government. It does not, however, displace existing jurisdiction under section 504 of the various funding agencies. Individuals may still file discrimination complaints against recipients of Federal financial assistance with the agencies that provide that assistance, and the funding agencies will continue to process those complaints under their existing procedures for enforcing section 504. The substantive standards adopted in this part for title II of the ADA are generally the same as those required under section 504 for federally assisted programs, and public entities covered by the ADA are also covered by the requirements of section 504 to the extent that they receive Federal financial assistance. To the extent that title II provides greater protection to the rights of individuals with disabilities, however, the funding agencies will also apply the substantive requirements established under title II and this part in processing complaints covered by both this part and section 504, except that fund termination procedures may be used only for violations of section 504.

Subpart F establishes the procedures to be followed by the agencies designated in subpart G for processing complaints against State and local government entities when the designated agency does not have jurisdiction under section 504.

Section 35.170 Complaints

Section 35.170 provides that any individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part within 180 days of the date of the alleged discrimination, unless the time for filing is extended by the agency for good cause. Although §35.107 requires public entities that employ 50 or more persons to establish grievance procedures for resolution of complaints, exhaustion of those procedures is not a prerequisite to filing a complaint under this section. If a complainant chooses to follow the public entity's grievance procedures, however, any resulting delay may be considered good cause for extending the time allowed for filing a complaint under this part.

Filing the complaint with any Federal agency will satisfy the requirement for timely filing. As explained below, a complaint filed with an agency that has jurisdiction under section 504 will be processed under the agency's procedures for enforcing section 504.

Some commenters objected to the complexity of allowing complaints to be filed with different agencies. The multiplicity of enforcement jurisdiction is the result of following the statutorily mandated enforcement scheme. The Department has, however, attempted to simplify procedures for complainants by making the Federal agency that receives the complaint responsible for referring it to an appropriate agency.

The Department has also added a new paragraph (c) to this section providing that a complaint may be filed with any agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice. Under §35.171(a)(2), the Department of Justice will refer complaints for which it does not have jurisdiction under section 504 to an agency that does have jurisdiction under section 504, or to the agency designated under subpart G as responsible for complaints filed against the public entity that is the subject of the complaint or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission. Complaints filed with the Department of Justice may be sent to the Coordination and Review Section, P.O. Box 66118, Civil Rights Division, U.S. Department of Justice, Washington, DC 20035–6118.

Section 35.171 Acceptance of Complaints

Section 35.171 establishes procedures for determining jurisdiction and responsibility for processing complaints against public entities. The final rule provides complainants an opportunity to file with the Federal funding agency of their choice. If that agency does not have jurisdiction under section 504, however, and is not the agency designated

under subpart G as responsible for that public entity, the agency must refer the complaint to the Department of Justice, which will be responsible for referring it either to an agency that does have jurisdiction under section 504 or to the appropriate designated agency, or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

Whenever an agency receives a complaint over which it has jurisdiction under section 504, it will process the complaint under its section 504 procedures. When the agency designated under subpart G receives a complaint for which it does not have jurisdiction under section 504, it will treat the complaint as an ADA complaint under the procedures established in this subpart.

Section 35.171 also describes agency responsibilities for the processing of employment complaints. As described in connection with §35.140, additional procedures regarding the coordination of employment complaints will be established in a coordination regulation issued by DOJ and EEOC. Agencies with jurisdiction under section 504 for complaints alleging employment discrimination also covered by title I will follow the procedures established by the coordination regulation for those complaints. Complaints covered by title I but not section 504 will be referred to the EEOC, and complaints covered by this part but not title I will be processed under the procedures in this part.

Section 35.172 Resolution of Complaints

Section 35.172 requires the designated agency to either resolve the complaint or issue to the complainant and the public entity a Letter of Findings containing findings of fact and conclusions of law and a description of a remedy for each violation found.

The Act requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies. The Committee Reports make clear that Congress intended to provide a private right of action with the full panoply of remedies for individual victims of discrimination. Because the Act does not require exhaustion of administrative remedies, the complainant may elect to proceed with a private suit at any time.

Section 35.173 Voluntary Compliance Agreements

Section 35.173 requires the agency to attempt to resolve all complaints in which it finds noncompliance through voluntary compliance agreements enforceable by the Attorney General.

Section 35.174 Referral

Section 35.174 provides for referral of the matter to the Department of Justice if the agency is unable to obtain voluntary compliance.

Section 35.175 Attorney's Fees

Section 35.175 states that courts are authorized to award attorneys fees, including litigation expenses and costs, as provided in section 505 of the Act. Litigation expenses include items such as expert witness fees, travel expenses, etc. The Judiciary Committee Report specifies that such items are included under the rubric of ''attorneys fees'' and not ''costs'' so that such expenses will be assessed against a plaintiff only under the standard set forth in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission,* 434 U.S. 412 (1978). (Judiciary report at 73.)

Section 35.176 Alternative Means of Dispute Resolution

Section 35.176 restates section 513 of the Act, which encourages use of alternative means of dispute resolution.

Section 35.177 Effect of Unavailability of Technical Assistance

Section 35.177 explains that, as provided in section 506(e) of the Act, a public entity is not excused from compliance with the requirements of this part because of any failure to receive technical assistance.

Section 35.178 State Immunity

Section 35.178 restates the provision of section 502 of the Act that a State is not immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court for violations of the Act, and that the same remedies are available for any such violations as are available in an action against an entity other than a State.

Subpart G—Designated Agencies

Section 35.190 Designated Agencies

Subpart G designates the Federal agencies responsible for investigating complaints under this part. At least 26 agencies currently administer programs of Federal financial assistance that are subject to the nondiscrimination requirements of section 504 as well as other civil rights statutes. A majority of these agencies administer modest programs of Federal financial assistance and/or devote minimal resources exclusively to ''external'' civil rights enforcement activities. Under Executive Order 12250, the Department of Justice has encouraged the use of delegation agreements under which certain civil rights compliance responsibilities

for a class of recipients funded by more than one agency are delegated by an agency or agencies to a ''lead'' agency. For example, many agencies that fund institutions of higher education have signed agreements that designate the Department of Education as the ''lead'' agency for this class of recipients.

The use of delegation agreements reduces overlap and duplication of effort, and thereby strengthens overall civil rights enforcement. However, the use of these agreements to date generally has been limited to education and health care recipients. These classes of recipients are funded by numerous agencies and the logical connection to a lead agency is clear (e.g., the Department of Education for colleges and universities, and the Department of Health and Human Services for hospitals).

The ADA's expanded coverage of State and local government operations further complicates the process of establishing Federal agency jurisdiction for the purpose of investigating complaints of discrimination on the basis of disability. Because all operations of public entities now are covered irrespective of the presence or absence of Federal financial assistance, many additional State and local government functions and organizations now are subject to Federal jurisdiction. In some cases, there is no historical or single clear-cut subject matter relationship with a Federal agency as was the case in the education example described above. Further, the 33,000 governmental jurisdictions subject to the ADA differ greatly in their organization, making a detailed and workable division of Federal agency jurisdiction by individual State, county, or municipal entity unrealistic.

This regulation applies the delegation concept to the investigation of complaints of discrimination on the basis of disability by public entities under the ADA. It designates eight agencies, rather than all agencies currently administering programs of Federal financial assistance, as responsible for investigating complaints under this part. These ''designated agencies'' generally have the largest civil rights compliance staffs, the most experience in complaint investigations and disability issues, and broad yet clear subject area responsibilities. This division of responsibilities is made functionally rather than by public entity type or name designation. For example, all entities (regardless of their title) that exercise responsibilities, regulate, or administer services or programs relating to lands and natural resources fall within the jurisdiction of the Department of Interior.

Complaints under this part will be investigated by the designated agency most closely related to the functions exercised by the governmental component against which the complaint is lodged. For example, a complaint against a State medical board, where such a board is a recognizable entity, will be investigated by the Department of Health and Human Services (the designated agency for regulatory activities relating to the provision of health care), even if the board is part of a general umbrella department of planning and regulation (for which the Department of Justice is the designated agency). If two or more agencies have apparent responsibility over a complaint, §35.190(c) provides that the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

Thirteen commenters, including four proposed designated agencies, addressed the Department of Justice's identification in the proposed regulation of nine ''designated agencies'' to investigate complaints under this part. Most comments addressed the proposed specific delegations to the various individual agencies. The Department of Justice agrees with several commenters who pointed out that responsibility for ''historic and cultural preservation'' functions appropriately belongs with the Department of Interior rather than the Department of Education. The Department of Justice also agrees with the Department of Education that ''museums'' more appropriately should be delegated to the Department of Interior, and that ''preschool and daycare programs'' more appropriately should be assigned to the Department of Health and Human Services, rather than to the Department of Education. The final rule reflects these decisions.

The Department of Commerce opposed its listing as the designated agency for ''commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business''. The Department of Commerce cited its lack of a substantial existing section 504 enforcement program and experience with many of the specific functions to be delegated. The Department of Justice accedes to the Department of Commerce's position, and has assigned itself as the designated agency for these functions.

In response to a comment from the Department of Health and Human Services, the regulation's category of ''medical and nursing schools'' has been clarified to read ''schools of medicine, dentistry, nursing, and other health-related fields''. Also in response to a comment from the Department of Health and Human Services, ''correctional institutions'' have been specifically added to the public safety and administration of justice functions assigned to the Department of Justice.

The regulation also assigns the Department of Justice as the designated agency responsible for all State and local government functions not assigned to other designated agencies. The Department of Justice, under an agreement with the Department of the

Treasury, continues to receive and coordinate the investigation of complaints filed under the Revenue Sharing Act. This entitlement program, which was terminated in 1986, provided civil rights compliance jurisdiction for a wide variety of complaints regarding the use of Federal funds to support various general activities of local governments. In the absence of any similar program of Federal financial assistance administered by another Federal agency, placement of designated agency responsibilities for miscellaneous and otherwise undesignated functions with the Department of Justice is an appropriate continuation of current practice.

The Department of Education objected to the proposed rule's inclusion of the functional area of ''arts and humanities'' within its responsibilities, and the Department of Housing and Urban Development objected to its proposed designation as responsible for activities relating to rent control, the real estate industry, and housing code enforcement. The Department has deleted these areas from the lists assigned to the Departments of Education and Housing and Urban Development, respectively, and has added a new paragraph (c) to §35.190, which provides that the Department of Justice may assign responsibility for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specific designated agencies by paragraph (b) of this section to other appropriate agencies. The Department believes that this approach will provide more flexibility in determining the appropriate agency for investigation of complaints involving those components of State and local governments not specifically addressed by the listings in paragraph (b). As provided in §§35.170 and 35.171, complaints filed with the Department of Justice will be referred to the appropriate agency.

Several commenters proposed a stronger role for the Department of Justice, especially with respect to the receipt and assignment of complaints, and the overall monitoring of the effectiveness of the enforcement activities of Federal agencies. As discussed above, §§35.170 and 35.171 have been revised to provide for referral of complaints by the Department of Justice to appropriate enforcement agencies. Also, language has been added to §35.190(a) of the final regulation stating that the Assistant Attorney General shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of this part.